In the Court of Appeal (Superior Jurisdiction)

The Honourable Leader of the Opposition Doctor Adrian Delia (299369 M)

v

Honourable Prime Minister of Malta, Dr Joseph Muscat

Attorney General

Chief Executive of Malta Industrial Parks Limited, which, in terms of a decree dated 16th November, 2021 changed its name to INDIS Malta Ltd

Vitals Global Healthcare Assets Limited that by means of a decree dated 16 November 2021 changed its name to Steward Malta Assets Limited

Vitals Global Healthcare Limited that by means of a decree dated 16 November 2021 changed its name to Steward Malta Limited

Vitals Global Healthcare Management Limited that by means of a decree dated 16 November 2021 changed its name to Steward Malta Management Limited

The Chief Executive of the Lands Authority, who assumed the functions previously pertaining to the Commissioner of Lands

The Chairman of the Board of Governers of the Lands Authority

(after the judgment of the 24th of February, 2023)

Appeal application filed by the defendant companies Steward Malta Assets Ltd (C70625), Steward Malta Management Limited (C70624) and Steward Malta Limited (C70546) [hereinafter the "**Appellants**"]

Respectfully submit:

1. This is an appeal from the judgment delivered by the First Hall, Civil Court on the 24th of February 2023 with regard to the public concession for the development, maintenance, management and operation of three of the public hospitals in Malta("the **Concession**"), which are St. Luke's Hospital ("**SLH**"), Karen Grech Rehabilitation Hospital ("**KGRH**") and the Gozo General Hospital ("**GGH**") (together the "**Hospital Sites**").

2. In summary, the Plaintiff, who occupied the role of Leader of Opposition when he instituted these proceedings, is stating that the conditions of the Concession were breached and that, consequently, the Government of Malta (hereinafter sometimes referred to as "**GOM**") is to be ordered to terminate the same Concession by this Honourable Court, that is, both the contract of temporary emphyteusis dated 22nd March 2016 by means of which Vitals Global Healthcare

Assets Limited had received the Hospital Sites by title of temporary emphyteusis, , as well as other contracts (called *Related Instruments*) which have nothing to do with the grant of the land, but regulate the granting of medical services in terms of the Concession, specifically, the *Service Concession Agreement, Health Services Delivery Agreement, Labour Supply Agreement* which, according to the Plaintiff, form an integral part of the temporary emphyteutical concession which forms the merit of this case.

3. With its judgment, the First Honourable Court rejected all the defendants' pleas and proceeded to accept the Plaintiff's requests and claims. In doing this, the Court built its reasoning on the back of several wild assumptions and comments leading it to arrive at a number of wrong conclusions with respect to the Appellants' conduct, amongst which, that they acted in a fraudulent and criminal manner. This goes way beyond what was requested by the Plaintiff and, moreover, such conclusions are so baseless that they skirt defamation and present the judgment as more a work of fiction than a sound and proper ruling which respects the substantive and procedural rights of the parties.

4. This appeal is being brought within **a shortened appeal term** of twenty (20) days instead of the full statutory term of thirty (30) days granted and contemplated in the law. This after the rest of the defendants, following a public declaration made by Prime Minister Robert Abela that the Government was not going to appeal the judgment, submitted a joint application for such a reduction in the term of appeal – all acting in concert. Despite the fact that this request was challenged by the Appellants, the First Hall of the Civil Court upheld the application and reduced the term for appeal in virtue of a decree dated 1st March 2023. The Appellants state that, for reasons explained in the reply to that application, this reduction infringes their right to a fair hearing because it reduces the time for them to properly prepare for their appeal and submit their grievances. In this regard, the Appellants **reserve all their rights, including the right to seek a Constitutional remedy and a remedy under the European Convention of Human Rights.** Furthermore, the Appellants note that, in order to act responsibly and not leave the filing of the appeal application to the very last minute, they are filing the appeal slightly earlier than the deadline. This, however, is without

prejudice to the position stated above, namely that the shortening of the appeal term by the Courts is in breach of their rights.

5. The appeal will be structured in the following manner:

5.1. **Firstly,** the Appellants are going to briefly reiterate the claims and the requests of the Plaintiff, and the pleas brought forward by the defendants, particularly the present Appellants.

5.2. **Secondly**, reference will be made to the appealed judgment, particularly to the operative section of the Court's decision, and a list of the grievances that the Appellants have in relation to the same judgment will be given;

5.3. **Thirdly**, the Appellants will then proceed to give a detailed factual background so that the Court of Appeal has a better understanding of the context, including the manner in which the involvement of Steward Healthcare Group in the Concession commenced. Here, some of the factual observations of the First Hall, Civil Court will be contested such that the Appellants (i) will explain how Steward was brought into the concession through (subsequently unkept) promises by the Government of Malta, (ii) will highlight the clear distinction between Steward and the Vitals group, and (iii) will show why and how the allegations made by the First Hall have deviated from good law and proper procedure expected by a Court of Law of a European Union jurisdiction in alleging fraud or malicious conduct on the part of Steward and its representatives with no evidence other than mere conjectures and assumptions, resulting in submissions which are completely wrong, unfair, and, ultimately, totally unacceptable;

5.4. **Fourthly**, legal submissions will be presented with regard to each ground of appeal raised.

5.5. **Lastly**, the Appellants shall proceed with their final requests.

6. The Appeal will show that the conclusions of the Court are based on considerations which are factually and legally mistaken, in some aspects

contradictory, and are gravely *ultra* and *extra petita* because they go well beyond what was requested by the Plaintiff in his application. As if this was not serious and worrying enough, the Court appeared to arrive at conclusions regarding alleged malicious conduct on behalf of the Appellants, not only when this was never requested by the Applicant, but also without any evidence that supports these wrong assertions and without having provided the Appellants with the opportunity to contest these assertions.

7. This has led to a judgment with a strong objective element of ***bias*** against the Appellants which also raises serious concerns from a **constitutional and fair hearing point of view.**

A. Part One. Sworn Application and the Pleas

A.1 The Sworn Application of Doctor Adrian Delia

8. By virtue of a sworn application dated 19th February 2018, the Plaintiff Dr Adrian Delia, in his capacity (at the time) as Leader of the Opposition, after setting out the premises of his claim as result from the said application, requested the Honourable Court to:

> 1. Declare and decide that the defendants Vitals Global Healthcare Assets Limited, Vitals Global Healthcare Limited and Vitals Global Healthcare Management Limited did not abide by and acted in breach of their obligations in terms of a contract dated 22nd March 2016, in the records of Notary Dr Thomas Vella and of the Service Concession Agreement, Health Services Delivery Agreement, the Labour Supply Agreement and amendments and/or addenda, such documents forming an integral part of the above-mentioned temporary emphyteutical concession;
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> 2. Declare and Decide that the Related Instruments form an integral part of the temporary emphyteutical concession of the 22nd of March 2016 in the acts of Notary Dr Thomas Vella;
>
> 3. Declare and Decide that the Chief Executive of the Lands Authority, who assumed the functions previously pertaining to the Commissioner of Lands and the Chairman of the Board of Governors of the Lands Authority and the Attorney General are obliged in terms of the law to protect public property and to take the necessary steps

to ensure that all the conditions of the property given on concession by the Chief Executive of the Lands Authority are to be respected and not changed, in terms of the same contracts and the relative Parliamentary resolution;

4. Revoke and Annul the temporary emphyteutical concession in the records of Notary Thomas Vella of the 22nd March 2016 and the *Related Instruments* which form an integral part of the above-captioned temporary emphyteutical concession and that the Court order the return to the Chief Executive of the Lands Authority of all the properties wherein situated at the sites of St Luke Hospital in St Luke's Road Pieta, with airspace 54, 728 metres squared, Karin Grech Rehabilitation Hospital in St Luke's Road Pieta, with airspace 768 metres squared and the Gozo General Hospital with 72,880 metres squared in L-Isqof Pietro Pace street, Rabat, Gozo, as better described in the above-captioned temporary emphyteutical grant;

5. Appoint a notary to publish the relative deed of revocation and annulment of the said temporary emphyteutical concession on a day and at a time and place to be established by the Court;

6. Appoint curators to represent the Chief Executive of the Lands Authority, the Chief Executive Officer of Malta Industrial Parks Limited and the Government of Malta and/or Vitals Global Healthcare Assets Limited on such deed of revocation and annulment of the said emphyteutical concession in the acts of Notary Dr Thomas Vella of the 22nd of March 2016.

With costs, including those of the judicial protest of the 29th of January 2018 and with submission of the defendants to the oath.

Nothing more than what was stated above was requested.

A.2 The Pleas of the Respondents

9. That in response to the above requests, the Appellants raised the following pleas:

I. On a preliminary basis, that the Sworn Application of the applicant is null and void in terms of Article 789(1)(c) of Chapter 12 of the Laws of Malta, and this with reference to that which is provided in Article 156(1)(a) of Chapter 12 of the Laws of Malta since the application does not contain a *"statement which gives in a clear and explicit manner the subject of the cause"* in view of the fact that although the applicant makes a

general reference to Chapter 573 of the Laws of Malta, he does not specify under which article he is basing his action, such shortcoming places the respondents in a position that they cannot defend themselves adequately;

II. That subordinately and without prejudice to the foregoing, but always on a preliminary basis, the applicant must prove his juridical interest to propose and proceed with this court case;

III. That subordinately and without prejudice to the foregoing, but always on a preliminary basis, a general principle in our law is that a contract in which a person is not a party to is *res inter alios acta* and therefore the contracts mentioned in the application are unequivocally *res inter alios acta* to the applicant;

IV. That subordinately and without prejudice to the foregoing, there is no contractual shortcoming, nor is there any breach with respect to the concession referred to in the court case;

V. That subordinately and without prejudice to the foregoing, the requests of the applicant are unfounded in fact and in law and should be rejected;

VI. Saving further pleas.

10. That as can be seen, whilst on the merits the Appellants reject the allegation that there is some form of contractual shortcoming or breach, they also raised numerous preliminary pleas.

A.3 The pleas of the other Defendants

11. Here it is worth stating that even the other defendants raised similar pleas of a preliminary nature, in addition to pleas addressing the merits.

12. The defendant Prime Minister and the Advocate General replied as follows:

1. Preliminarily, that the respondents Honourable Prime Minister and Advocate General are not the legitimate respondents for the action in terms of Artice 181B of the Code of Organisation and Civil

Procedure (Chapter 12 of the Laws of Malta) and they should, even just for this reason, be liberated from the requests and claims.

2. Also preliminarily, the respondents mention the lack of applicability of Article 33 of the Government Lands Act (Chapter 573 of the Laws of Malta) for that which was alleged by the applicant and consequently the lack of locus standi of the applicant to initiate this action. This is because this provision applies only and is exclusively limited to the moment of transfer of land, I.e., to the issue regarding whether the transfer of land took place in compliance with the dispositions of Article 31 of Chapter 573 of the Laws of Malta. That Article 33 of Chapter 573 of the Laws of Malta does not cater for an action for a declaration of nullity and/or for the annulment of the transfer of shares in commercial companies or actions on the alleged contractual breach of the conditions of the contract concluded according to the Government Lands Act. On the contrary, Article 33 applies only to the transfers of land that do not take place in compliance with Article 31 of Chapter 573. That, also contrary to what he claims, the applicant Plaintiff was not given any special faculty by Chapter 573 to supervise the execution of contractual obligations in the course of emphyteusis through judicial action and this renders the action inadmissible.

3. That preliminarily and without prejudice to the above, the lack of locus standi and juridical interest of the applicant in line with Article 33 of Chapter 573 since the action as envisaged to impugn transfer of assets in a commercial company and to annul transfers of land on the basis of alleged contractual breaches can only arise by the signatory parties to the contract and not the applicant.

4. That preliminarily and without prejudice to the above, the respondents bring forward the lack of juridical basis for the action on the part of the applicant in so far as the same action is based on the confusion between transfer of land and transfer of actions in a commercial company which are in fact two distinct things, separated both factually but also juridically.

5. That without prejudice to the above, both the **Service Concession Agreement** u l-**Health Services Delivery Agreement** considering that they are related to the emphyteutical concession, do not form part of the same temporary emphyteutical concession but they constitute contracts on the giving of services which are separate and distinct from the transfer of land. In fact, these two agreements were concluded prior the public contract in virtue of which the land was transferred, such transfer taking place in line with the dispositions of Chapter 573 of the Laws of Malta.

6. That considering the above, the requests of the applicant are unfounded in fact and in law and should thus be rejected.

7. Saving any other exceptions if applicable.

With costs.

13. The Lands Authority through its Executive Head and the Chairman of the Board of Governors of the Authority, responded to the Plaintiff's requests in the following manner:

> 1. Preliminarily, the respondents are not the legitimate respondents and should be released from the observance of justice and this because:
>
> a. The powers vested in the Commissioner of Lands in terms of Article 169 were vested in the Lands Authority which has a separate juridical personality (Article 6(1) of Chapter 563) and the powers of the Lands Authority were vested in the Board of Governors (Article 6(2) of Chapter 563);
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> b. Regarding the land forming the merits of the case in question, in virtue of two subsidiary laws L.S. 94/16 and L.S. 95/16, documents annexed Document A and Document B respectively, the powers and obligations reserved by Law to the Commissioner of Lands (Chapter 169) were vested by law in the Malta Industrial Parks. This position became crystallized in virtue of Article 4 of Chapter 473 of the Laws of Malta to the extent that even if the respondents all had to take action, they are legally precluded from doing so.
>
> 2. That without prejudice to the above, this action centering around Article 33(2) of Chapter 573 should fail because this article provides the Advocate General or Member of Parliament with limited rights to request the nullification of the transfer, when this transfer was carried out in violation of Article 31 of Chapter 573. The same article does not provide the right to institute an action when a contractual breach is alleged as is the case with the action in question.
>
> 3. That without prejudice to the above, in any case, the applicant's claims are unfounded in fact and in law.
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> 4. Saving any other pleas.
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> 5. With costs.

14. Malta Industrial Parks Limited, today known as INDIS Limited, in its sworn reply, stated:

> 1. That preliminarily, the respondent in its role, does not have the power to carry out public functions and thus, it is not the legitimate respondent and should be released from the observance of justice;
>
> 2. That subordinately and without prejudice to the premise, but always preliminarily, the action of the applicant is insufficient as it is deprived of a reason for the request as required by Article 156 of

Chapter 12 and it does not even state on which disposition of the law, the claims are being based on. Thus, the respondents are not able to defend themselves properly and the request should be rejected;

3. That subordinately and without prejudice to the premise, but always preliminarily, the applicant does not have the juridical interest required by the law to exercise the action in question and thus the request should be rejected;

4. That subordinately and without prejudice to the premise, but always preliminarily, as long as the action of the applicant is based on the dispositions of Article 33 of Chapter 573, the locus standi of the applicant remains lacking since this disposition cannot be invoked to syndicate the fulfilment of, or at least, the contractual obligations arising from the contract of public land;

5. That subordinately and without prejudice to the premise, but always preliminarily, as long as the action attacks a commercial agreement were the contracts are *res inter alios acta* for the respondents and independent from the concession qua transfer, the applicant has no interest and/or right to request any judicial intervention and the claims in this regard must be rejected;

6. That subordinately and without prejudice to the premise, there is no shortcoming or breach with regards to the concession forming the merits of the case;

7. That subordinately and without prejudice to the premise, the applicant's requests and claims are unfounded in fact and in law and should be rejected;

8. Saving other ulterior exceptions.

With costs.

15. Thus, the pleas brought forward can be grouped in the following way:

15.1 In the case of the Prime Minister and Advocate General:

- Lack of passive legitimacy of the defendants [**the first plea**];

- Lack of applicability of Article 33 upon which the Plaintiff is basing his claim and this given that this article is relevant only in the case of defaults at the time of giving the concession and is not relevant for a

situation of violation of the contract as is being alleged by the Plaintiff [**the second plea**];

- Lack of juridical interest on the Plaintiff's part given that Article 33 of Chapter 573 of the laws of Malta can only be invoked by the signatories [**the third plea**];

- Lack of juridical basis for the action since the case confuses the transfer of land with the transfer of actions in a commercial company [**the fourth plea**].

15.2 With respect to the Lands Authority:

- It is not the legitimate respondent;

- Article 33 can only be invoked by the Attorney General or a Member of Parliament when the emphyteutical transfer itself is irregular and not when there is a consequent breach [see the second plea of the Authority which is like the second plea of the Attorney General]

15.3 Malta Industrial Parks pleaded preliminarily that:

- It is not the legitimate respondent;

- The applicant's application is insufficient because it does not list clearly the grounds of the claim as required by Article 156 of Chapter 12;

- The applicant does not have the juridical interest required by law or the necessary *locus standi* as per Article 33 of Chapter 573 [the third and fourth plea, equivalent to the third plea of the Attorney General and the Prime Minister];

- Insofar as the proceedings refer to the commercial contracts which are *res inter alios acta* with regards to the Plaintiff, the necessary juridical interest is missing.

16. All the defendants, aside from these pleas of a procedural nature, also contest the merits of the allegations of the Plaintiff.

B. PART TWO: THE APPEALED JUDGMENT AND THE GRIEVANCES OF THE RESPONDENTS

B.1 The appealed judgment

17. In the initial part of its considerations, the First Court gives a summary of what it believed to be the basis of this action and states as follows:

> 341. After this Court reviewed all the testimonies and documentation that it considered relevant to today's case and that were presented and produced before it during the hearing of witnesses that was held before this Court, it is now necessary for this Court to enter into the claim made by the applicant and the defences raised by the various respondents in the case.
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> 342. It is an undisputed fact that Dr. Adrian Delia is a Member of the House of Representatives, where, at the time he brought the present case, he was Leader of the Opposition, and today he is still a Member of the House of Representatives.
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> 343. It appears, although not expressly written in the content of the opening application, but certainly clarified in the hearing of the witnesses and in the detailed submissions submitted by his able legal advisor, that today's action is based on Article 33 (2) of Chapter 573 of the Laws of Malta.
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> 344. Article 33 of the Government Lands Act, i.e., Chapter 573, provides as follows:
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> *33.(1) Any disposal of land, to which article 31 applies, which was disposed of differently from the provisions of that article, shall be null and void.*

> *(2) The nullity of a disposal made in contravention of the article aforesaid may be demanded by the parties involved in the disposal and also by the Attorney General or by any person who is a member of the House of Representatives at the time of the demand before the Civil Court, First Hall.*
>
> *(3) The effects and consequences referred to in articles 541 and 543 of the Civil Code shall apply to whosoever acquires land in violation of article 31 of this Act.*
>
> 345. It appears, therefore, that the claimant, as a Member of the Chamber of Deputies, availed himself from a right given to him, as a representative elected by the people, in order to contest a decision taken by the Government of the day and the competent Authorities that fall under the control of the same Government, with aim that such decision is annulled.

