

## A brief note on '*actio rei vindicatoria*' and '*actio publiciana*'

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## 1 Introduction

*Actio Rei Vindicatoria* is an action that is available to an owner who has lost possession and wants to reclaim back possession of that thing currently in the hands of the possessor by proving that he has a title over that property. The plaintiff is therefore the one who claims to be the owner who has lost possession, while the defendant is the person who has the actual possession at the time of the notification of the action. The objects that can be subject to such action are all things subject to ownership. In this context, in an *actio rei vindicatoria*, the plaintiff must put forward concrete evidence to prove that he has an 'original title' of the thing under contestation.

## 2 What constitutes an 'original title'?

What constitutes an original title for the purpose of the *actio rei vindicatoria*?

According to the judgment in the names **Il- Kummissarju ta' I- Artijiet vs Frans Mallia**, decided by the First Hall of Civil Courts on the 20th January 2005:

*“ B'titolu originali, l-awturi u d-duttrina tifhem dak it-titolu li jitnissel favur persuna minghajr ma jkun mghoddi lilu minn haddiehor, filwaqt li titolu derivattiv huwa dak fejn il-jedd jghaddi min ghand persuna ghal ghand ohra. Dan ifisser li jista' jkun hemm kisba b'titolu originali wkoll fejn il-haga, qabel, kienet ta' haddiehor imma li tkun waslet ghand is-sid attwali minghajr ma tkun inghaddiet lilu mis-sid ta' qabel: dan iseħh, per ezempju, fejn wiehed jikseb bil-pussess ghal zmien ta' izjed minn tletin sena bla ma qatt ikun gie mfixkel f'dak il-pussess, jew fejn wiehed izomm oggett mitluq minn haddiehor ghaz-zmien mehtieg.”*

## 3 Is it enough to show that defendant is not the owner?

It is not sufficient on the part of the plaintiff to show that the defendant is not the owner of the thing. In other words, the plaintiff may not claim ownership on the grounds that the defendant is not in a position to justify his possession at the time of action. This principle was elaborated upon by Italian jurist **Ricci** who wrote that in the absence of concrete evidence brought forward by plaintiff showing that he has an original title over the property under contestation, the defendant would still not be deprived of his right of possession of the said property. For the *actio rei vindicatoria* to succeed, the plaintiff needs to demonstrate in no uncertain terms that he has a title emanating from an established original title.

#### 4 What if an 'original title' is not shown?

Our courts have indeed acknowledged that in practice, it is extremely difficult, if not impossible, for the plaintiff to furnish an original title.<sup>1</sup> A solution to derogate the level of 'absolute proof' was indeed found in the application of the *actio publiciana*, relying on the '*diritto migliore*'.

#### 5 A 'better title' rather than the 'original title'

In his "*Preuve par titre du Droite de Propriete Immobiliere*", **Francis E. Levy** argues that property rights are relative so that the Courts should decide in favour of the party who succeeds in bringing forward the best evidence of titles. Levy's arguments reflect the practical reality that an original title is very often difficult to attain. Even in a local context, our Courts have shown that they are willing to adopt a 'less rigid' approach whereby the '*prova diabolica*' may be done away with as long as the plaintiff is in a position to demonstrate the "*better title*".

For example, in **Fenech et vs Debono et** decided on the 14<sup>th</sup> May 1935, the Civil Court came to the conclusion that the plaintiff was not legally obliged to prove an original title, but it was enough for him (plaintiff) to demonstrate a "*better title*" than that of defendant. The same principles were expressed in other recent judgments – for example, in **Vella vs Camilleri** decided by the Court of Appeal on the 12<sup>th</sup> December 2002 and also **Direttur tal-Artijiet vs Polidano Brothers Limited** decided by the Civil Court of First Instance on 7th July 2004.

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<sup>1</sup> In fact, our courts have termed such evidence as "*diabolica probation*" due to it being very difficult to attain.

The very fact that the *publiciana* and the *vindictoria* have been consistently resorted to by our Courts does not necessarily mean that there exist no difficulties and uncertainties in their application. Codifying the *actio publiciana* would perhaps serve as an important step to put an end to current uncertainties by providing a formal 'equitable' remedy of regaining ownership without the need of having first attempted the *actio rei vindictoria*.

## Recommended further reading

**Marc Agius Fernandez (2014):** *A Comparative Analysis of the Actio Publiciana and the Actio Rei Vindicatoria* - A thesis presented to the Board of the Faculty of Laws of the University of Malta in partial fulfilment of the Degree of Doctor of Laws (LL.D.)