18. Whether one agrees or not with the conclusions of the Court that *"the basis of the action is clear"* (and the Appellants continue to insist that they are not – in fact the action is a contradictory one), the fact remains that according to the Court, this is a procedure instituted in terms of Article 33 of Chapter 573 permitting a Member of Parliament to invoke the nullity of a transfer of a public land that takes place in a way other than according to procedure and dispositions as established in Article 31 of Chapter 573.

19. The Court then proceeds to give a summary of the pleas:

> 347. It appears that although the various respondents presented separate and distinct pleas based on their position and involvement in the case, it appears that, mainly, the pleas can be summarized in the following way:
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> - **That they are not the legitimate respondents in the present case** - this has been raised by all parties except for the Vitals companies;
>
> - **That the applicant does not have a legal interest in the present case since the action could not be initiated in terms of Article 33 of Chapter 573.**

- **That the applicant was not a party to the contract being attacked, and therefore has no legal interest to attack it, and this based on the "Res inter alios acta" principle.**

- **That the service contracts are distinct and separate from the contract of emphyteutical concession**

- **That there was no violation of the conditions as alleged by him.**

348. It also emerges that the respondent company Vitals, subsequently Steward, and INDIS Malta Ltd have also raised a preliminary exception of a formal nature, i.e., that, with violation of Article 156(1) (a) of Chapter 12, **there was no "*statement which gives in a clear and explicit manner the subject of the cause*"**

20. In the light of its observations, the Court divides its judgment into the following sections:

20.1 Sworn application null as it violates Article 156 of Chapter 12

20.2 Contracts of service are distinct and separate from contracts of concession

20.3 The Applicant does not have juridical interest in the present case since the action could not be instituted in terms of Article 33 of Chapter 573

20.4 The Applicant was not part of the contract that is being attacked and thus does not have juridical interest to impugn it and this based on the principle of *"res inter alios acta"*;

20.5 The passive legitimacy of the various respondents

20.6 Alleged breach of the conditions

20.7 *Fraus omnia corrumpit* (even though this point was not mentioned at any point in the sworn application)

21. Finally, the Court concludes its considerations in the following manner which is being reproduced *verbatim* since reference will be made to such considerations when the Appellants explain their grievances further on. It is worth noting here that the wording in bold is the Court's emphasis, and not the Appellants'.

> **Considering**
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> 505. Considering the facts as described above, this Court begins by reiterating that it has no doubt that the company Vitals Global Healthcare Limited today Steward Malta Limited, as well as the companies Vitals Global Healthcare Assets Limited today Steward Malta Assets Limited and the company Vitals Global Healthcare Management Limited today Steward Malta Management Limited were awarded the Service Concession Agreement of 30 November 2015, the Health Services Delivery Agreement of 30 November 2015, the Labor Supply Agreement of January 8, 2016 and the Emphytheutical Concession of March 22, 2016, **as a result of manoeuvres and lies intended solely to corrupt the thinking and assessment of those who were responsible for choosing and deciding, which manoeuvres were to the benefit the company Vitals Global Healthcare Limited, together with the subsidiary companies Vitals Global Healthcare Assets Limited and the company Vitals Global Healthcare Management Limited, today all owned by the company Steward Malta International Limited, at the expense of the Government of Malta.**
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> 506. The Court also has no doubt that, at the moment that the company Steward Healthcare International Limited acquired the shares of the company Vitals Global Healthcare Limited, the contractual obligations and milestones that the Vitals companies had committed themselves to abide by had not been reached in any way, with the result that the Government of Malta was obliged not to accept any transfer of shares to Steward Healthcare International Limited, and instead had to proceed to ask for the rescission of all contracts based on non-performance by the Vitals company
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> 507. The Court also has no doubt that the Government of Malta, together with the other competent authorities called in the present case, had the obligation and duty to fulfil all the contracts, in view of fraudulent behaviour systematically embraced by the company Vitals and Steward;
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> 508. The Court, therefore, also has no doubt that it was the duty of the applicant, as a member of the House of Representatives, elected to represent, defend and promote the interests of the citizen, that in the absence of action, he makes use of the tool given to him in Article 33 of Chapter 573 of the Laws of Malta and ask for the rescission of the Emphyteutical Deed of 22 March 2016, along with the entire agreements antecedent to such Concession, defined as 'Related Instruments', which

agreements should be considered as an integral part of the emphyteutical concession dated 22 March 2016.

509. Therefore, this Court sees that the applicant's action, as stated, and as proven, deserves to be accepted.

22. On this basis, the Court goes on to decide in the following manner:

The Court

After hearing the witnesses produced and seeing the vast documentation brought before it;

After seeing the written submissions of the able defenders of the parties;

After having heard the final treatment of the same able defenders of the parties;

After having established and properly analysed the facts of the case, and

After having made its considerations in detail;

Proceeds to hear and decide the dispute by:

Rejecting all the pleas of all the respondents

Granting the applicant's request as presented, and therefore:

Declares that the Services Concession Agreement of 30 November 2015, the Health Services Delivery Agreement of 30 November 2015 and the Labor Supply Agreement of 8 February 2016, together with the various amendments and addenda that have been entered into, shall be considered to form an integral part of the temporary Emphyteutical Concession granted to the company Steward Malta Assets Limited, previously Vitals Global Healthcare Assets Limited, on the 22 March 2016 in the acts of the Notary Doctor Thomas Vella

Declares that the respondents Steward Malta Assets Limited, Steward Malta Limited and Steward Malta Management Limited did not fulfil and breached their obligations under the terms of the contract of 22 March 2016 as well as the Services Concession Agreement of 30 November 2015,

of the Health Services Delivery Agreement of 30 November 2015 and of the Labor Supply Agreement of 8 February 2016 together with the amendments and addenda that were made subsequently.

Declares that the Chief Executive of the Lands Authority, who assumed the functions previously assumed by the Commissioner of Lands, and the Chairman of the Board of Governors of the Lands Authority as well as the Attorney General, are under obligation, in terms of the law, to guarantee the public property and to take the necessary steps to ensure that all the conditions of the granted property are fulfilled and not changed in terms of the same contracts and a resolution of the Chamber of Deputies, and therefore:

Rescinds and annuls the temporary Emphythetical Concession in the acts of Notary Thomas Vella of 22 March 2016 as well as the Services Concession Agreement of 30 November 2015, the Health Services Delivery Agreement of 30 November 2015 and the Labour Supply Agreement of 8 February 2016 together with the amendments and addenda that were made subsequently. Supply Agreement of 8 February 2016 together with the various amendments and addendums that have been made and which form an integral part of the above-referenced temporary emphyteutical concession;

Orders the return of all the property where the sites of St. Luke's Hospital St. Luke's Road Pieta, with an area of 54,728 square meters, the Karin Grech Rehabilitation Hospital in St. Luke's Road Pieta, with a surface area of 768 square meters and the Gozo General Hospital of 72880.92 square meters in Triq I-Isqof Pietro Pace, Rabat, Gozo as better described in the emphythetic concession referred to the same Chief Executive of the Lands Authority

Nominates the Principal Notary of the Government to publish the relative deed of rescission and annulment of the said temporary emphyteutic concession within a period of three months from today.

Reserves the right to nominate deputy curators to represent the Chief Executive of the Land Authority, the Chief Executive Officer of Malta Industrial Parks Limited and the Government of Malta and/or Vitals Global Healthcare Assets Limited on the act of rescission of the said emphyteutic concession in case it is requested after the judgment has been given.

Costs of the present procedures and of the notarial acts required in compliance with today's decision shall all be borne by the Steward Malta Limited

B.2 The Appellants' Grievances

23. The Appellants are naturally aggrieved by this judgment that not only ignored basic points of procedure in order to "save" a sworn application full of legal and procedural contradictions but also proceeded to, amongst others, put forward defamatory statements about the Appellants and their representatives and accused them of criminal conduct whilst, ironically, depicting the Government of Malta, an EU Member State, not only as innocent but as a weak, if not even an "ignorant" party, that ended up being deceived or coerced by Steward to accept certain terms or conditions against the interests of the Maltese citizen.

24. This is decidedly not the case, and it was, on the contrary, the **Government of Malta** that with various promises and assurances, convinced Steward to take over and save a broken Concession which was vital to the country, and which was then on the verge of completely collapsing, causing a great scandal for the Government. This will be explained in more detail further on.

25. The grievances of the Appellants vary from procedural ones to legal ones and others based on the evaluation of the facts. The respondents will also highlight how the appealed judgment violates their **constitutional and fundamental human rights**, as well as basic principles of European Union Law.

26. The grounds of appeal of the Appellants are clear and manifest and consist in the following grievances, which will be expanded upon in a subsequent section of the appeal:

26.1 The First Grievance: The First Court was wrong when rejecting the plea of nullity based on lack of clarity of the sworn application. Contrary to what the Court stated, not only does the Plaintiff fail to quote the article of the law on which he is making his requests (even though he vaguely refers to Chapter 573), but he also confuses the distinct concepts (that exclude each other) of a declaration of nullity

and termination or recission because of default. This in addition to other mistakes of a procedural nature;

26.2 The Second Grievance: The Court itself confused the two concepts of nullity and rescission based on default and fails to clearly distinguish between these two concepts;

26.3 The Third Grievance: The annulment of any contract awarded for the provision and management of health and ancillary services to economic operators, the consideration for which consists in the right to exploit those services is only governed by S.L. 595.13 *"Procurement (Health Service Concessions) Review Board Regulations"*, and not by Chapter 573 of the Laws of Malta

26.4 The Fourth Grievance: The Court was wrong and incorrectly applied the dispositions of Chapter 573 when it found that the Plaintiff had *locus standi* to request the recission of the contract based on alleged breach. According to Chapter 573, this *locus standi* is exceptionally given to Members of Parliament only if the grant/transfer originally does not follow the procedures mentioning specifically in the Act. This remedy is not available when the basis of the claim (as in this case) is that a party breached the conditions of the contract and is also not available for the rescission of contracts that do not consist in "transfers of land";

26.5 The Fifth Grievance: In addition to and in connection with the aforementioned grievance, the decision of the Court to recognise the *locus standi* of Adrian Delia represents a violation of the principle *res inter alios acta* and leads (both in this case, and generally) to absurd legal consequences, including that Members of Parliament can interfere in any transfer of land (from an industrial zone to an apartment under a home ownership scheme) not only if it was granted following the wrong procedure, but also on the basis of alleged subsequent breach of conditions found in a separate agreement to that of the transfer of land itself.

This is tantamount to a circumvention of the notice and termination provisions agreed upon between the parties, which forms the basis of the consent to enter into the agreement, because it means that the termination is requested (by a third party!) without reference to the terms and procedures agreed upon in the contract or indeed the relationship between the parties in such contract. This also amounts to **a breach of the Constitutional and Conventional rights**, the rights protected under the Charter of Fundamental Rights of the European Union, and of the **basic founding principles of European Union Law, including respect of fundamental rights and the principle of proportionality**;

26.6 The Sixth Grievance: The Court acted *ultra vires* when it considered allegations of fraud in the granting of the concession and subsequent to its granting, given this was an argument raised by the applicant "along the way", and is not reflected in the sworn application and in the various sworn replies that establish the *litis contestatio*, i.e., the parameters of the dispute between the parties which needs to be heard and decided by the Court;

26.7. The Seventh Grievance: On the merits and on this point of alleged fraud and malicious conduct on the part of the Appellants, the Court was wrong in fact and in law because there is no evidence in the records of the case that could conceivably justify the statement that the Appellants or their directors/representatives acted criminally, when taking over the Concession or at any moment after this. This shortcoming is graver when one considers the basic principle, expressly set out in the Civil Code, that bad faith must be proven and not presumed. On the contrary, it was the Appellants who were deceived by the Government of Malta and induced to enter into the Concession. Moreover, the First Court recognised in various parts of its judgment alleged collusion that involves members of the Government and/or the public authorities concerned, particularly in connection with the granting of the Concession to Vitals. This excludes the concept of vitiation of contract based on fraud, which can never be present if (allegedly) the two contracting parties were acting in collusion between them;

26.8 The Eighth Grievance: In connection with the aforementioned grievance, it must be postulated that with the allegations of fraud and criminal conduct on the part of Steward and/or its representatives, the Court violated the right to a fair hearing of the parties involved not only because it deprived the concerned parties from the opportunity to contest the allegations that were raised in the judgment but also because it led to this conclusion on the basis of a superficial and totally wrong examination of the evidence, which ultimately seriously tarnishes the reputation of an internationally well-established and highly regarding hospital operator;

26.9 The Ninth Grievance: On the alleged breach of the Concession Contracts, the Court was wrong in the merits of its conclusions and the sarcastic way it considered the evidence raised before it, which continues to reveal a sense of bias against the Appellants;

26.10 The Tenth Grievance: The appealed judgment is unclear about the contracts being rescinded. The request made by Plaintiff specifically refers to the rescission and annulment of the temporary emphyteutical concession in the acts of Notary Thomas Vella dated 22nd March 2016 and of the "Related Instruments" which, according to the Plaintiff, form an integral part of the aforementioned emphyteutical concession. The Related Instruments are well defined in the emphyteutical concession and refer to the SCA, LSA and HSDA but this definition does not extend to every contract that is in some way related to the Concession. Despite this, the operative part of the judgment implies that every subsequent agreement that in some way relates to the Concession is being rescinded, which order, if it should really be considered that way, is clearly *extra petita* and *ultra vires*, potentially impinging on contracts involving third parties that are not party to the suit (such as Bank of Valletta p.l.c. and Steward Healthcare International S.L.U.);

26.11 The Eleventh Grievance: The Appealed Judgment infringes Article 63 of the Treaty on the Functioning of the European Union ["**TFEU**"]

26.12: The Twelfth Grievance: Regarding the costs, the Appellants complain that the First Court pinned all judicial costs on the Appellants, whereas even if the Court was correct in its conclusions (and it is not), the costs should have, in a worst case scenario, also be borne by the other defendants. Again, this is a sign of clear bias against Steward, significantly the only "foreign" party to the suit.

C. PART THREE. FACTUAL BACKGROUND

C.1 Introduction

27. As stated, the present case appears to be based on provisions of the law which regulate the grant of public land (the Government Land Act, Chapter 573 of the Laws of Malta). For the sake of completeness it should be stated then when the concession was originally granted, the applicable law was the Disposal of Government Land Act (Chapter 268 of the Laws of Malta), although Chapter 573 had then entered into force by the time the court action was filed. However, the relevant articles under Chapter 573 reproduce provisions which were already present under Chapter 268.

28. Chapter 573 (and, previously, Chapter 268) regulate "the disposal of government land" which can include transfer by emphyteusis. In this case, however, the emphyteutical deed is just one piece out of **several agreements** which, together, regulate a **health services concession**. As the Court may determine from the exhibited documents, apart from the emphyteutical deed of the 22nd March, 2016, there were a number of **earlier agreements**, specifically:

(i) *Services Concession Agreement* dated 30 November, 2015 (the **SCA**);

(ii) *Health Services Delivery Agreement* dated 30 November, 2015 (the **HSDA**);

(iii) *Labour Supply Agreement* dated 8 January, 2016 (the **LSA**);

29. The said contracts are collectively being referred to as the "**Concession Contracts**".

30. The companies which were awarded the concession following what the Appellant understood to be a competitive process were Vitals Global Healthcare Assets Limited, Vitals Global Healthcare Limited and Vitals Global Healthcare Management Limited. Today, **after a GOM authorised change in the shareholding** of these entities, the parties to the Concession are the Appellants Steward Malta Assets Ltd, Steward Malta Limited and Steward Malta Management Limited.

31. At the time of the original grant of the Concession, the shareholder in the "VGH" entities was a company named Bluestone Investments Malta Limited. Steward Health Care ["**Steward**"], the present shareholder, had nothing to do with that phase of the concession. Steward was not a bidder nor did it in any way participate in the procedure for the grant of the Concession and/or in any discussions leading to the grant of the Concession.

32. Plaintiff quotes reports prepared by the National Audit Office that revealed irregularities in the original concession and in his final submissions before the First Court, had pointed out that Appellants themselves had relied on the same NAO reports to defend themselves from a monetary claim filed by an individual who was mentioned in those NAO reports as one of the "dubious" original investors in the Concession. It should be made clear, however, that this is in no way an acceptance by the Appellants of the Plaintiff's claims which, it should be reiterated, are based on an alleged breach of the Concession conditions, and not on the manner in which the Concession was granted, or any alleged fault in the procurement process in which, in any case, Steward was not involved.

33. Indeed, Steward entered into the Concession only **three years after the award**, as a result of a transfer of shares from the Concessionaire companies, which transfer of shares occurred on the 16 **February 2018,** that is only days before the present proceedings were filed. At this stage, it would be helpful to explain what led to this.

34. Recent evidence suggests that the granting of the Concession to VGH was, to say the least, improper. It is not the purpose of this appeal to consider and conclude if the award was fraudulent (though there are now available indications that this might well be the case). Reaching this conclusion, which is beyond the remit and beyond the parameters of the present Court case, requires further action of the Court and deeper investigation particularly if, as is the case, the Court is alleging that such criminal activity existed.

35. On the face of the now available factual evidence leading to Steward taking over from VGH, one could be led to conclude that (a) the shortcomings of VGH immediately upon being granted the Concession made of VGH an unsuitable grantee; (b) the lack of action by the Government of Malta (other than in supporting VGH by, amongst others, extending the effective date for the entering into effect of the Concession or by waiving the key requirement to accredit bank financing to VGH or indeed by signing off on bills and payments quarterly without requiring VGH to produce accounts) suggests that not only the process of selecting VGH but the treatment of this entity as Concessionaire and the non-exercise of its contractual termination rights by the Government of Malta over a period of more than two years until Steward came into the Concession is suspicious, suggesting some form of collusion between grantor and grantee. This may be the reason which justifies the Government of Malta now choosing not to appeal the judgment – although there may also be other reasons for this surprising decision, including (i) arguing contrary to the clear indications of Government collusion may backfire on Government given the evidence now available and (ii) the Government finds it convenient to make use of this judgment to walk away with a light reprimand from the Court which may be the best option for Government in the circumstances.

C.2 The promises given by the Government of Malta to Steward and the European Commission

Introduction

36. Steward, in what was its first investment in the European Union, took over from VGH in February 2018. It did this (a) in good faith, assuming, based on the tender having been led by a Government of a Member State of the European Union, the existence of a due process culminating in the granting of the Concession to VGH and (b) based on explicit, significant and material assurances from GOM, through the Prime Minister, Chief of Staff and the Minister of Health and Tourism, that the Concession would be restructured to make it sustainable and capable of obtaining necessary financing, that is, to make it "bankable". This was a necessary condition for Steward to take on the Concession and be able to guarantee the long-term sustainability of the services offered. These promises and assurances will be explained in greater detail further on in the Appeal.

37. It is necessary to stress here that the assurances from GOM in respect of paragraph (b) above were also represented by GOM to Eurostat in 2018 (the year in which Steward took over). The following is a summary account and reflection on the dialogue between GOM and Eurostat in respect of the Concession, which dialogue results from the European Commissioners "Final Findings Eurostat EDP [Excessive Deficit Procedure] dialogue visit to Malta 31 May-1 June 2018", which is also referenced in detail in the NAO reports exhibited before the First Court:

- the National Statistics Office ("NSO") identified in the Concession framework elements that automatically lead to the recording of the assets on GOM balance sheet. *Appellants contend that this amounts to a misrepresentation of the basis upon which the project was tendered and awarded to VGH with the knowledge and acceptance of VGH. The project was meant to be an SPV "ring fenced" PPP but was not awarded on that basis*;

- the NSO admitted to the European Commission, with a view to providing comfort in respect of a broken Concession and the fact that Steward would take over to fix it, *that new complete contracts on the PPP agreement between GOM and Steward Health Care International were [in 2018] under negotiation and that these would be provided to the European Commission **"as soon as possible"***;

- the initial investment of VGH was meant to be € 220,000,000 to cover, amongst others, construction costs. However, in February 2018 (almost 3 years after the Concession was awarded) no major capital expenditure had yet been incurred on the project by VGH. As a result, key contractual terms of the SCA such as the construction milestones had not yet been attained;

- as early as January 2018, the NSO notified Eurostat that discussions of a take-over by the US group Steward Health Care from the then shareholders (VGH) were under way. *The takeover would result in, GOM officials explained to Eurostat, the renegotiation of a new agreement after the change in ownership of VGH to the Steward Health Care group. The contracts, it was represented by GOM, were expected to remain unchanged in the operational obligations of the private partner but financing and government obligations to buy minimum levels of service (amongst other elements) were under discussion.* To date (2021) none of this has been honoured by GOM.

- based on the above representations of GOM officials to Eurostat, Eurostat concluded that:

> *"The new agreements will have to be reassessed as soon as signed".*
>
> *"The Maltese statistical authorities will provide the new complete contracts on the PPP agreement between government and Steward Healthcare International. Deadline: as soon as signed." [Action point number 21 on page 24]*

> *"The Maltese statistical authorities will include in the EDP questionnaire Table 11 the PPP agreement with Vitals Global Healthcare/Steward Healthcare International. Deadline: before the October 2018 notification." [Action point number 22 on page 24]*

38. The undertaking from GOM to Steward to provide a bankable and sustainable concession framework (as also represented to the European Commission) has not been honoured to date. A first, and apparently *bona fide*, attempt to address the inherent problems in the structure of the Concession failed after the political turmoil of November 2019. Subsequently, other discussions took place but GOM deceived Steward by various means and specifically by, on at least two occasions (December 2020 and May/June 2021), agreeing to signing dates of documentation purporting to restructure the Concession and then refusing, at the last minute, to proceed to such signing. Appellants argue that such manoeuvres reflect the willingness throughout of GOM - individuals in GOM aside, since Steward was dealing with the highest Institution in the Maltese administration and not with specific individuals serving or otherwise representing such high Institution - to continue with the Concession on its current terms whilst at the same time gaining time in prejudice of Steward with the obvious intention, amongst other, of "saving face". Evidence of this can and will be provided.

39. The above statement is confirmed by the fact that in July 2021 GOM represented to Steward (a) its willingness to operate going forward based on existing Concession terms (something which completely contradicts GOM´s public and private undertakings, as explained above) and (b) its rejection to agree to a new contractual framework. This "new contractual framework" was not only understood to be the basis of Steward consenting to the takeover from VGH, but was also represented by GOM to EUROSTAT in the year in which Steward agreed to take over (2018) and also in the EPD visit of 2021.

40. It is therefore evident that Steward entered into the Concession, taking over from Bluestone, on the invitation and authorisation of the Government of Malta

and its officials, at a time when grave difficulties in the operation of the Concession by the previous shareholder was increasingly evident. The transfer of shares occurred by agreement between all parties concerned, following an authorisation by the Government of Malta as grantor of the Concession, and after the Government assured Steward that aspects of the Concession were going to be restructured in a way that would make it "bankable", that is, sustainable and capable of obtaining necessary financing from banks and financial institutions allowing for the construction of new hospitals and such that health services in the country could be developed further in the public interest.

41. Here it should be stated that the new shareholder forms part of the Steward Health Care group – one of the leading physician-led health practice organisation in the world, offering high-quality medical services, and operating several hospitals, primarily in the US but also in several other areas of the world. Steward wanted to bring its high-quality medical services to Malta, and this is precisely what it has done over the past five years, by continuing to contribute to the health services in Malta despite all the challenges including a Government which reneged on its promises.

42. To sum up, whilst the party to the transfer of shares which gave Steward control of the concessionaire companies was Bluestone Investments Malta Limited, a private company, the representations and assurances which induced Steward to agree to such transfer were made by GOM in its capacity as grantor of the Concession and party to the Concession Agreements into which Steward would come in. **GOM was then - and is now - the counterparty to the concession companies in the health services concession**.

43. In the appealed judgment, the Court implies (for instance in paragraph 495 *et sequitur*) that Steward acquired the Vitals shares with the ulterior aim of profiting from the Government of Malta by obtaining financing from Bank of Valletta plc with the peace of mind that the Government would guarantee such financing, but fails to take into account and mention that such financing, which was only provided

in September, 2019 (together with Steward equity) was destined to the construction and finalisation of Barts Medical School. It is significant, in any event, that not even the Plaintiff ever alleged that Steward acquired the Vitals shares with these "ulterior motives", that certainly needed to be proven, and not "assumed" by the Court and declared in the judgment is if they were confirmed truths! The Court's reasoning also shows considerable ignorance of how an international group of company with over forty thousand employees all over the world, which runs over forty hospitals, and whose turnover is in excess of 7 billion US dollars runs a business. Certainly not by planning to default a thirty million euro loan upon the cancellation of a concession to recieve cash via a Government guarantee, a fantastical aspect of the court judgment.

44. The reality is very different and, in the light of these unfounded and unexpected statements from the Court, Appellants feel duty bound to point out that:

44.1 It was the Government of Malta, not Bluestone, that gave rise to legitimate expectations to Steward that the acquistion of VGH would be immediately followed by, amongst other commitments, the restructuring of the concession agreements, which legitimate expectations were subsequently not honoured by the Government, as will be explained in greater detail further on;

44.2 It was the Government of Malta, not Bluestone, who represented to the European Commission, concurrent with Steward coming into the Concession, that the Concession Agreements would be restructured to make them "bankable" and sustainable in the long-term, with the intention of saving the Concession in the public interest.

44.3 Finally, it was the Government of Malta, not Bluestone, who acknowledged to Steward that the financial model of the Concession needed to be amended to make it viable (though not necessarily profitable).

45. Simply put, Steward would not have entered into the agreement with Bluestone to acquire the shares in the concessionaire companies (VGH) had the undertakings of the Government of Malta to restructure the Concession not been made. There was no investment logic for Steward in doing this, given the background which explains why the Government of Malta wanted Steward to step into the Concession. This background is further explained below. We highlight here the following:

45.1 The concession was bankrupt when negotiations between the Government of Malta and Steward started;

45.2 Given that one of the reasons why the concession was bankrupt was its financial model, it rested only on GOM to fix it.

45.3 This was also GOM's representation to the European Commission and to Steward.

46. On the contrary, the Government of Malta had much to gain from Steward's involvement in the Concession. The Government of Malta benefited directly from Steward becoming the holder of the shares in the concessionaire companies and through that ownership the holder of the Concession. The benefit to GOM is obtained from, at least, the following:

46.1 the finding of a solution to a publicly acknowledged failed concession award to VGH which is only imputable to GOM;

46.2 the cure to a 3-year blatantly failed concession supervision, particularly by the Ministry of Health, after the failed award of the concession to VGH,

46.3 the remedy to the ensuing loss of credibility of GOM due to the points mentioned above, and

46.4 the stopping of the unsustainable damage to the Health Care sector in Malta.

47. To obtain that benefit, GOM induced Steward - through undertakings which were entirely within GOM's (not individuals in GOM) power, ability, and authority - to become its indirect counterparty in the concession scheme. This was Steward's first investment within the European Union, and rested on its understanding of the protections which EU law provides to investors in Member States.

48. It results and is confirmed from the evidence presented before the First Hall that the Government of Malta probably had other and ulterior reasons for which it wanted to achieve the urgent transfer of the Concession. Quality and standing of the pre-February 2018 Concessionaire aside, Steward was faced, post-acquisition, with new, critical information, regarding the background to the award of the Concession, which, with hindsight, in part explains the actions and interest of the Government of Malta in clearing the concession from VGH.

49. As confirmed in the July 2020 National Audit Office ("**NAO**") Report on the hospital concessions (the "**First NAO Report**"), the award by GOM of the concession to VGH was "**fraudulently contrived**" (as further established in the NAO July 2020 Addendum Report on the award of the Concession – the "**Addendum**"), and involved improprieties and collusion between VGH and GOM in relation to the procurement process (which GOM misrepresented to Steward as having been run under the rule of law in Malta).

50. Following the First NAO Report, the second part of the National Audit Office's Report relating to the operation of the concession up to February 2018, published in December 2021 (the "**Second NAO Report**") highlighted the shocking deficiencies in the running of the concession when it was under VGH's control.

51. The NAO observed that *"none of the major concession milestones were achieved when the concession was under the VGH's control"* and went to highlight *"all subsequent failures registered in this concession by Government [...] The Government's acquiescence to the evident inadequacies of the VGH reflected ineffectiveness, mirroring the VGH's failure to deliver on its commitments"*.

52. This point is particularly relevant, because when one reads the First Court's considerations, one is led to understand that the Government has come out clean of this whole saga, while Steward was the "criminal" or "con artist" which first convinced the Government of Malta to take over the Concession, then continued to benefit to the prejudice of the same Government. It is indeed highly contradictory that, as regards VGH, the Court concludes that there was collusion between the Concessionaire and the Government, but where Steward is concerned the Government suddenly becomes a mere "victim"! – a conclusion which does not have any logic behind it.

53. The – very different – truth is that the Concession began to unravel under VGH's inevitable failures and the Government of Malta's (and, particularly, the Ministry of Health's) now publicly confirmed lack of oversight. It therefore comes as no surprise that, in an effort to mask its improprieties, the Government of Malta sought a world-class health care system to take over the Concession.

54. As part of this effort, GOM, through its Prime Minister, Chief of Staff and Health and Tourism Minister at the time, made significant and material representations to Steward (the largest privately held for-profit hospital system in the United States) in order to induce Steward to take over the concessionaire and with it, the concession to which GOM was the counterparty. Such representations did result in engagement with GOM in the drafting of new terms to the Concession, but were ultimately never finally honored.

55. Steward was an obvious option for GOM the following reasons:

55.1 Through one of its executives, who served for a limited period of time in VGH (end of November 2016 to January 2017, at which time he went on leave up until his resignation from VGH in August 2017), Steward became acquainted with VGH executives and key representatives of GOM;

55.2 Steward's international strategy in late 2017 was to expand in, amongst others, the European Union, which made the timing favorable for both GOM and Steward.

55.3 Malta, in the above context and the discussions then held with GOM, was an initial opportunity from where Steward could expand its footprint into other European countries running PPP processes.

56. Initial conversations between GOM and Steward took place in Q4 2017. These conversations led to Steward insisting on due diligence before potentially finalizing any transaction leading to the effective transferring of the VGH companies. However, for GOM time was of the essence since the national health system of Malta was in jeopardy, and arguing that, consequently, typical due diligence was not possible in such urgent circumstances, Steward, on the basis of undertakings from GOM that it would restructure the Concession, agreed to the acquisition in and accelerated time frame. Steward however assumed that no diligence of any significance was ultimately necessary in respect of a concession which had been awarded by the government of an EU member state and subsequently supervised by the EU Statistical Office.

57. As is now evident – including from the reports issued by the NAO and produced before the First Court - appropriate due diligence would have uncovered the Government of Malta's irregularities to the organs of the European Union. With the benefit of hindsight and considering the subsequent NAO reports referred to above, it transpires that the Government of Malta had other motivations to urgently close the deal beyond those connected to the viability of Malta's health services.

58. More significantly, Steward, although unaware of the real extent of the problems underlying the Concession, which would, in the absence of proper due diligence, only became apparent upon actual running of the Concession, was, based on its experience and the limited due diligence available, aware of certain material issues with the structure of the concession which made it financially unsound and not sustainable.

59. In other words, the Concession as then structured (award process aside) would clearly not be able to generate enough revenue to meet the repayment of the principal and interest relating to financing required to undertake the investments in the project. In view of these concerns raised by Steward, GOM, impersonated through its highest officials, undertook and promised Steward that the Concession Agreements would be renegotiated on commercially reasonable terms acceptable to Steward with a view to making it "bankable" that is, that it would be such as to allow the Appellants to be in a position to obtain sustainable financing.

60. To sum up, in an effort to bring credibility to the Concession through Steward, the Government of Malta made numerous material representations to Steward, including those outlined below.

61. These representations, undertakings, promises and assurances, made by the Government of a democratic state within the European Union where, supposedly, the "rule of law" reigns, a government whom one should fairly expect to act openly, transparently and honestly, gave Steward, in its first ever investment within the European Union, legitimate expectations that the promises would indeed be adhered to by GOM, particularly, in relation to the restructuring of the concession contracts.

62. A company of international stature, when it speaks to and negotiates with a Member State within the European Union, legitimately expects that it can trust the Government of that State. Private cmanies do not carry out due diligence on Governments in the fashion that due diligence is undertaken in corporate acquisitions. Malta is a EU member state. The Government of Malta should be good enough to put Steward´s mind at rest..

63. It is in this context that the Court's statement about "fraud" on the part of Steward is simply hilarious (if it hadn't been made by a Court of an EU Member State). The judgment, in a totally unfounded manner, portrays a totally different picture to the one in which Steward was really involved, so much so that it states that the negotiations between the Government and Steward were the result of

possibly *"ingenuity on the part of the Government of Malta"* but *"certainly"* a consequence of *"criminal acts"* on the part of Steward. The now known background to the award of the concession and its oversight show little "ingenuity".

64. If there is anyone in this matter who has been defrauded, it is none other than Steward at the hands of the Government of Malta.

65. The Government of Malta failed to respect its promises. Not only did the Deputy Prime Minister and Minister of Health declare in Parliament in May 2022 that "no negotiations would take place" but to add insult to injury, as soon as the appealed judgment was delivered, he publicly stated that the Government of Malta's strategy to "resist" Steward's requests for renegotiation of the Concession had borne fruit since the Government of Malta could now use the judgment in its favour against Steward! This goes completely against the same Minister Fearne's statements at the time of the transfer of shares, stating that Steward was the "real deal" or ordering to all parties involved that closing was on the essence "*Guys - we absolutely need to close this week. I am being told that MAM are once more being pushed to go to industrial action. That will damage all of us*." (email from Chris Fearne 3 april 2018 to Steward).

66. . Significantly, the Prime Minister also publicly reiterated (after the judgment) that the Government had refused to collaborate with Steward in the restructuring of the concession.[1]

67. If this is – and previously was – the Government of Malta's frame of mind, then this is proof of the same Government's bad faith. This is being stated since there were no less than **three intensive attempts** to restructure the contracts to make them bankable and sustainable (in October/November 2019, October 2020 to January 2021 and again in April to June 2022). The first attempt faltered after the political turmoil and resignations in late 2019, whereas the subsequent attempts, under the new Government administration never came to fruition, solely through

[1] https://timesofmalta.com/articles/view/abela-demand-steward-reimburses-funds-used-investment.1018845

the fault of GOM which repeatedly reneged on its promises and retreated from discussions on some pretext or other.

68. It is important to note that these attempts to restructure the Concession were hardly "unofficial" meetings, but were well known to and in some cases involved high representatives of the US Embassy in Malta. In fact, since Steward took over the Concession at the request of the Government of Malta, several senior executives and directors of Steward met regularly with US Ambassadors and the Chargé d'Affaire to keep them abreast of the progress of the negotiations and the challenges Steward was facing. Such representatives including G. Kathleen Hill (between 2016 – 2018), Mark A. Schapiro (Chargé d'Affaires, 2018 – 2020) and Gwendolyn "Wendy" Green, Chargé d'Affaires, (2020 – 2022). Mark Schapiro accompanied representatives of Steward in their first meeting with Prime Minister Robert Abela and, significantly, Gwendolyn Green was formally invited to attend the signing of restructured Concession set for the 18 December 2020 before the Government of Malta pulled out at the last minute.

C.3 The NAO Reports

69. Earlier in this Appeal application, Appellants referred to events subsequent to the taking over of the Concession. Following the publication of the the First NAO Report, as subsequently further confirmed in its Addendum, Steward discovered that the procurement process for the award of the Concession to VGH was *"fraudulently contrived"* (see paragraph 71 of the Addendum) as between GOM and the VGH investors. NAO reports that the GOM entered into a secret Memorandum of Understanding with VGH in 2014, before the tendering process had even commenced, precisely reflecting the eventual concession terms, which indicates that the tender process was devoid of any meaning. This fact, coupled with other elements such as a letter of support from Bank of India predating the tender process RfP that expressly references the Maltese projects, led the NAO to the view that there was collusion between GOM and VGH, with the structure and order of the procurement being pre-agreed and the procurement process undertaken solely intended as a superficial exercise leading to an already determined outcome.

70. It should be stated in this context that the Concession Contract Regulations (Subsidiary Legislation 601.09) which transposed Directive 2014/23/EU into Maltese law was not yet in force at the time of the award of the concession. This notwithstanding, principles established by the ECJ over the years required that, even in the context of concession contracts, despite their not being specifically regulated at the time, awards should follow a process which is competitive, transparent and fair. Evidently, GOM attempted to give the impression that a process meeting these requirements was being followed, albeit it eventually appeared that this might not have been the case.

71. In fact, as concluded from the NAO Report, VGH was not fit for purpose, yet it was still awarded the Concession. Thus, the NAO Report conclusion is evidence of the irregularities behind the original procurement process. None of this was disclosed by GOM to Steward, either at the time or, indeed, at first, in response to the Auditor's General's enquires.

72. It was certainly not disclosed to Steward during the discussions referred to above, prior to it taking over the Concession Agreements. Rather, GOM sought to get round Steward to take over the Concession from VGH, knowing that Steward was not aware of these shortcomings and that it would not become aware of them as long as GOM resisted to Steward carrying full due diligence. Certainly, had Steward been made aware of the full picture, it would not have taken over the Concession from VGH.

73. It further transpires that the very persons who negotiated the said MoU with VGH on behalf of GOM – chiefly, then Prime Minister Chief of Staff Mr. Keith Schembri – were the same Government officials who later spearheaded discussions with Steward, emphasizing the "urgency" for Steward to step into the Concession replacing VGH. The sequence of events suggests that the supposed urgency was not solely related to a *bona fide* concern about the healthcare system in Malta, but was also a pretext on the part of GOM to attempt to cover its tracks (including vis-a-vis Steward) and to find a seamless fix to a failed concession.

74. This was further confirmed in the Second NAO Report, which highlights several shortcomings on the part of GOM during the "VGH tenure" of the concession, essentially allowing VGH to bring the assets under concession to the brink of ruin.

75. The Government of Malta was then – and is still at this time – the counterparty to the Concession Companies in this health services Concession.

76. This further shows how mistaken the First Court was when it "assumed" any sort of wrongdoing on the part of Appellants, when it was none other than the Government of Malta which was "in the driving seat" and can therefore never be portrayed as a victim of any misrepresentations or wrongful acts allegedly carried out by Steward.

C.4 Negotiations between Government of Malta and Steward prior to the acquisition of shares in the concessionaire VGH.

77. As set out above, prior to the acquisition of VGH and its associated companies, Steward's negotiations were not, primarily, with the shareholders of VGH as the (then) concessionaire, but rather with the Government of Malta as the counterparty in the Concession. In fact, Steward had several meetings and discussions with Government officials in relation to the Concession. As explained, in none of these meetings did the Government of Malta provide any detail in respect of the wrongful award process.

78. Following these meetings, Steward and the Government of Malta entered into a Memorandum of Understanding (the "**MoU**") in order to regulate certain matters relating to the eventual acquisition by Steward of VGH and the subsequent operation of the concession, including restructuring of and amendments to the already existing Concession Agreements.

79. As per normal procedure, Steward expected and intended to conduct the necessary due diligence exercise prior to concluding this venture, more so given its understanding through the Government of Malta of VGH´s failure in its operation of the Concession and the need to amend the financial model of the Concession.

80. This notwithstanding, not only did Steward not carry out any "machinations" against Government, but it was Steward itself that was facing significant "pressure" (which Steward, at the time, understood to be "in good faith") by representatives of the Government of Malta to take over the concession framework in as short a period of time as possible due to the financial and operational issues with VGH. In this context, Steward was neither offered nor given the opportunity or possibility by the Government of Malta to carry out a complete due diligence exercise. The Government represented that this could be done later, on the basis that there was nothing in the concession framework - other than the existing concessionaire - which would result in an impediment to taking over, an assumption which later proved to be incorrect.

81. In exchange for not undertaking customary due diligence, Steward requested and obtained a number of assurances from the Government of Malta. The truth uncovered following the acquisition of the Concessionaire Companies was that it would not even have been possible to conduct such due diligence considering the utter confusion which reigned in connection with available (or rather, unavailable) information, lack of filing, lack of management accounts, and a total lack of oversight by the Government of Malta.

82. The MoU between the Government of Malta and Steward materially provided that:

> *"D. Subject to the provisions of this MoU:*
>
> *Steward has indicated an interest in assisting GOM in* ***implementing*** *the Concession by considering an involvement with the Concession Companies and / or the Concession; and* [emphasis added to show recognition of GOM that Concession -three years after award- was not operative]

(ii) the GOM is willing to assist Steward in such a process,

*(the "**Proposed Transaction**").*

E. *Accordingly, the Parties wish to enter into this MoU to record their agreement in relation to the Proposed Transaction and to provide a framework for the Parties to proceed with the Proposed Transaction in a structured, focused and timely manner.*

1. ***Intention, Purpose and Preliminary***

1.1 *This MoU is legally binding.*

1.2 *This MoU sets out certain terms and conditions on and subject to which each Party is willing to enter into, proceed with and implement the Proposed Transaction in a structured, focused and timely manner.*

1.3 ***The Parties intend that this MoU will form the basis for drafting and negotiating legally binding definitive agreements required for the Proposed Transaction**. The provisions of this MoU are intended to be advisory and accordingly not deemed to be exhaustive.* [emphasis added as the agreements referred to were with GOM not VGH]

1.4 …

1.5 *Each Party shall work with the other Party in good faith and in the spirit of cooperation and collaboration to complete the Proposed Transaction in a structured, focused and timely manner.*

1.6 …

…

2. *Conditions Precedent*

The Proposed Transaction is conditional on:

…

2.4 *the relevant Project Documents … being amended to the satisfaction of each Party strictly in so far as such amendment is necessary to reflect new financing conditions for the Concession, and provided that the restructured Project Documents (as relevant) are broadly comparable to the existing Project Documents;*

4. ***Information***

As soon as reasonably practicable after the execution of this MoU, and subject to any confidentiality undertaking in the Project Documents, the GOM will arrange for Steward and its advisors and representatives to have access to the documents, records, employees, assets and operations relating to the Concession and will respond on a full and timely basis (or will procure that any third party responds on a full and timely basis) to all due diligence enquiries to enable Steward to evaluate and assess the Concession and the Proposed Transaction."

83. Therefore, contrary to the public statements made by the Government of Malta following the appealed judgment, denying that the Government was ever willing to renegotiate the Concession, the MoU specifically granted Steward the right to demand restructuring and consequent amendments to the Concession Agreements also in order to satisfy the assurances provided by the GOM and to address Steward's concerns about the concession not being "bankable" and frustrate the necessary financial sustainability of the services offered.

84. In addition to several other meetings with representatives of the Government of Malta, a meeting was held in December 2017, between Steward and high representatives of the Government of Malta, including Prime Minister Dr Joseph Muscat and the Government's Chief of Staff Mr Keith Schembri, during which Steward set out its substantial concerns about proceeding with the acquisition in circumstances in which it would not be possible to carry out full customary due diligence in order to determine the extent of the liabilities accumulated by VGH and that the Concession would require restructuring in order for it to be economically and commercially viable.

85. Therefore, Steward informed the Government's representatives that Steward would only proceed with the acquisition if it would be given the opportunity to subsequently renegotiate the concession terms, and on the basis that Steward would both 'be made whole' in respect of taking over the Concession and be able to restructure the Concession to make it viable and hence, successful.

86. In response, the Government of Malta:

86.1 informed Steward that it wanted Steward to acquire the holder of the Concession and understood that the terms of the Concession would need to be renegotiated and amended for it to be commercially bankable and financable for Steward;

86.2 confirmed that GOM would renegotiate the terms of the Concession in order to make it viable for Steward;

86.3 acknowledged that VGH were indebted and not solvent and that Steward would not be able to carry out full customary due diligence allowing a full determination of these debts in the time available;

86.4 assured Steward that if it acquired the Concession, it would be "made whole." In the context of the discussions, it was understood that the phrase "made whole" meant that Steward would not be worse off as a result of acquiring and reforming the Concession, and therefore that it would not lose money as a direct result of it due to its terms and/or operate the Concession at a loss due to its terms;

86.5 assured Steward that it would be compensated for any unknown liabilities of VGH which were not apparent or understood at the time of the sale of the shares, including that any defaults under the Concession Agreements would be waived by the GOM, including that there would not be default notices or services deductions imposed on Steward following the taking over of the Concession;

86.6 assured Steward that any VGH VAT or tax liabilities would be neutral to Steward;

86.7 promised to assist Steward in the implementation of the acquisition of the VGH's shares and facilitate dialogue with the tax authorities in relation to certain tax and duty issues arising from the sale and, later on, of VGH's failure to honour VAT payments.

87. On the basis of information provided by the Government of Malta, and on the basis of these confirmations and assurances (which continued and persisted over time), Steward agreed to proceed with the acquisition and reached an agreement with the Government of Malta. Steward took over the Concession by acquiring the shares within VGH and associated companies. This was done through the company Steward HealthCare International Limited.

88. The Appellants have in hand ample documentation confirming the Government of Malta's promises and commitments to negotiate the restructuring of the Concession, **including an MoU signed by Minister Dr Konrad Mizzi in August 2019**, which documentation is referred to in other paragraphs in this application, and which Appellants are requesting leave to exhibit by means of an application filed concurrently with this appeal. This request is being put forward at this appeal stage since the negotiations between Steward and Government did not fall within the merits of the sworn application filed by Plaintiff. Nevertheless, in its judgment, the Court chose to make wild, unfounded and unrequested assertions about "fraudulent means" which "misguided" the Government of Malta and allegedly led the Government of Malta to sign agreements intended only for the "unjustified enrichment" of Steward. Since Appellants did not have the opportunity to defend itself from these assertions made by the Court, the Appellants are requesting leave to present documents confirming how wrong this assessment is, including:

88.1 Email exchanges between Government officials and representatives of Steward preceding the entry into Concession, evidencing a request to restructure the concession, which request was acceded to;

88.2 Email exchanges with Government officials dating from 2019 regardin such restructuring

88.3 The MoUs with Government;

88.4 Extracts from Eurostat reports, confirming public statements by GOM that the Concession Agreements would be renegotiated;

88.5 Information which further evidences the negotiation process with Government: including signing and closing agendas from 2019 and 2021 and emails regarding closing of discussions and pending final issues;

88.6 A letter of protest sent to the Hon Prime Minister and State Advocate in September 2021, setting out the background to the negotiations which, by that time, had stalled.

89. As stated above, from the taking over of the Concession by Steward to date, there have been broadly three attempts to restructure and amend the existing Concession Agreements to make them viable as originally agreed with GOM. Unfortunately, these amendments were never executed by GOM, the first time because of the resignation of key Government officials, and the second and third times because of last minute withdrawals by GOM. On each of these three separate occasions, the parties had the finalised drafts in place together with a date for signing set.

90. The latest attempt at restructuring the concessions was abandoned by the Government of Malta around June 2021. This notwithstanding, in an approach which, unfortunately, Steward has grown used to with GOM, it was only on 18th May 2022, **nearly a year later**, that the GOM publicly admitted and declared (throughout its Deputy Prime Minister in Parliament) that it would not renegotiate the agreements since "*Steward are bound by the contract and the concession to which*

Vitals was awarded. This contract was taken over because in fact Steward bought the shares of Vitals" [2].

91. This public declaration also contradicts previous statements made by GOM in official publications and in official communications with the European Commission though Eurostat (**European Statistical Office**), a Directorate-General of the European Commission, as reflected in the NAO report. Indeed, the Final Findings of the Eurostat EDP dialogue visit to Malta for 2018 and again in 2021, both report Government committing to the renegotiation and restructuring of the concession agreements.

92. This confirms that the promise and commitment that the Concession would be restructured was not only made to Steward, but it was a commitment recognised and promised by the Government of Malta to the EU – a commitment justified amongst others – by the wrong financial model of the Concession.

93. To conclude this part of the appeal, it should be reiterated that Steward was under the impression that it was discussing and negotiating with high-ranking officials of a sovereign State within the European Union. In such a context, it certainly did not expect and never dreamt that it could not trust what was being promised by the highest representatives of the Maltese State. If there is any "victim" in this saga it is certainly not the Government of Malta, but Steward or the Appellants. In this context, the comments that Steward carried out any "fraudulent" or "wrongful acts", or that it "conned" the Government of Malta, are totally inconceivable and out of place and defamatory. So is the allegation that the Appellants obtained any "unjustified enrichment" to the prejudice of the State of Malta.

94. On the contrary, it was Steward whose legitimate expectations were breached – legitimate expectations which were created by the Government of

[2] https://www.independent.com.mt/articles/2022-05-18/local-news/Steward-Healthcare-bound-by-conditions-of-original-VGH-contract-Health-Minister-says-6736243050

Malta. This resulted in serious prejudice and financial loss to Steward which was perpetrated through breach of the Government's commitments, stated not only at the moment of taking over the concession, but also repeatedly over the course of the following years.

95. It should also be stated that all this was confirmed by Steward and its representatives to the Office of the Auditor General in the context of investigations which were meant to lead to the third part of the NAO report regarding the Concession, which part was meant to specifically cover the transfer of the Concession to Steward, including negotiations to Government leading to such Concession. This investigation was carried out early in 2022 but, strangely, despite Steward being informed that the report would be published some time around September 2022, the report has, to date, not been published. With the benefit of hindsight, Steward has its own suspicions as to why this is the case.

96. From what has been said up to here, a striking distinction can be drawn between, on the one hand, the real facts of the case and, on the other hand, the "narrative" extracted from the judgment of the lower court, namely that there is a logical and well planned script from award of the concession, to transfer to Steward, to rescission of the Concession by court ruling: *Steward has a master plan*; (i) it will take over a concession in the Health Care sector in the EU, (ii) it will force its termination through a court judgement and (iii) it will seek competation.

C.5 Investment and work done by Steward

97. Despite the fact that the Government did not fulfil its promises, Steward continued to perform its duties as Concessionaire namely, providing the best possible medical services from the hospitals that are under its management, thus protecting and improving the health sector, in the public interest of the citizens of Malta and Gozo.

98. In this regard, and as will be explained in greater detail in the part regarding grounds of appeal, the Appellants are affronted and offended by the unacceptable sarcastic and superficial way in which the First Court considered the evidence presented before it in relation to the investment made by Steward which, in a number of EU jurisdictions, could justify sanction of the judiciary.

99. Before the First Court, the Appellants exhibited James Grima's affidavit together with a photo report attached to it that testifies to capital projects carried out by Steward. The Court implied (to the immense pleasure of certain political figures) that Steward did not do anything except *renovate a toilet*.

100. The unfairness of this assessment can be seen from the already mentioned document which shows, among others, upgrades which took place at the Gozo General Hospital, including a new Dental Clinic and Stroke Unit, a new Orthopaedic Unit, a new Orthotics and Prosthetics Unit at Karin Grech Hospital, complemented by new collaborations and joint ventures with world experts in the field of prosthetics, a new fleet of ambulances as well as new helicopter services for patients, **an Anatomy Centre in Gozo together with the *Barts College for Medicine and Dentistry* Building** - a project that had stalled under the Vitals administration but was swiftly completed soon after Steward entered into the Concession. This is among several other renovation projects all carried out while Steward was also providing and developing high quality healthcare services from the hospitals it operated.

101. The development and construction of Barts Medical School merits specific attention. Upon Steward taking over the Concession at the Government of Malta's behest, the completion of the construction of Barts – which, as stated, had stalled under the VGH administration – was clearly and specifically indicated to Steward as a priority by Joseph Muscat – the Prime Minister on behalf of the Government of Malta. Steward at the time intervened the heal a worsening relationship with Queen Mary University of London (QMUL), which was threatening to leave Malta and Gozo as its students had no facilities to continue their clinical studies in. There were initial high-level meetings between Steward and QMUL leadership in London and Malta, with a view to re-engage and realign objectives, and monthly steering

group meetings involving all stakeholders (Steward, QMUL, Government) were resumed. The Anatomy Centre was immediately built, to allow for continued medical student education, since failure to do so would have resulted in the need to transfer students back to London. This meant an accellerated 5-month design, construction and refurbishment, to ensure success of the QMUL programme, leading to completion of this part of the project in October 2018, a mere eight months after Steward takeover. Steward subsequently designed and built the Medical School in 17 months (April 2018 to October 2019) although it should be stated that Government and QMUL requirements involved an increased size of the facility from approximately 4,000 square metres to 8800 square metres, with the challenges that these changes involved, especially considering the requirement to build an innovative hbrid construction for a high tech building. All this at a cost of thirty-five million Euro (€ 35,000,000).

102. One should not forget that all this was done against the backdrop of uncertainty caused by the Government of Malta itself as it failed to honour the promises and assurances it had given to Steward and to complicate matters, constantly kept changing its plans for the hospitals. Suffice it to say that to date, the Government representatives from the Ministry of Health on the Projects Monitoring Board set up between the Government and Steward in accordance with the Concession Contracts, have not yet confirmed to Steward Government's requirements for the new hospitals to be built under the terms of the Concession!

103. These are just a few of the problems that the Appellants had to face for five whole years since they entered the Concession. Despite these challenges, they continued to provide excellent health services, while making capital investments that exceeded **sixty million Euro**.

104. One must also consider that the Concession did not only consist of construction obligations and structural upgrades but also involved the reorganization of the operation and the provision of high-quality medical services in the hospitals under Steward's management, in the best interests of the public.

105. Steward managed this operation with efficiency including in the challenging times of the Covid pandemic during which Steward used its international contacts to obtain ventilators in the Gozo Hospital in a rapid manner, even before the Government managed to acquire ventilators for MDH. While Government was still struggling with obtaining equipment, leaving Steward in the lurch, Steward managed to prepare a ward at GGH with twenty-five beds equipped with ventilators obtained through Steward's international network of health product suppliers. It is a pity that the Court was so preoccupied with the "ceramics of the toilets" that it seems to have missed this fact explained in James Grima's report.

106. It is significant that in the five years that Steward has been involved in the Concession, it has never received any notice from the Government alleging any default in relation to the management of the hospitals. On the contrary, the Government's public statements, including those of Minister Fearne, defending the choice of Steward as Concessionaire and the budgets allocated for the management of the hospitals by Steward are well known.

D. PART IV – SUBMISSIONS ON INDIVIDUAL GROUNDS OF APPEAL

107. In this section of the appeal, the Appellants shall make their legal submissions in relation to the respective grievances on which the appeal is based.

D.1 First Grievance: Nullity based on the lack of clarity in the sworn application

108. The Appellants submit that the First Court was wrong and ignored applicable law in rejecting the plea of nullity based on the lack of clarity of the sworn application submitted by the Plaintiff.

109. In its deliberations on this point, the Court was vague and unconvincing in its reasoning. It only stated [3] *"that while formality is an essential part of a judicial process, this does not mean that such formality should be used in a suffocating way in order to hinder and stop procedures that have been started before it in a legitimate way."*

110. The Appellants however submit that the lack of a professional approach shown by the First Court, where everything is accepted and anything goes to "save the claim", is fundamentally wrong, and perhaps in it one finds the root of all the problems which lie at the heart of this unsafe, appealed judgment.

111. The first shortcoming in the Plaintiff's sworn application is that although the Plaintiff makes reference to Chapter 573 of the Laws of Malta, he fails to indicate the specific article on which he is building his case and therefore not only fails to comply, as referred in greater detail further below, with Article 156(1)(a) of Chapter 12, but also acts in breach of the right of the defendant to be clearly aware of the basis of a claim in order to be able to put forward its defence. Contrary to what was stated by the Court when the Appellants pointed out the nullity due to a lack of clarity, they were not "cavilling", but they were genuinely indicating the fact that there is a discrepancy between the premises of the case as brought forward, and the provisions of Chapter 573, and therefore there was certainly room, if not for nullity, at least for clarification of the nature of the case.

112. This is being stated since, from reading the premises of the sworn application, it is made clear that the Plaintiff was building his whole case on an alleged breach of obligations under the Concession Contracts. However, Chapter 573 (as in the case Chapter 268 before the entry into force of Chapter 573) does not allow any rescission at the request of a Member of Parliament **on the basis of default** and so at first glance there is a clear contradiction between the contents of the application and the provision on which it is allegedly based.

[3] See paragraphs 350 till 352 of the Judgment.

113. Similarly, the application completely confuses the concept of "nullity" and "rescission/termination due to default." Nullity implies that the Emphyteutical Concession and the Related Instruments were to be considered null and void *ab initio*. On the contrary, termination in itself implies that a contract, or contracts, that **were originally valid and binding on the parties**, are being terminated as a consequence of default.

114. It was precisely this manifest contradiction which led the Appellants to raise a preliminary plea that the case lacks a *"clear and proper explanation of the object of the case."* The relevant application and claims group together the Emphyteutical Deed, which consist of a **grant of land**, and the Related Instruments, which are not a deed transferring land but **service contracts**. Nowhere does Chapter 573 provide for the linking of other, separate contracts of a different nature to a grant of land. There is also further confusion between the "rescission" of contacts and an allegation of contractual default, when it is clear that contractual default does not necessarily justify "rescission" of a contract, and in any case, may be invoked **only** by the Parties. **These are all major points of confusion between legal concepts and their effects, which certainly the First Hall should have well considered, had it not been so eager to pursue its declared objective "save the claim**".

115. During the course of proceedings, there was also a change in approach on the part of Plaintiff who, instead of focusing on the alleged "default", utilised one hearing after another to cast doubt on the procurement process that led to the granting of the concession with the aim of changing the focus and the object of the claim. This, however, is not reflected in the original application and requests made in the case, which refer to a breach of conditions or obligations that allegedly came about after the concession came into force.

116. In this regard, the Plaintiff failed to consider that the process of granting public contracts falls within the scope of other special laws (**public procurement laws**) that regulate the field, particularly the Public Procurement Regulations, the Concession Contracts Regulations and other subsidiary legislation relating to procurement which are all based on European Union Directives and principles developed by the European Court of Justice. The public procurement law

framework provides for special and specific remedies and stipulates that any complaints regarding a procurement process – such as requests for the "ineffectiveness" of a contract – are to be decided by specialised fora (such as, for example, the Public Contracts Review Board or, in the specific case of **health concessions** the Procurement (Health Service Concessions) Review Board as will be detailed further under the third grievance).

117. Therefore, the Plaintiff's arguments, insofar as they may be based on violations of **public procurement law** are not relevant to this case, both because they do not fit within the parameters of the original application and requests, and also because actions contesting the procurement process are regulated in a different manner, both procedurally and on the merits, to civil proceedings. The First Hall should have realised this, had it not been so eager to pursue its declared objective of "saving the claim," as already stated.

118. In light of these contradictions, the plea of nullity as put forward by the Appellants should certainly not have been considered as a frivolous or "asphyxiating" defence. On the contrary, the sworn application as filed is confusing and contradictory in a manner which ironically resulted to be of benefit to the Plaintiff himself, since when it came to consider the Plaintiff's claims, the Court simply understood what it pleased, as long as it would support the conclusion it wanted to arrive at. Again, the First Hall should have realised this, had it not been so eager to pursue its declared objective of "saving the claim", as already stated.

119. Reference is made to Article 156 (1)(a) of Chapter 12, from which the obligation arises that (i) the Plaintiff identifies the object of the case by stating the reason for its claim; (ii) the object and reason must be clearly and properly defined; (iii) the request or requests must be linked to the reason or reasons as stated in the sworn application; and (v) these elements must result **from the judicial act itself**

and not from any clarification that can be made about them during the hearing of the case. [4]

120. Article 789 (1) of the same Chapter 12 then stipulates as follows:

> (1) 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 bylaw, 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.

121. Reference is also made to the judgment of **HSBC Bank Malta p.l.c vs Rita Caligari u Emanuel Degiorgio**[5]:

> *"It results that the first two requests are based on the actio pauliana - art 1144 of the Cap. 16 while the third request is based on the ground 1366 of Chapter 16 and* ***thus there is a mixture of causes and requests. This is not allowed by law****. It is obvious that what the law requires regarding actio pauliana is completely different from what is regulated in a case regarding a sale by one spouse to another. In this context it is interesting to note what is provided by art 789 (c) of Chapter 12 which states:*
>
> *"789. (1) The plea of nullity of judicial acts is admissible -*

[4] Court of Appeal, 30.3.1998 in the names *Ray Beżżina v. Anthony. Galea*

[5] First Hall Civil Court, Judge Lino Farrugia Sacco, 13th February 2021, Citation No. 1282/2002.

(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; (emphasis added)

122. It was also held that:

Article 156(1) provides that the objects and reasons for the judicial requests should be clearly and correctly explained in the application. This does not mean that any shortcoming in the application should be considered to be in breach of Article 155(1) [today 156(1) of Chapter 12] and consequently brings about the nullity of the claim. For the application to be deemed null there should be grave reasons, and above all, ***it should be considered whether the application is unclear or incomplete in such a way that the defendant would be prejudiced in his defence.***

[l- Artikolu 156(1) jipprovdi li l-oggett u r-raguni tat-talba gudizzjarja ghandhom ikunu mfissra car u sewwa fic- citazzjoni. Dan ma jfissirx pero' li kwalunkwe nuqqas da parte ta' l-attur ghandu mill-ewwel jigi mehud fis-sens li qed imur kontra d-dispost ta' l-Art.155(1) [illum 156(1) tal- Kap.12] u ghalhekk igib mieghu n-nullita` tac-citazzjoni. Infatti biex citazzjoni tigi mwaqqfa jrid ikun hemm raguni gravi, u fost kollox, ***ghandu jigi ezaminat jekk ic-citazzjoni tkunx defungenti jew zbaljata b'mod li l-konvenut ikun jista' jigi pregudikat fid-difiza tieghu.]*** [6]

123. This confirms that although nullity is an extreme remedy, the Court **should certainly consider carefully if the contradictions and lack of clarity in the sworn application were prejudicial to the defendants**. The Appellants here contend that it certainly did. In the present case, the utter confusion and lack of clarity were clearly prejudicial, because they led the Court to "read" in the

[6] Court of Appeal, "Bonnici vs Zammit noe," 20.01.1986

preambles and in the requests "reasons" for the claims which, objectively, in no way result from relevant application and claims.

124. The First Court had rejected the request of the defendants that the preliminary plea be decided before the merits, and with this approach conditioned the rest of the case in the sense that the contradictions and the lack of clarity in the sworn application remained unaddressed, to the detriment of the Appellants. Here it is worth saying that even if the Court had to (wrongly) consider that there was no justification for nullity, it was its power **and duty** to request those necessary amendments and clarifications in the sworn application to allow all parties a fair defence. **But the Court never did this**. **Clearly, doing this would have put at risk the Court's declared aim of "saving" the claim.**

125. As a result, this highly delicate case was decided on the basis of **an application which is null and void because it is contradictory and unclear**, apart from the fact that, as a consequence of the confusion that prevails in the same application, the rights of the Appellants for a proper hearing were prejudiced, depriving the Appellants of the opportunity to present appropriate defences.

126. Furthermore, the Plaintiff's total disinterest towards correct procedure can also be seen from his failure to correct aspects of the sworn application, including the particulars of the parties to the case, in order to reflect the changes that occurred during the course of the procedures.

127. In relation to this, it is observed that the Plaintiff Dr. Adrian Delia proceeded till the end to indicate he is acting as the "Leader of Opposition," a role that he left back in 2019, while the defendants include Joseph Muscat as "the Prime Minister," despite the fact that Joseph Muscat resigned from the role in early 2020 after having announced this move in December 2019.

128. There shortcomings are far from being mere frivolities. They continue to add to confusion at the heart of these proceedings by misrepresenting the role with which the Plaintiff was instituting the case. The least one would have expected was that Plaintiff would have made the necessary corrections in the particulars of the

case with the resulting consequence that the legal elements of the claim were sacrificed to the political sphere. None of these shortcomings were corrected, either by the Plaintiff who had a duty to do so as the promoter of the claim, or by the Court, in breach of the said Court's duty to administer judgments on the basis of facts and law – although, surely, on this as well, the First Court would have argued that these are mere minutae of no relevance, once again, with the declared object of saving the claim.

129. The Appellants therefore insist that the judgment of the First Court should be revoked, and the action considered **null and void** due to lack of clarity, contradictions in the basis and requests of the claim, and manifest procedural errors which remained unaddressed and uncorrected to the end.

D.2 Second Grievance: The Court itself confused the concepts of "nullity" and "termination/rescission based on default"

130. Through their second ground of appeal, the Appellants submit that even the judgment itself is afflicted with contradictions and a lack of clarity when it comes to its considerations and how they lead to the eventual decision.

131. It would appear that the main consideration of the Court (as expressed in **paragraphs 446 to 504**) was that the Concession was afflicted by "fraud", both in the granting of the Concession and in subsequent periods, which "fraud" was allegedly carried out by Vitals, and subsequently, by representatives of Steward. This is also reiterated in paragraph 505, wherein the Court observed that the emphyteutical deed and Related Instruments were *"a result of deception and lies intended solely to corrupt the thinking and assessment of those who were responsible for choosing and deciding"*.

132. **Interestingly, in its final orders in the judgment, the Court is not bold enough to rule on the basis of the the alleged fraud element, which it happily brings into its tale of "deception and lies"** (sic). This probably would have been

too much, given the obvious fact that the sworn application **does not contain any reference to this allegation**, whether in the premises of the application or the specific requests. It was necessary for the Court to capture the interest of the reader of the judgment, and ultimately the media, in order to "colour" the justification of its ruling, even if, when it does come to deliver the final order, it limits itself to "mildly" declaring that *"the respondents Steward Malta Assets Limited, Steward Malta Limited and Steward Malta Management Limited did not comply with, and breached their obligation under the terms of the contract of March 22, 2016 as well as the Services Concession Agreement of November 30, 2015, of the Health Services Delivery Agreement of November 30, 2015 and the Labour Supply Agreement of February 8, 2016 together with the amendments and addendum made subsequently".*

133. This shows a clear contradiction between the considerations of the Court, and its final decision, in the sense that if the Concession were to be considered "null" because it was affected by fraud, then the final decision cannot be based on an alleged default in performance. The same contradiction can even be found in the request for the Principal Government Notary to *"publish the relative act of cancellation and nullity"* of the emphyteutic concession which is a contradiction in terms because it is not possible to have a cancellation of an agreement that is *null ab initio.* Surely the Court as presided should have been qualified to appreciate the difference and effects between these basic legal concepts.

134. Since it appears that the same decision is afflicted by elemental legal contradictions, and a conflict between considerations and decisions, it should be revoked.

D.3 Third Grievance: The annulment of any contract awarded for the provision and management of health and ancillary services to economic operators, the consideration for which consists in the right to exploit those services is only governed by S.L. 595.13 "Procurement (Health Service Concessions) Review Board Regulations", and not by Chapter 573 of the Laws of Malta

135. As has been described above, the Judgment declared the "Related Instruments" including the Service Concession Agreement, to be an integral part of the Emphyteutical Concession, and consequently declared them null and void.

136. However, as already mentioned under the First Grievance, the Service Concession Agreement is not a "transfer of land", and it is, rather, a "contract" as defined by Article 2 of of the Procurement (Health Service Concessions) Review Board Regulations (hereinafter "**PHSCRBR**") that is:

> *Any contract for pecuniary interest concluded in writing between one or more economic operators and one or more procuring entities having as its main object the entrusting of the provision and management of health and ancillary services to one such, or more, economic operators, the consideration for which consists either solely in the right to exploit those services that or the subject of the contract or in that right together with payment.*

137. This point is relevant and ties up with submissions made under other grievances relating to the *locus standi* of the Plaintiff and the remedies which he could seek under Chapter 573. Appellants point out that contracts such as the SCA are regulated by the PHSCRBR which lays down the rules to be considered when challenging any decision of a procuring entity in relation to the procurement procedure of these contracts, pursuant to its Article 3. The consequences of this special framework to appeal PHSCRBR contracts, in connection with the case at hand, are:

137.1 Complaints against decisions of a procuring entity may only be filed by *"any **candidate** who feels aggrieved".* (Article 30)

137.2 The complaint must be served within ten (10) calendar days following the communication date or the date on which the decision was published by the procuring entity (article 30); and

137.3 The Procurement (Health Service Concessions) Review Board is the sole competent body in charge of dealing with these Complaints (Article 4)

In view of this legal notice, the First Hall of the Civil Court is not competent to annul the SCA and the other Related Instruments. Nor does any member of

parliament have the *locus standi* to file such a challenge which, in any case, was not filed within the legal term. As a result, the judgment should certainly be revoked insofar as it relates to the Related Instruments.

D.4 Fourth Grievance: The First Court was wrong when it found that the Plaintiff had locus standi to request rescission of the contracts based on alleged default. The First Court wrongly applied article 33 of Chapter 573 of the Laws of Malta.

138. In its considerations, the First Court observed[7] that *"it appears, although not expressly requested in the content of the sworn application, but certainly clarified in the hearing of the witnesses and in the detailed submissions..."* that the action is based on Article 33(2) of Chapter 573 of the Laws of Malta.

139. Article 33 of Chapter 573 of the Laws of Malta holds that:

> *(1) Any disposal of land, to which article 31 applies, which was disposed of differently from the provisions of that article, shall be null and void.*
>
> *(2) The nullity of a disposal made in contravention of the article aforesaid may be demanded by the parties involved in the disposal and also by the Attorney General or by any person who is a member of the House of Representatives at the time of the demand before the Civil Court, First Hall.*

140. It is clear and manifest that Chapter 573 refers to a situation when a "member of the House of Representatives" is allowed to submit a request for a declaration of nullity of the transfer, **if the transfer is made in violation of Article 31**. Article 31 gives a list of different scenarios and applicable policies which would justify the transfer of Government land. A breach of the mandate given by this article occurs when there is an error in the transfer procedure of the transfer of land to private entities, based on the fact that the original grant/transfer did not

[7] Paragraph 343

follow the procedures specifically mentioned in the Act. In such a case, **exceptionally**, *locus standi* is granted to Members of Parliament (and that to the Attorney General) to request the nullity of such transfer.

141. As has been already observed, however the relevant application and the way in which the claims were made are based on **an alleged default of the parties** in observing the obligations of a contract and not on the nullity of the grant. This is therefore incongruent with the alleged basis of the action (as also understood by the Court itself), i.e. Article 33 of Chapter 573.

142. It is equally as clear that Article 33 of Chapter 573 refers to **deeds of transfer of public land** and cannot be extended to refer to other contracts (for instance, service concession agreements) that do not consist in the transfer of Government land and which provide for undertakings and duties which go beyond and are of a different nature to the transfer of the land itself.

143. Even in this regard, the First Court very conveniently adopted a loose interpretation of Article 33, and upheld the Plaintiff's request that the Related Instruments be rescinded together with the emphyteutical deed. The Related Instruments, however, do not consist of a "transfer of land," but are public contacts relating to the provision of health services. Necessary services which, one should add, Steward was and is still providing to date.

144. The Court was therefore manifestly wrong in its approach. Article 33 – and for that matter, the rest of Chapter 573 as a whole - relate to the **transfer of land**. It would have been otherwise if, say, the Act in question referred public contracts in general. As is well known, and as has already been alluded to in the preceding (Third) grievance, however, public contracts (including their alleged "ineffectiveness" if not granted according to law), are regulated by a **distinct legal framework** (public procurement law) which is governed by its special rules and terms established by the applicable subsidiary legislation which is in turn based on EU Directives and principles developed and established by the ECJ. **This is not a case which falls under or was filed in terms of the rules and regulations of**

public procurement and it is dangerous from a procurement law (and European Union Law perspective) to extend the application of Chapter 573 in such a way as impact on the application and interpretation of a wholly distinct legal framework.

145. It is therefore submitted that Article 33 of Chapter 573 certainly does not give any *locus standi* to the Plaintiff to request the "nullity" or "rescission" of public contracts that do not consist of a grant of land. The same applies insofar as the Plaintiff purports to attack any agreement of transfer of shares from Bluestone to Steward. A transfer of shares is not a "transfer of land" and does not fall under Article 33 of Chapter 573. Apart from this, if the Plaintiff is claiming to dispute or attack the transfer of shares, judgment could not have been given on this matter because the transferor (the previous shareholder) was not a party to the case.

146. The Court clumsily attempts to cover up all these shortcomings when, in several parts of the judgment, it refers to concepts of "public interest" and, particularly in paragraph 381, it throws all the procedural difficulties we have mentioned out of the window and, indulgently states that *"it is duty of a member of the Chamber of Deputies to protect the interests of the citizen who has elected him to represent him" (!)*. This argument is as popularly attractive, as it is legally dangerous and unacceptable – especially where it leads, as in this case, to a defendant (and its representatives) being "tried" without being allowed the right to contest. The right and/or duty of a member of parliament to seek "the best interest of the citizen" **needs to be exercised according to the law**. The Court seems to have reasoned that the "citizens' interests" allow any member of parliament entering to intervene into the application a public contract. If this were the case, however, the legislator would not even have needed to include Article 33 of Chapter 573 because this would have been an "automatic" right. However, the fact that the rule found in Article 33 exists shows that this is a **very specific exception** to the principle of *res inter alios acta* and should therefore be applied strictly as allowed by law. **Once again, the First Court, did anything and everything in order to save the claim.**

147. The Court, in paragraph 379 of the Judgment, observed that:

> There is no mention in Chapter 573 that the action of a Member of the House of Representatives, in relation to Article 33, is subject to any period of prescription until when such action can be taken, and therefore, such a request can be made at any time, even after the transfer has been made and effected.

This argument shows to what extent the Court, deliberately one guesses, failed to understand the pleas of the Appellants, and, again, basic legal principles. Firstly, the plea of the Appellants was not based on "prescription/statute of limitations" or on the *punctum temporis* when a Member of Parliament can file a claim under Chapter 573, but rather on **what may be the basis of such a claim**. In relation to this, the Appellants reiterate that a grant of land can only be attacked in relation to how the grant took place, and not based on facts that allegedly occurred afterwards.

148. In its exorbitant and unfounded interpretation of Article 33, however, the Court is adopting the position of a legislator and applying a concept of "judge-made law" which is alien to the Maltese law or to any other jurisdiction within the European Union. The judge is bound to remain strictly within the parameters of the law and adhere strictly to what is established by the wording of the law:

> *As stated by the First Hall of the Civil Court in its judgement of 31st January 2003, in the case of Josephine Bonello pro et noe v. John Bonello:*
>
> *"Until recently it has been pointed out that the Courts must apply and interpret the laws of the country as promulgated by the Parliament and they have no discretion either to adopt them in an approximate way according to what they think is fair and equitable in the circumstances and much less to sanction procedures that the laws of the country do not allow to be improvised in those circumstances, with the consequence of neutralizing and emasculating other procedures expressly provided by law."* [Kummissarju tat-Taxxa fuq il-Valur Mizud –vs-George Schembri", Appell, 6 ta' Ottubru, 2000]. [8]

[8] Mario Degiorgio *pro et nomine* v Kummissarju tal-Artijiet, Court of Appeal (Superior Jurisdiction), 13.11.2018. See also, amongst others, Emanuel Hayman *et v* Mary Caruana *et*, Court of Appeal (Superior Jurisdiction), 30.01.2017

149. Without prejudice to the above, the recognition of *locus standi* of the Plaintiff in the case at hand is not compatible with Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention of Human Rights.

150. EU law protects the independence and impartiality of judges in Member States of the EU, as established in Article 19 of the TEU and Article 47(2) of the Charter of Fundamental Rights of the European Union. The purpose behind these articles is to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that bod to external factors and influences, and its neutrality with respect to the interests before it. In order to find that a judicial body is independent, three aspects must be satisfied:

150.1 The adjudication of the dispute must be carried out by "an authority acting as a third party in relation to the authority which adopted the contested decision".

150.2 Said authority must be "protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them" and thus the person deciding over the dispute must have guarantees "against removal from office".

151. Against that background, a wide interpretation of Article 33 of Chapter 573 of the Laws of Malta, as made by the First Hall, is incompatible with Article 47 of the Charter of Fundamental Rights of the European Union. Independence is not only attained by giving guarantees against removal from office, but it is also necessary to be protected from external and undue influence. In the case at hand, the Plaintiff was acting as the "Leader of the Opposition", against the then "Prime Minister", in a claim related to a party breach of the conditions of the contracts and claiming the rescission of contracts which do not consist of "transfers of land". The use of the judicial proceedings by politicians as a political dispute therefore undermines the independence of the judiciary and the State has the obligation to ensure *"that individual judges be free from undue influence"*.

152. As also stated by the ECHR, in relation to Article 6 of the Convention, and bearing in mind the intense political pressure surrounding these proceedings, "*the scope of the State's obligation to ensure a trial by an independent and impartial tribunal was not limited to the judiciary, but also implied obligations on any other State authority to respect and abide by the judgments and decisions of the courts. Judicial independence further demanded that individual judges be free from undue influence, including from within the judiciary".*[9]

153. In the circumstances of the case at hand, the fact that the First Hall recognised *locus standi* to the then Leader of the Opposition by virtue of an exorbitant interpretation of Article 33 of Chapter 573 also constitutes a breach of its right to a fair trial as a private party to the Concession.

154. Therefore, the Court was wrong in its application of Article 33 of Chapter 573 when it considered that the Plaintiff had *locus standi* to present the case he brought, and also in breach of the Appellants' rights.

D.5 Fifth Grievance: Manifest violation of the principle of res inter alios acta resulting in a violation of basic principles of Civil, Constitutional and EU law

155. In addition, and further to the preceding ground of appeal, Appellants stress that the Court's decision to recognize the *locus standi* of Adrian Delia **represents a clear violation of the principle of *res inter alios acta* which leads to absurd legal consequences**. This continues to show how dangerous it is that the effects of Article 33 of Chapter 573 are extended in order to create a "legal/juridical interest" where this does not exist.

[9] Agrokompleks v Ukraine, ECHR judgment, 23.07.2013

156. It would be useful here to go back to the basic principles regarding the effects of contracts, as clearly result in the relevant subtitle contained in the Civil Code (Chapter 16) of the Laws of Malta. Reference is made to the following articles. [Emphasis added]:

> **992.** (1) Contracts legally entered into **shall have the force of law for the contracting parties**.[10]
>
> (2) They may only be revoked **by mutual consent of the parties**, or on grounds allowed by law. [11]
>
> .....
>
> **999.** (1) A person **cannot by a contract entered into in his own name bind or stipulate for any one but himself**.

157. These provisions of the law are clear. A third party who is not a party to a contract cannot be allowed to intrude into the contractual relationship between the parties. The justification of this basic principle of contract law is also clear. It is the parties to the contract who have the right to enforce the conditions of the contract, and no one else. The law recognizes that there may be exceptions to this, but only "for reasons known by the law" or "in the cases that the law envisages", and not because someone – even a judge – believes it "is fair" or "in the better interest of the citizen" to be otherwise.

158. This is a basic and sacrosanct principle of civil and contract law, and by extension, of property law, that has been reiterated in a number of judgments of

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[10] Here, the Parties would have been the parties to the emphyteutical deed and/or the Related Instruments, namely INDIS, in the case of the Emphytuetical Deed, and the Government of Malta, in the case of the Related Instruments, and the Concessionaire companies.

[11] The parties set out in the previous footnote

our Courts. Reference is made, for example, to the judgment in the names *Central Mediterranean v Direttur tal-Uffiċċju Konġunt et*[12]. In this case, the Plaintiff, as emphyteuta of a land of which the Joint Office was the dominus, was trying to challenge the validity of a redemption of ground rent that the Joint Office was reaching directly with sub-emphyteuta. The Court observed as follows:

> *The court will move on to consider the other two complaints of the Plaintiffs on which a decision has not yet been given:-*
>
> *1.* ***The transfer is not being made according to the procedure contemplated in Article 2 of the Agreement made between Santa Sede and the Government.***
>
> *In this regard the court considered that:-*
>
> *It is true that the agreement between the Government and Santa Sede was incorporated into law. It nonetheless remains an agreement. The court understands that if there was a breach of obligation by any party, the issue must be dealt with between the parties to the agreement and not a third party that was not a party to the agreement. The direct dominium belonged to the Government and not to the Plaintiff and therefore she has no right to try to dictate to the Government how it should proceed if it wants to transfer it. If then in this exercise the Government broke any contractual agreement it made with Sante Sede, it is ultimately her who has the juridical interest to see that the Government honors the obligations it entered into.*

159. The same concept is found, explained and defined in greater detail, among others in the judgment *L-Avukat Dottor Rachel Tua nomine v Eamon Diver*[13]. In the case in question, the Plaintiff was seeking to annul a transfer of shares in a company and claimed that even though he was not a party to the said contract, he had the right to attack its validity given that it prejudiced him. In its judgment, the Court cited the *Novissimo Digesto*, Giorgi and other authors in order to come to the conclusion that a third party who is not a party to a contract, does not have the

[12] First Hall Civil Court (AE), 30th July 2012, not appealed
[13] First Hall Civil Court (JZM) 28th February 2017

locus standi to request the cancellation of a contract even if he states that this was done to his prejudice.

160. One therefore quickly concludes that, under principles of civil law, the Plaintiff does not have the required *locus standi* to bring forward the requests he has brought forward in this case.

161. However, the First Court conveniently circumvented these well-established principles by saying that Chapter 573 represents one of the "cases allowed by law" to justify an exception to the rule.

162. Apart from the fact that this is wrong for the reasons explained in connection with the preceding grievance, Appellants draw this Court of Appeal's attention to the **legally absurd consequences** of such a position. Thus, if this argument is taken as applied in this judgment, a Member of Parliament can interfere in any transfer of land, from an industrial area to a house under a home ownership scheme, not only if it was transferred using a wrong procedure (as clearly contemplated in Chapter 573), but even if it seems to him that **subsequently** there has been a breach of the conditions and contractual obligations linked to that grant. Worse still, a Member of Parliament can also intervene in other contracts which are **principal to**, rather than accessory, to the transfer of land, bringing them down!

163. This reasoning also proves to be a convenient way of avoiding the notice and termination procedures agreed between the parties (in this case, in the Service Concession Agreement), and leads to the absurd situation where, ironically, a **third party** has stronger rights than the parties themselves, given that such third party can request rescission of an agreement without being bound by clearly agreed rules that govern the breach and termination of the contract (including, for example, obligations to give notices, cure periods, dispute resolution procedures, bonds for unjustified termination, indemnities deriving from unjustified termination etc).

164. The Appellants contend that this aspect of the judgment also raises serious concerns of a **constitutional/human rights** nature consisting in a breach of the Constitution and the European Convention on Human Rights and Fundamental

Freedoms, as well as the Charter of Fundamental Rights of the European Union. Essentially, as a result of this judgment, the Maltese State will take back property granted by virtue of a concession without the State having to follow the procedures stipulated in the current contracts with the Appellants. This has an effect that is **equivalent to expropriation of the land** previously granted to the concessionaire Companies. This is in violation of the fundamental right to property as protected by Article 37 of the Constitution of Malta, by Article 1 Protocol 1 of the European Convention on Human Rights and as reflected in Article 17 of the Charter of Fundamental Rights of the European Union.

165. In connection with this, reference is made to the judgment delivered by the Constitutional Court in the names of *Malta Playing Field Association* v *Kummissarju tal-Art et.* In this case, the Government had decided to take back, by expropriation, land that had previously been transferred to the Plaintiff association, instead of adhering to the termination procedures as found in the current contract between the Government and the Association. In its judgment, the Court, while confirming the judgment of the First Hall of the Civil Court, observed as follows:

> *25. The Court believes that submissions made by the Association that Articles 16 and 19 bind the Government. Once the Government had undertaken to give the Association the faculty to carry out the project proposed by it for the benefit of the society, it could not, legally, later choose to expropriate the same property because it appeared that the An association was not honouring its contractual obligations. The Government is also bound by the obligation of good faith in the execution of contracts and could not choose to expropriate the land in order to avoid such obligations. There is no law that gives the Government the right to ignore a contract and back out of an agreement.*

> *26. The Court observes that in light of the premise and in the circumstances of the case it cannot validly be said that the expropriation was necessary in the public interest. The Government had the means stipulated in the contract [clause 19] to submit its complaints to arbitration and then it had to exhaust this remedy before proceeding to the exceptional measure of expropriation.*

166. Last but not least, if the Court considered that there had been a violation of the obligations of the contract, these should have been addressed according to the terms and within the fora established in the contracts between the parties instead of resorting to the final and draconian measure of rescission and "nullity".

167. In this regard, the appealed judgment therefore also violates the principle of **proportionality** which is one of the basic and founding principles of European Union law. Even if one were to accept, for the sake of the argument, that the Plaintiff had the necessary *locus standi* to file a lawsuit for rescission based on default in the performance public contracts, the rescission of such contracts without any reference to or application of the procedures established in the Concession Contracts translates into an outcome that goes completely against the said principles. This is being stated since there are other more reasonable, appropriate and "proportional" solutions to an alleged breach of contract, for instance actions for specific performance, or the application of penalties (all of which, by the way, are contemplated in each of the Related Instruments). Rescission should be a last resort and is therefore and as already stated in breach of the principle of **proportionality**. This submission will be developed further in the context of the tenth Grievance.

168. In this regard, the Appellants **are, concurrently with this appeal application, filing a request for a preliminary reference to the European Court of Justice.** The request will be based, *inter alia*, on the need to clarify the correct application of the principle of **proportionality** in this dispute and obtain an interpretation whether the right to property and right to an effective remedy and to a fair trial protected by the Charter of Fundamental Rights of the European Union have been undermined, in light of the arbitrary and unfounded set of decisions adopted by the Court of First Instance when applying or failing to apply national measures falling within the scope of European Union law.

169. Article 31(g)(C)(i)(b) of the Government Lands Act, that constitutes the main basis for the Judgment to annul **all the contracts** related to the emphyteutical concession, states that:

> No land which either belongs to the Government or which is either possessed, kept or administered by the Government shall be disposed of unless such disposal is made in accordance with one of the following provisions, that is to say:
> [...]

> (g) according to one of the following:
> […]
> (C) transfer by title of emphyteusis (i) Government land may be transferred by title of temporary emphyteusis:
> (b) if it consists in land which is offered for an industrial project after applicant would have satisfied the competent authority about the benefit which the project would render to the country's economy and that it would create an adequate number of jobs.

170. In this regard, the Court considers that at the time Steward Healthcare International Limited acquired the shares of the company Vitals Global Healthcare Limited – the former shareholder in the Concessionaire – the contractual obligations and milestones that the Vitals companies had undertaken were not complied with. Hence, the Court considers that the Government of Malta should not have accepted the share transfer.

171. According to the Court's interpretation therefore, even where the assignment is made due to universal or partial succession following corporate restructuring – as in the present case – this would be prohibited where the former concessionaire has not complied with its contractual obligations.

172. Appellants submit that such interpretation constitutes a restriction on the freedom of establishment foreseen in Article 49 of the TFEU as it prevents a company from operating the concession as a result of universal succession following corporate restructuring, when the original holder is not in a condition to adequately meet the obligations of the concession.

173. As stated by the European Court of Justice (ECJ) in case C-391/20[14] "All measures which prohibit, impede or render less attractive the exercise of the freedom guaranteed by Article 49 TFEU must be regarded as restrictions on the freedom of establishment (see, to that effect, judgment of 22 January 2015, Stanley International Betting and Stanleybet Malta, C 46313. EU:C:2015:25, paragraph 45). More precisely, as the TJEU pointed out in joined cases C-357/10 to C-359/10[15]

[14] ECLI:EU:C:2022:638
[15] ECLI:EU:C:2012:283

> It is settled case law that Article 49EC requires not only the elimination of all discrimination against service providers established in another Member State on the ground of their nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit, impede, or render less attractive the activities of a service provide established in another Member State where it lawfully provides similar services (see, inter alia, Case C-76/90 Säger [1991] ECR I 4221, paragraph 12 and Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others [2011] ECR 1 9083, paragraph 85.

174. Therefore, according to ECJ caselaw, any measure, even where applicable without discrimination on grounds of nationality, which prohibits, impedes or renders less attractive, the exercise of the freedom of establishment is regard as a restriction to such right.

175. In the present case, as already mentioned, the Court's interpretation prohibits a company from operating the concession in replacement of another. Therefore, it is clear that the application of Articles 31 and 33, as interpreted by the Court, constitutes a restriction to the freedom of establishment.

176. Notwithstanding what has been stated, a restriction on the freedom of establishment is permissible where:

> "[I]t is justified by an overriding reason in the public interest and, in the second place, it observes the principle of proportionality, which means that it is suitable for securing, in a consistent and systematic manner, the attainment of the objective pursues and does not go beyond what is necessary in order to attain it (judgment of 6 October 2020, Commission v Hungary (Higher Education), C-6618, EU:C:2020:792, paragraph 178." (See case C-391/20 (ECLI:EU:C:2022:638)

177. Therefore, for the restriction to be permissible in terms of EU law it is required that it is justified by an overriding reason in the public interest.

178. In this case, the only public interest that could be invoked is Government's interest in securing compliance of the public concession's obligations and the correct performance by the Concessionaire.

179. Pursuant to EU case law "in the context of the fundamental freedoms guaranteed by the Treaties, reason of public policy may be relied on only if there is a genuine, present and sufficiently serious threat to a fundamental interest of society (judgment of 19 June 2008, Commission v Luxembourg, C-319/06, EU:C:2008:350, paragraph 50.)"[16]

180. In addition, such restrictions even where there are valid reasons of public interest, would still need to comply with the principle of **proportionality**, that "*requires the measures adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued; where there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (judgment of 25 October, 2012, Astrim and Elyo Italia v Commission, T-216/09, not published. EU:T:2012:574, paragraph 24).*" In the same way, vide Judgment of 6 October 2021, in Case T-7/20.

181. The next step, therefore, consists in determining whether an interpretation of Article 33 of the Government Lands Act that concludes that any lack of compliance of the conditions of a transfer of land should lead the Court to annul the Concession, is compliant with the principle of proportionality.

182. In this regard, pursuant to Article 43.1 (d) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on concession contracts, which is not applicable to the present case, because of the object of this concession, included in its Schedule 4:

> "Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases:
>
> Where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either:
>
> (ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does

[16] C-66/18 ECLI:EU:C:2020:792)

not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive [...]"

183. Appellants submit that if, for ordinary concessions, the Directive allows the replacement of the existing Concessionaire as a result of corporate restructuring without a new procurement procedure being required, it follows that in terms of EU law, the assignment of a health concession should also be allowed, when a transfer of the Concession is, as in this case, effected as a result of a corporate restructuring meant precisely to address the problems with the previous shareholder and ensure the success of the Concession. Certainly, in such a scenario there is no "serious threat to a fundamental interest of society" which would justify prohibiting such an assignment.

184. In fact, such a prohibition or restriction cannot be deemed as "proportional" in a context such as this one where the former concessionaire (in this case VGH) had shown its lack of capacity to comply with its contractual obligations, and the concession's assignment to a new shareholder capable of saving the concession (in this case, Steward), was meant to save the concession.

185. Therefore, the Court, in giving this interpretation, acted against the principle of proportionality.

D.6 ***Sixth Grievance: The First Court erred, and acted ultra petita and ultra vires when it considered allegations of "fraud"***

186. As has already been said, a substantial part of the considerations of the judgment refer to alleged "fraud" committed by Vitals, and subsequently by Steward. These considerations are altogether irrelevant and out of place, and this because the Plaintiff's sworn application does not make any reference to "fraud". It was only during the course of the suit that the Plaintiff started making reference to the principle of *fraus omnia corrumpit*. However, the Court in its judgement

surprisingly stated[17] that *"although direct reference was not made to the phrase fraus omnia corrumpit", all the arguments and the premises and the claims "are all based on the fact that he was alleging that fraud took place".*

187. The Appellants are surprised and perplexed because they genuinely cannot understand where, in the sworn application, the word "fraud" is ever mentioned, or where fraud is alleged, at the very least in an implicit way. The sworn application is clearly based on alleged non-performance, not on fraud.

188. It is an established principle that:

> *"...the Court* ***must adhere to the causes and claims which were included in the writ of summons and as a general principle these should not be changed****. In the judgement in the names Carmela Mangion proprio et nomine vs Paolo Mangion decided on the 10th of August 1956 (Vol. XL.i.258), the Court of Appeal observed: "It is not legitimate that the causes in the writ of summons are changed, in the Superior Courts; and if the Court decides on a different cause, its decision is extra petita. The Court should adhere to the terms of the demand and the judgement should be in conformity with the demand" (also see the judgment reported in Volume XXXIII.i.748 u XXX.ii.137)."*[18] *(added emphasis)*

189. From among several other decisions along the same line of thought, the Appellants also make reference to the judgement in the names *L-Avukat Dottor Roberto Montalto nomine v Edwin Bartolo u Vivienne Bartolo*[19] wherein it was stated as follows:

> *As stated by this Court in the suit* ***Grima v. Said****, decided on the 25th of November, 2016:*
>
> *"Our jurisprudence makes it clear that no Court, especially in a suit before a superior Court (as opposed to a suit before an inferior Court) can broaden*

[17] see paragraph 447

[18] Court of Magistrates (Gozo) Superior Jurisdiction, Magistrate Dr. Anthony Ellul, **Giuseppe Attard Vs Francesco u Stella konjugi Xuereb u Carmel Debono**, 03.12.2007

[19] Court of Appeal (Superior), 28.04.2017

the claims brought by the Plaintiffs. The Court of Appeal (Inferior) in its judgement in the names ***Carmelo Cassar v. Victor Zammit*** *taught that:*

"It is known, and even accepted, as a matter of general principle, that the nature and characteristics of the action should be deduced from the terms of the act by which proceedings were commenced. It is also a procedural rule, substantiated by jurisprudence, that the causes of the demand i.e. the juridical reason for the claim, beyond needing to be explained clearly and well, cannot be changed or expanded and the Court must adhere to the claim as explained in the writ of summons. This is such that the Court cannot decide on some other right which ensues, also because "it is not legitimate that the suit is decided on the basis of causes which are different to those expressed in the writ of summons".

So too in the suit **Grech v. Valenti,** also decided by this Court on the 27th of February, 2015, it was stated that the courts should adhere to the claim as explained in the sworn application, and the court *"cannot decide on some other right which ensues, but which does not match with the claim as explained in the writ of summons"*...The Defendants cannot be condemned to something which did not constitute the merits of the claim.

190. In its judgement, the Court refers to "fraud" or what the Maltese Civil Code refers to as "a malicious act" (*"għemil doluż"*) which is a vice of consent. It is accepted that a vice of consent can only be invoked by the party whose consent was allegedly vitiated. According to the Court, in this case it was the Government or its representatives who were "deceived". It is however significant that **none of the other defendants in the suit**, all entities of the Government of Malta, pleaded or ever professed or submitted that the contracts forming the subject matter of the suit were obtained "by fraud" or were in some other way afflicted with a "vice of consent". **It is if the First Hall is issuing its judgment as if it were the Government itself, that is supplanting the contractual position of the Government in the Related instruments by coming up with its own plea, then proceeding to decide on the basis of a plea it itself invoked. This is unheard of and going against all legal and procedural logic.**

191. It is therefore submitted that since neither the Plaintiff in his sworn application nor the defendants in their respective replies raised allegations of fraud or "malicious acts", the First Court could not have and should not have considered this point itself because this is *ultra vires* the powers of the court.

192. Furthermore, even if for the sake of the argument, the Court felt that it had to and could consider allegations of fraud in its considerations, in such case it was required to specifically and explicitly warn the parties in order to give them the opportunity to produce evidence and make submissions specifically in this regard.[20] Without such warning, the Court acted against the law in considering allegations of "fraud" in the award of the concession and thereafter, given that this argument was raised by the Plaintiff along the way and is neither reflected in the sworn application nor in the several replies which establish the *litis contestatio* i.e. the parameters of the dispute between the parties.

193. Such conduct of the Court also has serious consequences of **a Constitutional nature**. Because of the direction taken by the Court in its judgment, a direction which is not justified by the sworn application as brought, the Court trampled upon and infringed the right to a fair hearing not only of the Appellants, but also of the **individuals** involved in Steward who were tainted and taken for criminals in the judgment, without even being party to the suit, and without therefore having had the opportunity to defend themselves from accusations that they acted criminally. This raises serious concerns as it reflects a breach in the applicability of the rule of law, and all Constitutional and other rights and remedies are being hereby reserved.

D.7 Seventh Grievance: A finding of "fraud" is wrong in fact and at law

194. Without prejudice to the previous complaint, the Appellants maintain that any finding of "fraud" or "malicious acts" in their regard - in any case devoid of any

[20] This is as reflected, for instance in Article 732A of Chap 12:

proof, hearing or otherwise - is wrong in fact and at law and once again demonstrates the **clear bias** of the First Court in the Appellants' regard, with the purpose of first "saving" and then justifying the Plaintiff's claim.

195. The Civil Code addresses the concept of "fraud" [in the sense of a malicious act] as a vice of consent. The Court, however, applies this concept in total disrespect of Article 981 of the Code, which stipulates as follows:

> *981.(1) Fraud shall be a cause of nullity of the agreement when the artifices practised by one of the parties were such that without them the other party would not have contracted.*
>
> *(2)* ***Fraud is not presumed but must be proved.***
>
> *[added emphasis]*

196. Our Courts considered the concept of fraud (in the civil/contractual law sense) in a number of judgments, but never as applied by the Court in this case. In this context, reference is made to the judgement of the Court of Appeal (Superior) in the names *Rita Camilleri et v Marco Gaffarena et*[21] which contains a collection a helpful examination of the matter:

> *"Fraud which vitiates consent is regulated by Article 974 of the Civil Code; …*
>
> *"Fraud leads the victim to error. In the judgement Emmanuele Sciberras vs Nobbli Nazzareno Zimmerman Barbaro decided by the First Hall on the 13th of February 1946, the Court observed:*
>
> *"That, as Baudry observes, the annullability of a contract based on fraud also supposes the error made by the contracting party who makes the request for annulment because of the fraud of the other party…*
>
> *[…]*
>
> *Our law provides (article 981(2) of the Civil Code) that fraud is not presumed but must be proved.. As stated by Giorgi ("Teoria delle Obbligazioni", Volume IV, Libro II, Part II, p. 46):*
>
> *"il dolo è una forma speciale di errore avente per carattere proprio di essere cagionato dalla mala fede dell'altro contraente."*

[21] 26th of May, 2017

> *…In the judgement of the Court of Magistrates (Gozo) in its Superior Jurisdiction, of the 5th of October, 2005, in the suit in the names Maria Pace et v. Carmelo Grima et it was stated:*
>
> *"Our law explains that: "Fraud shall be a cause of nullity of the agreement when the artifices practised by one of the parties were such that without them the other party would not have contracted.* ***Fraud is not presumed but must be proved."*** *…*
>
> *As stated by this Court in its judgement of the 3rd of March, 2011, in the suit in the names* ***Frank Refalo et v. Joseph Vella et:***
>
> *"For fraud to vitiate the consent of a party to a contract it is required that (a) fraudulent means or acts are employed; (b) which are grave; (c) in such way that they are determinant for the negotiations which took place between the parties, and, (d), above all, that such means or acts were committed by the other party. In order for fraud to be grave, it must be such that a person of ordinary wit would not have realised they were being defrauded and it must go beyond exaggeration about some quality of the object of negotiation, and had it not been for the fraud, the other party would not have become involved in the negotiations in question (Joseph Mifsud noe v. Paul Tanti, First Hall, 4th of February, 1965)."*

197. As already stated, it is accepted that "fraud" [in the Civil Code sense of a malicious act leading to a vice of consent] cannot be presumed but must be proven and this as required by Article 981(2) of Chap 12.

198. Amazingly, however, the First Court **did the exact opposite of what this article states** and expressly stated that it was **presuming** the existence of "fraud" on the part of the Appellants, and in particular Steward, without any evidentiary basis to support this and without applying the minimal expect logic to the events at hand. It is not the Appellant who is stating that the declaration is simply based on presumption/assumption, but it was openly stated by the First Court itself, particularly in paragraphs **501 till 504** of its decision – perhaps the most shocking part of the entire judgment, the section which most clearly shows the absolute bias of the Court.

199. Essentially, the First Court imputes two elements which it regards as "fraudulent".

200. Firstly, it claims that Steward must surely have known about the problems being faced by the Concession when it acquired Vitals' shares. From this point the Court concludes, with a logical jump worthy of the Olympic Games, that Steward took part in the Concession with the sole scope of enriching itself unjustly. The Court states that this "enrichment" was done by Steward by obtaining and making use of financing from Bank of Valletta plc guaranteed by the Government (see paragraphs 495 till 498 of the appealed judgment) which -by the way- only happened well after the Appellants had acquired the shares in the then Concessionaire. Crystal ball "benefit" (if any) which according to the *logic* of the judge should have involved also the signatory Bank of Valletta plc but which bank is conveniently not mentioned in this context.

201. Secondly, the Court points its fingers specifically at the **Amendment and Restatement Agreement** signed on the 27th of August, 2019 (noticeably a full 18 months (!) after the transfer of the Concession in February 2108) between the Government, the Appellants and **Bank of Valletta** – the third party bank who is not party to the suit. Here the Court finds fault with a particular clause by virtue of which the parties agreed that a termination of the Concession, even if as a result of a judgment, is considered a *GoM Non-Rectifiable Event of Default* in such manner that the Government of Malta must guarantee for the loan granted by BOV and pay the stipulated SCA penalty of one hundred million Euro (see paragraphs 499 and 500). The Court fails to acknowledge (i) that the one hundred million Euro was in schedule 7 of the SCA from the outset (that is, prior to Steward taking over the Concession) but that the 2019 agreement simply created a new ground for a non-rectifiable event of default by the GOM – namely, recission or annulment of the Concession Agreements (ii) that amendment provided a new route of access to the E100m but did not introduce it for the first time and just as relevant, (iii) that the new *direct termination provision* was introduced at the request of Bank of Valletta, a bank controlled by the Government of Malta, as a condition precedent to the financing.

202. **There is no doubt that the sequence of events in time is, if we accept the Court's argument, the work of a mastermind or of a fortune teller who**

could anticipate that each of these contracts would be signed at the appropriate time. This is a case of a bad judgment which is nothing else than bad logic.

203. The Court was of the view that the above-mentioned, contractually agreed, conditions are so advantageous to the Concessionaire, that "it wanted to believe" that no representative of the Maltese State was going to freely accept them, and it is **only on this basis** that it concludes that Steward "definitely" acted not only "fraudulently in a civil law sense, but worse yet, with conduct that is "possibly criminal"! Again, a bad judgment is nothing but bad logic, although here this unfounded allegation merits a serious reprimand by a higher instance that the Appellant will seek.

204. Not only! In an extreme, unjustified and misguided attempt to cover and forgive any shortcomings of the Government of Malta and impute fraud to Steward – the "foreigners", the Court makes the following observation.

> *502. The Court admits, however, that it is indeed worrying how persons responsible of the Governing Authorities could ever knowingly enter into obligations which are so onerous on the Government, and would like to believe that such obligation was assumed by them, possibly as a result of ingenuity, if not pressure for the original project to remain viable, but* ***certainly believes*** *that it occurred in view of the fraudulent and possibly criminal conduct of both the company Steward, as composed today, and also the company Vitals, as originally composed and its investors.*

205. The words "believes", "thinks", "assumes", "wants to believe" and so on reveal that the conclusions of the Court are not based on any hard evidence but on a narrative which is attractive from a populist perspective.

206. In other words, according to the wise considerations of the Court, the highest representatives of the Government, including the Honorable Minister Doctor Konrad Mizzi, were amateurs, virgins or, at worst, cretins, as well as devoid of any responsibility as if they were not of age. The same applies, it would appear

to the Court, for the high-ranking officials of Bank of Valletta plc, a leading bank in a European Union Member State. On the other hand, Steward "as composed today", exercising obscure wiles worthy of a villain in a Gothic novel, took advantage of the naivety of these pitiful individuals.

207. There is hardly any need to state that the Court's reasoning makes no sense. It also goes against the basic legal principles already mentioned, i.e. that **any fraud must be proven**:

> *As stated in the judgement in the names Victor Azzopardi et vs John Azzopardi et decided by this Court on the 11th of February 2016*
>
> *"[i]* ***the law expressly states that the evidence of such dolo must be presented by whoever alleges is and the intention to deceive is essential since the modern right does not envisage object dolo in re ipsa.*** *...*
>
> *Furthermore, it is a known principle that whoever alleges fraud as a vice of consent must prove this by means of evidence which are "gravi e concordati." (vide Innocenzo Galea vs M. Zammit, decided by the Court of Appeal on the 3rd of December 1919.)*[22]

208. In clear breach of these well-established principles, the First Court imputed "possibly criminal conduct" from a simple reading of a contractual clause which it felt was advantageous to the Concessionaire! This is an argument which is "worked backwards" from its conclusion although the approach is exposed by the poor logic behind it.

209. It is true that when Steward entered into the Concession, it knew that the Concession was under pressure due to shortcomings of Vitals and lack of oversight by the Ministry of Health, even if it had absolutely no knowledge of the problems which were subsequently uncovered in the NAO Reports, and which justified the letter of protest sent to Prime Minister Robert Abela on the 28 September, 2021. Steward however, entered into the Concession after promises which were made to

[22] Emilio Agius et v Adrian Muscat et, First Hall, 27.03.2017

it, including by the Prime Minister, Minister of Health and Chief of Staff of the epoch, that the Concession was going to be renegotiated to be financially viable. Promises that were breached and faded into nothing. Indeed, Steward had no interest to enter into the headache that is this Concession, had it not been for the reassurance of support from the Maltese Government to turn a concession which at the time had failed, into one which would bankable and, consequently, a success. What was the logic for a successful, well-known US corporation to do this otherwise?

210. It is a publicly reported and well-known fact– as was also confirmed by the witnesses before the First Court – that negotiations regarding the Concession were still ongoing during the course of the suit. However, as soon as the appealed judgement was delivered, the Prime Minister and the Deputy Prime Minister, both came out publicly saying they never considered Steward's requests to fix the structure of the concession, and even confessed that this strategy of the Government had a positive outcome in light of the judgment delivered!

211. Therefore, if there is a defrauded party, a party in error from a contract law point of view, it is not the Government but **Steward,** that, in good faith, relied on the assurances given by the highest-ranking representatives including the Prime Minister, Deputy Prime Minister and Minister of Health, and Chief of Staff of the Government of a European Union Member State, with which it was discussing in good faith, the basis of its investment. Now, illogically and adding insult to injury, it finds itself accused by a Court of the same State that it behaved in a criminal manner! With the Government of Malta smugly rubbing its hands, and promptly declaring that it will not appeal the judgement despite being one of the losing parties and despite the fact that the amongst the other defendants there are authorities which are supposed and expected to act independently to Central Government. **This action (or inaction, to be more accurate) not only has implications in the Service Concession contractual sphere, but also, make of the Government and the Judiciary a common party, in breach of tenets of separation of powers**.

212. In its most superficial analysis regarding the alleged "fraud", the Court also completely ignores the involvement of Bank of Valletta in the contracts which the Court considered so problematic. The fact that the Bank of Valletta was also a signatory to the contracts goes to show that there were other interests involved, beyond those of the Government and of Steward as Concessionaire, but in its judgment, the Court completely fails to take this into account, and as a result, its analysis remains superficial and incomplete.

213. Indeed, it doesn't take much to understand that the clause regarding the guarantees granted by the Government in the context of termination is not there to benefit Steward only, but primarily **to protect Bank of Valletta**. In fact, it was the Bank which insisted on the Amendment and Restatement Agreement of the 27th of August, 2019, in the context of ulterior financing which the Bank was advancing, with particular connection to the realisation of the building of Barts College, in Gozo. It is worth reminding that the Barts project, after it had practically totally halted under Vitals, was completed in a short period by Steward, and inaugurated later on that year, on the 21st of November, 2019 and therefore this financing was essential at a time when there was high capital expenditure.

214. Even within this context, if there was a weaker party in the contract it was certainly Steward, **not** the Government and **not** the Bank. We should not forget that Steward was contracting in a jurisdiction which was foreign to it, involving contracts subject to the laws of Malta, with the Government of Malta, and with a leading Maltese Bank in which the same Government has a substantial share. It is inconceivable how in a context such as this one Steward is depicted as having ever been capable of "deceiving" the other parties to the contract. Besides, this contradicts the observations which the Court itself made in other sections of the same judgement (for example in paragraphs **426 and 427**), where it criticizes the conduct of Konrad Mizzi, who was at the time a Minister in the same Government.

215. Apart from the factual aspect, the considerations of the Court are also lacking when considered from a legal aspect.

216. In this regard, the Appellants observe that the concept of "fraus", or fraud in the context of civil law, is altogether distinct from the concepts of "fraud" as may be understood in a criminal law context, having constitutive elements which are altogether different and naturally implying a different burden of proof. **The First Court, however, seems to ignore this basic legal distinction.**

217. As has been stated earlier, "fraud" as a vice of consent requires "deceit" – whether "criminal" or otherwise – which leads the other contracting party to conclude negotiations which they wouldn't have contracted had it not been for such "deceit".

218. Criminal "fraud", on the other hand, is an offence contemplated in Article 293 to 301K of the Criminal Code (Chapter 9 of the Laws of Malta) which, it must be noted, is distinct from the offence of corruption (Article 121 of Chapter 9) or trading in influence (Article 121A of Chapter 9) which are the offences which the Court seems to be referring to in its reasoning.

219. It follows that if it appeared to the Court that there was criminal conduct which involved Government representatives, this in itself excludes fraud as a basis of vice of consent, as it means that the Government representatives had the necessary *scientia* when signing the relative contracts and therefore, it cannot be said that they were deceived.

220. The Appellants do not really believe that this has escaped the presiding judge. On the contrary, it is probably for this reason that in a most contradictory manner, after making an extensive criticism of the representatives of the Government of Malta, the Court in paragraph 503/504 immediately changes its tune and imputes "fraud" **to Steward only**, so as to justify its (mistaken) conclusion that "fraud" took place in the civil sense of a "vice of consent". This despite the fact that the First Court referred in several sections of the appealed judgement to the alleged "collusion" which involves members of the Government and/or public authorities, particularly with regard to the award of the Concession to Vitals. This, in and of itself excludes the **concept of vice of consent based on fraud** which can never be present if (allegedly) both contracting parties were colluding among themselves.

221. Conveniently, the Court, without in any way examining the article about "fraud" in the criminal context, conflates "fraud" in a civil context with "criminal conduct" and then, without any probatory basis which indicates any "fraud" – neither contractual let alone criminal – goes on to accuse Steward of both! Again here, the end justifies the means for the Court.

222. The Court then hides the superficiality and poor logic of this argumentation under a dangerous appeal to the popular sentiment by presenting the Plaintiff (and, implicitly, itself when allowing his claims), as a bulwark of the interests of the Maltese citizen in the face of foreign fraudsters. An attitude which is altogether insular, unjust, shocking and breaches the **right to a fair hearing** of the Appellants and also of their officials in their personal right as submitted in further detail in the next complaint.

223. Also for these reasons, the judgment should be revoked.

D.8 Eighth Grievance: Breach of the involved parties' right to a fair hearing, when the Court accused the appellants and their representatives of "fraud" and "criminal activity" on the basis of a superficial examination of evidence

221. Under the preceding ground of appeal, the Appellants showed how the assertion of "fraud" on Steward's and its representatives' part is unfounded in fact and at law.

222. In addition and without prejudice to this, the Appellants affirm that the manner in which the Court considered the evidence in this regard, in order to come to the conclusion of "fraud" or even "criminal activity" in Steward's regard, is so

wrong and superficial that they lead to a breach of the rights that Steward and its individual directors have in terms of Article 6 of the Convention.[23]

223. The Appellants refer among others to the following considerations:

223.1 As we have seen, "**fraud**" requires the existence of a victim, i.e. the person induced with deceit in order to contract against their own interest. None of the parties to the contracts in the Concession (i.e., the other defendants) accused Steward of "fraud". No one invoked nullity of contract on the basis of vice of consent. It was therefore a surprise to the Appellants how the Court could ever invoke vice of consent when it was not even being invoked by the contracting parties;

223.2 Any **criminal conduct** must be proved beyond reasonable doubt, which certainly was not done in this case. If the Court however, is considering that there are grounds for recission of the concession on the basis of fraud [*"għemil doluż"*], this means that it appears to the Court that the offence **was committed** and this in itself implies the involvement of Government representatives. One therefore asks why the Court did not order the investigation of even **one official** of the Government of Malta?

223.3 The Court also confused the concept of fraud *ab initio* with events which allegedly took place afterwards and which were not, to state the obvious, fraudulent in any way on the part of Steward. In this manner, one hardly understands how the alleged fraud (not proved!) relating to the Amendment and Restatement Agreement could ever lead to the retroactive effect of nullity of the contract of emphyteusis of the 22nd of March, 2016 or the Service Concession Agreement of the 30th November 2015 or any other of the Related Instruments;

[23] See in this regard, Carmel Saliba v Malta – 24221/13 – Judgment of the ECHR 29.11.2016, particularly Section IV ("Failure of domestic authorities to thoroughly assess evidence in civil proceedings: violation"

223.4 This is further emphasised when one considers that the persons involved in negotiations with the Government in 2015 (Vitals) and in 2019 (Steward) were different.

224. All of this objectively shows an attitude of bias against Steward and its representatives and serious shortcomings in the examination of evidence and the application of the legal principles involved. This constitutes a classic example of an unsafe judgement and therefore merits the setting aside of the appealed judgment even **in terms of Article 6 of the European Convention.**

D.9 Ninth Grievance: Alleged Non-Performance

225. With regard to the alleged non-performance, the Court was mistaken in the merits of its conclusions, and the sarcastic way in which it considered the evidence brought before it further shows a grave bias against the Appellants.

226. The Court here essentially considered that the Concession Milestones linked to the construction project were not attained and that the medical tourism project which was part of Vitals' original proposal never took place and it does not appear that there is the intention for it to take place. The Court here transforms itself into a contracting party and decides in the absence of any further information or justification.

227. The Court however did not stop here, but with several ironic comments about a photo-report exhibited by Steward which shows an "upgrade of the toilets", gave the impression that Steward did not contribute anything else in the years it was involved in the Concession.

228. The Court's observations were altogether baseless and out of place. The Court, in "reviewing" the report in question apparently read only the first and last pages, skipped whole sections which detail (i) the upgrades at the Gozo General Hospital, (ii) including a new Dental Clinic and (iii) Stroke Unit, (iv) a new Orthopaedic Unit,

(v) a new Orthotics and Prosthetics Unit at the Karin Grech Hospital (vi) complemented by collaboration with world experts in the field of prosthetics, (vii) a new fleet of ambulances as well as (viii) new services of a helicopter for patients, (ix) an **Anatomy Centre in Gozo together with** (x) **the Barts College for Medicine and Dentistry Building** – a project which had stalled under Vitals and was speedily completed as soon as Steward joined the Concession, among several other upgrade projects plus the continuous delivery and improvement of health services throughout. The summary of all this in the eyes of the First Hall is simple: an "upgrade of the toilets". An investment of over **€ 60,000,000** was, it must be stated again, reduced to "an upgrade of the toilets!" Such investment, however, is there to see, and the Appellants insist that if the Government of Malta takes back the hospital sites as a result of the judgment, it should be compensated for its investment. Appellants reserve all their rights at law in this regard, including that of invoking, if necessary, the *jus retentionis* in terms of the Civil Code (Chapter 16 of the Laws of Malta), including **Article 550** thereof.

229. Moreover, both the Plaintiff as well as the Court seem to forget that the Concession did not only consist of obligations of construction, development and upgrades but also a reorganisation of the operations and the provision of health services from the Hospital Sites.

230. Steward ran this with efficiency including during the difficult periods of the spread of Covid where Steward utilised its international contacts to obtain ventilators in a short period of time in the Gozo Hospital and prepared a ward with twenty-five beds equipped with a ventilator while the Government was still scrabbling to find a supply of ventilators for MDH (*vide* photo-report confirmed on oath by James Grech). However, as stated, the Court seems to have been so invested in analysing the "ceramic of the toilets" that it even overlooked this fact explained in James Grima's report.

231. It is significant that in the five years that Steward has been involved in the concession, it never received any notice from the Government which alleges default in relation to the running of the hospitals. On the other hand, it is known that the

Government made several public statements, including by Minister Fearne, defending the choice of Steward as "the real deal"[24] and the budgets allocated to the running of the hospitals by Steward.

232. Therefore the narrative reflected in the judgment of a Concessionaire that did nothing in five years and remained complacent "enriching itself unjustly" out of the Concession and simply "upgrading toilets" is a caricature which is not based on any evidence and which, instead, reflects the poor logic adopted by the First Court in order to reach its conclusions.

233. Without prejudice to the above, all allegations of non-performance should have also been considered in the context explained earlier on in this appeal, (though Appellants in any event reiterate that neither the court nor the Plaintiff had the right in law to step into the Concession Contracts), a context where the original structure of the concession was not a bankable one and therefore, without the collaboration of the Government of Malta in good faith, even as declared to Eurostat, for the structure of the Concession to be changed, the construction projects could not have progressed.

234. However this was certainly not due to a shortcoming of Steward. This was also not due to "poor planning" for the future, as inferred by the Court, which also seems to have forgotten the voluminous documentation brought forward by representatives of the Planning Authority from which the planned projects committed to by Stewardclearly result.

235. This all takes us back to the question of Adrian Delia's juridical interest to bring this suit. The disputes which are being mentioned in this section could have been – if the Government of Malta felt that there had been some breach – the

[24] https://timesofmalta.com/articles/view/20171221/local/vitals-planning-to-sell-hospitals-concession.666193;

subject of arbitral or judicial proceedings between the contracting parties, in which case they would have been conducted in accordance to the terms and conditions of the Concession Contracts. Ultimately, the effect of the sentence is that the Government benefitted indirectly, in the sense that it obtained (in a vicarious way through the Opposition) dissolution of the Contract without having to adhere to the contractual obligations which it had previously assumed! It is a breach of those obligations and of legitimate expectations and unequivocal events of default which would justify termination of the Concession Contracts by the Concessionaire.

236. Therefore the judgement of the First Court is also mistaken insofar as it is based on contractual non-performance.

D.10 Tenth Grievance: Lack of clarity in the ruling of the judgement regarding rescinded contracts, and consequentially, a decision that is extra petita and ultra vires

237. This complaint specifically refers to the final operative part of the judgment [the *decide*].

238. The Appellants affirm in this regard that the appealed judgement is not clear with regard to the contracts which are being rescinded. The claims of the Plaintiff[25] refer precisely to "rescission and annulment" of the "temporary emphyteutical concession in the acts of Notary Thomas Vella of the 22nd of March, 2016 and the Related Instruments which form an integral part of the emphyteutical concession referred to".

239. The Related Instruments are well defined in the emphyteutical concession and refer to SCA, LSA and HSDA, **but not** to all and any contracts which name or refer to the Concession.

[25] See the fourth claim in particular;

240. Nonetheless, the considerations of the Court, especially with regard to the Amendment and Restatement Agreement, suggest that the Court had the intention of cancelling any agreement which is somehow connected to or is related to the Concession.

241. This seems to also be suggested by the holding part of the judgment which implies that any form of subsequent contract which is somehow related to the Concession is being cancelled.

242. Nonetheless the Court's orders, should they indeed be so understood, are clearly extra petita, ultra petita and ultra vires.

243. This is being stated because the claims as brought by the Plaintiff only make reference to the emphyteutical concession and the Related Instruments but not to amendments or addenda thereto, which "amendments and addenda" in any case are not defined in a clear manner either in the premises or in the Plaintiff's demands. Therefore and first and foremost, there is room for clarification as to which contract the Court is referring, as the lack of clarity is resulting in more uncertainty and confusion.

244. In any case, the Court is not entitled to order the cancellation of contracts the cancellation of which was not claimed. This applies in particular to any agreement which took place after commencement of the suit, given that the Plaintiff did not request any amendments to the claims brought forward, and:

> *"It is an established principle in jurisprudence that causes as expressed in the writ of summons cannot be changed in the course of pleadings of the suit and the Court must adhere and conform to the terms of the demands as expressed in the writ of summons. If this is not done, then the judgement delivered would be extra petita";*[26]

245. Lastly, the Court could certainly not rescind contracts involving third parties who were not party to the suit. This also includes the Amendment and Restatement Agreement which the Court said was potentially a result Steward's "criminal conduct", **without considering that this agreement involved not only the**

[26] Court of Appeal **Alphonse Sant v. Pauline Micallef u s-socjeta` A.M. Developments Limited,** 30.11.2007;

Government of Malta, but also a third party, i.e. Bank of Valletta plc which was never party to proceedings and certainly never made its voice heard regarding such agreement or other parties which are direct beneficiaries to such agreements by virtue of separate agreements such the "subordination agreement" and the "junior debt agreement."

246. For these reasons, the judgement should be revoked.

D.11 Eleventh Grievance: The Appealed Judgment infringes Article 63 of the Treaty on the Functioning of the European Union["TFEU"])

247. Without prejudice to the preceding grounds of appeal, Appellants submit that the appealed Judgment constitutes a national measure having the effect of an indirect expropriation and, as a consequence and for the reasons which will be explained in the context of this grievance, it infringes Article 63 of the TFEU which states:

1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

248. Indirect expropriation is a situation where a government takes actions that significantly interfere with the use, enjoyment, or economic value of an investment, even if it does not take the property outright. Indirect expropriation can occur in a variety of ways, such as through regulatory changes, permit revocations, or arbitrary or discriminatory actions.

249. Bilateral investment treaties or multilateral investment treaties usually afford protection against:

i. Direct expropriation: Investment protection agreements typically prohibit direct expropriation without prompt, adequate, and effective compensation. This means that if a government takes an investor's property, it must provide compensation that is fair market value, paid without delay, and in a convertible currency.

ii. Indirect expropriation: Investment protection agreements also protect against indirect expropriation, which, as noted above, occurs when a government takes actions that significantly interfere with the use or value of an investment, even if it does not take the property outright. Indirect expropriation can take many forms, including regulatory changes, permit revocations, and arbitrary or discriminatory actions. Investment protection agreements typically require governments to provide compensation for indirect expropriation that is equivalent to the value of the investment that has been lost.

250. Appellants submit that although Malta has no bilateral investment treaty in force with Spain or the United States of America, the jurisdictions of the parent companies of the Appellants, EU law offers protections equivalent to those protections, as the European Commission ("**EC**") itself has confirmed.

251. Reference is made here to the so-called Communication from the Commission to the European Parliament and the Council on the Protection of intra-EU investment published by the EC on the 19 July 2018 ("**2018 EC Communication**")[27], whose objective was to recall "*the most relevant substantive and procedural standards in EU law for the treatment of cross-border investments in the EU*" and show that "*EU law protects all forms of EU cross-border investments throughout their entire life cycle.*" According to Article 17 of the Treaty on the European Union ("**TEU**"), the EC is the guardian of the EU treaties and must enforce

[27] Electronically available in this link.

EU law, monitor its application, and ensure its uniform application throughout the EU.

252. According to the Commission, EU law protects the economic activity of economic operators throughout the whole lifecycle of an investment.[28] In general, any national measure adopted by a Member State that may affect EU law and another EU investor's rights must comply with the applicable general principles of EU law, so as not to lead to unlawful or indirect expropriation namely:

i. The national measure must be **proportionate**. It must serve a legitimate public objective in a consistent and systematic manner.[29] It must not go beyond what is necessary to achieve the public interest.[30] It is not proportionate if there are alternative means that are less restrictive.[31]

ii. National measures must be clear, precise, and predictable regarding their effects.[32] This includes the protection of the legitimate expectations of an economic operator in certain specific cases:[33]

> "*It is settled case-law that any trader on the part of whom an institution has promoted reasonable expectations may rely on the principle of the protection of legitimate expectations. However, if a prudent and circumspect trader could have foreseen that the adoption of a Community measure is likely to affect his interests, he cannot plead that principle if the measure is adopted*."

28 EU law does not use the term 'investment' or 'investor'.
29 C-169/07, Hartlauer, ECLI:EU:C:2009:141, para 55.
30 C-52/16, SEGRO, ECLI:EU:C:2018:157, para 76.
31 C-452/01, Ospelt, ECLI:EU:C:2003:493, para 41.
32 C-318/10 SIAT, ECLI:EU:C:2012:415, para 58. C362/12 Test Claimants in the Franked Investment Income Group Litigation, ECLI:EU:C:2013:834, para 44.
33 C-17/03 VEMW, ECLI:EU:C:2005:362, paras 73-74.

253. Applying the above principles to the case at hand, Appellant notes that, following the EC reasoning:

i. An indirect expropriation is a disproportionate restriction of the free movement of capital protected by EU law (Article 63 of the Treaty on the Functioning of the European Union ["**TFEU**"]). As noted by the Court of Justice of the European Union ("**CJEU**"), in the SEGRO case:[34]

> "*In the present instance, it must be found that, by virtue of its very subject matter, legislation such as that at issue in the main proceedings, which provides for the extinction of rights of usufruct acquired by contract over agricultural land, including those held as a result of exercise of the right to free movement of capital, restricts that freedom on account of that fact alone. The possible adoption, envisaged by the referring court in its second question in Case C-52/16, of a measure compensating the persons who, after acquiring such rights, have been deprived of them in this way by that legislation would not be capable of affecting that finding.*
> *That legislation deprives the person concerned both of the ability to continue to enjoy the right which he has acquired, by preventing him, in particular, from using the agricultural land concerned for the purposes for which he acquired that right, and of the ability to dispose of that right.*
> *By depriving in that way nationals of Member States other than Hungary, who are entitled to benefit from free movement of capital, of enjoyment of the property in which they invested capital, the national legislation at issue in the main proceedings constitutes a restriction on such free movement.*
> *Furthermore, as is clear from settled case-law, the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those which are likely to discourage non-residents from making investments in a Member State (judgments of 25 January 2007, Festersen, C-370/05, EU:C:2007:59, paragraph 24 and the case-law cited, and of 1 October 2009, Woningstichting Sint Servatius, C-567/07, EU:C:2009:593, paragraph 21).*
> *It follows that national legislation such as that at Issue in the main proceedings constitutes a restriction on the fundamental freedom guaranteed in Article 63 TFEU.*"

Furthermore, the freedom of establishment of an economic operator in the internal market is also protected by the EU Treaties (Article 49 – 55 of the TFEU) against any direct or indirect discrimination. Arbitrary and targeted

[34] See SEGRO at fn. 5. Paras 62-66.

actions by a Member State that render impossible the establishment of a given economic operator from another Member State fall in the category of measures prohibited by this fundamental freedom.

ii. Second, EU law also protects the right to property as a fundamental right and any deprivation of any right entails a right to compensation on the basis of Article 17(1) of the Charter of Fundamental Rights of the European Union.[35] Any expropriation must comply with the applicable general principles of EU law noted above.

254. Following the reasoning of the European Commission, EU law offers protections equivalent to those that would be offered by a bilateral investment treaty. Therefore any act of an organ of the State, such as the appealed judgment, which leads to an indirect expropriation would be in breach of the obligation of Member States to protect investments made by any EU investor.

255. The First Court Judgment, to the extent that is clearly *extra petita* and *ultra vires,* as submitted in the fifth grievance, is not compatible with Article 63 of TFEU.

D.12 Twelfth Grievance: Contestation of the decision regarding costs

256. Regarding the allocation of judicial costs, the Appellants complain of the fact that the First Court ordered Steward to pay all the judicial costs when, even if the Court were correct in its conclusions (which it certainly is not), judicial costs should, in a worst-case scenario, also be borne by the other defendants.

257. Firstly, it should be said that

[35] C-78/16 Pesce and Others, ECLI:EU:C:2016:428, paras 85-86.

> The way judicial costs are paid is regulated by Articles 223 to 225 of Chapter 12 of the Laws of Malta, given that normally any definitive sentence must condemn the losing party to the costs. [1]

258. In fact, Article 223(1) stipulates that "every definitive judgement shall award costs **against the party cast**". This rule is mitigated in sub-article 223(3) where it is stated

> (3) In all cases, it shall be lawful for the court to order that the costs shall not be taxed as between party and party, when either party has been cast in some of the points at issue, or when the matter at issue involves difficult points of law, or where there is any other good cause.

259. These provisions of the law have been interpreted by the Courts in the sense that when there is a losing party in a case, the Court should as a rule order that losing party to suffer the costs himself in the absence of any of the elements mentioned in Article 223(3) of Chapter 12.

260. In this case, the Court rejected all the pleas of the various defendants, and with reference to the other defendants (not being the Steward companies) it considered some of their defences as frivolous - such as when it criticized the fact that each of the defendants (except Steward) pleaded that it is not the legitimate defendant. This is in addition to the fact that in several parts of the judgment the behaviour of certain Government representatives was criticized (even though, where convenient, as we have seen, the Court also absolved them of responsibility).

261. Despite this, incredibly, **the Court without giving any reason or justification,** allocated all the costs of the case to the Appellants, with absolutely no mitigation of costs.

262. It is submitted that this goes against the provisions of the law. More than that, however, it continues to reveal the strong element of **bias** in the appealed judgment, where even in relation to a basic element such as the head of costs, the Court did everything in its power to pin responsibility on Steward.

E. PART V – CONCLUSION AND REQUESTS

263. In conclusion, the Appellants reiterate that the appealed judgment is afflicted by several deficiencies of a procedural and substantive nature, in addition to an erroneous and superficial appreciation of the facts. One also notices, from the incomprehensible aggressiveness of the Court's observations towards the Appellants, that the decision is **unsafe and objectively unfair** and raises serious and worrying doubts also on its Constitutionality and to its validity from a European Union Law perspective which merit a preliminary reference to the Court of Justice of the European Union (which is being concurrently requested).

264. The Appellants appeal to this Honourable Court of Appeal to consider the Appellants' grievances fairly and objectively, free from any considerations of a merely political or populist nature, and which are inappropriate in a Member State of the European Union which should protect intracommunity investment.

THEREFORE, THE APPELLANTS, while making reference to the records of the case and reserving to submit all further evidence that may be admissible and to make those further submissions which may be required, respectfully request that this Honourable Court of Appeal revoke the judgment dated 24 February 2023 in the mentioned names and instead proceed to decide the case by upholding the pleas of the Appellants and rejecting the Plaintiff's claims with costs against him.

Finally, in view of the nature of the case, the number of grounds of appeal, the serious concerns of a Constitutional and Conventional/human rights nature raised by the judgment, and in particular, following the shortening of the term for the filing the Appellants' appeal, the Appellants request that this Honourable Court of Appeal grant a sitting for the hearing of the cause, for the purpose of hearing evidence and/or oral submissions as contemplated in **Article 207(5) of the Laws of Malta**.

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Notifications:

1. Onorevoli Prim Ministru, Auberge de Castille, Valletta
2. Avukat Ġenerali, Admiralty House, 53, South Street, Valletta VLT 1101
3. INDIS Malta Limited, 88, Triq il-Wied tal-Imsida, Birkirkara BKR 9020
4. Il-Kap Eżekuttiv tal-Awtorita' tal-Artijiet, Auberge de Baviere, Valletta

5. Iċ-Chairman tal-Bord tal-Gvernaturi tal-Awtorita' tal-Artijiet, Auberge de Baviere, Valletta

6. Dr Adrian Delia, Kamra tad-Deputati, Valletta.