

The Functions of the Court of Voluntary Jurisdiction

Lecture Title: The Institute of Emphyteusis

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**Undergraduate Certificate in Notarial Law
Fundamentals for Office Assistants**

What is emphyteusis?

Emphyteusis is a legal term referring to a long-term lease or contract where the tenant (known as the emphyteuta) is granted the right to use, enjoy, and even improve a piece of land owned by someone else. The tenant typically pays a fixed ground-rent to the landowner, but the arrangement is different from a standard lease in that it often allows the tenant to make significant improvements to the land and benefit from those improvements over time.



The origin of emphyteusis dates back to Roman Law, and the word 'emphyteusis' derives from Greek, meaning 'to plant' or 'to establish'.

Emphyteusis was particularly common in the context of agricultural land. It was a way to incentivize the cultivation and improvement of land, especially in cases where the landowner was absent or unable to fully develop the property.

It allowed for the productive use of land without transferring full ownership. This arrangement benefited both the tenant (who gained long-term access and potential improvements to the land) and the landowner (who received a reliable income through rent and eventual improvements to the property).



Key aspects of Emphyteusis:

1. Long Term Lease: Emphyteusis typically lasted for a very long period—often 99 years or more, and it could even be inheritable.
2. Tenant's Rights: The emphyteuta had the right to use the land as their own. They could cultivate the land, build on it, and make improvements. This gave the tenant greater freedom and control over the land compared to a regular lease.
3. Improvements and Benefits: The tenant could make lasting improvements to the land, and typically, they would retain the benefits of those improvements throughout the term of the lease. However, when the lease ended, the land and all improvements made on it would revert to the landowner.



4. Ground-Rent: In return for the long-term use of the land, the emphyteuta would pay a fixed ground-rent to the landowner. This ground-rent was usually quite modest compared to what the tenant might pay in a regular lease.

5. Duties of the Emphyteuta: The tenant was required to cultivate the land and maintain it. If they failed to do so, the landowner had the right to terminate the contract. This could be enforced under Roman law, and the owner had the option to reclaim the land if the tenant was negligent in fulfilling their duties.

6. Landowner's Rights: While the emphyteusis granted the tenant broad use and control over the land, the landowner still maintained ownership of the land itself. The landowner also had the right to reclaim the land if the tenant violated the terms of the contract.

7. Transferability: Emphyteusis could be transferred to another person or inherited by the tenant's heirs. This made it an attractive option for tenants who wanted long-term security in their land usage. In some instances, sub-emphyetesis was permitted and this meant that the tenant is now acquiring the right to be paid an increase on the original ground rent.



Context in Malta:

In Malta, **emphyteusis** has historical roots that trace back to Roman law and has been a significant aspect of land law for centuries.

During the **Knights of St. John** rule (1530–1798), the institution of emphyteusis became widespread in Malta as a way for the Order to manage and develop its large estates. The Knights granted long-term emphyteutic leases to tenants, often in exchange for a small annual rent, in order to improve the land. These land grants were particularly significant in agricultural and rural areas.



When the British took control of Malta in 1800, they retained many of the land tenure systems of the Knights, including emphyteusis. During the British colonial period, emphyteusis continued to be an important method of managing land, particularly in rural areas.

The British government used emphyteusis to grant land to individuals, especially in the context of building houses and developing property. This allowed the British colonial administration to maintain control over land ownership while encouraging the development of infrastructure, residential areas, and agriculture.

After Malta gained independence in 1964, emphyteusis continued to be recognised in Maltese Law, and it is regulated by the Civil Code of Malta, which was originally influenced by Roman Law. The Civil Code acknowledges emphyteusis as a legitimate form of land tenure.

Emphyteusis can be Perpetual or Temporary. The distinction revolves around the duration and the rights involved.

Perpetual Emphyteusis:

Perpetual Emphyteusis is an indefinite lease. The emphyteuta (tenant) can enjoy the land as if he were the owner, subject to certain obligations such as paying ground rent and maintaining the land in good condition.

Temporary Emphyteusis:

Temporary Emphyteusis has a defined duration, which can range from a few years to decades. As soon as the lease expires, the tenant's rights to the property end, and by right the property reverts back to the dominus, which is the owner.



Article 1494: “Emphyteusis is a contract whereby one of the contracting parties grants to the other, in perpetuity or for a time, a tenement for a stated yearly rent or ground-rent which the latter binds himself to pay to the former, either in money or in kind, as an acknowledgment of the tenure”

Article 1497: “Emphyteusis is null –

- (a) if not made by a public deed; or
- (b) if the grant is otherwise than in perpetuity or for a stated time to be reckoned from any certain day; or
- (c) if the amount of the ground-rent is not expressly stated in the contract.”



Article 1498.(1) Where a tenement is granted for a time exceeding sixteen years or in such manner that the grant may by the grantee be made to last for more than sixteen years, and, in either case, under conditions which are in accordance with the provisions of the following article of this Title rather than with those relating to contracts of letting and hiring, the grant shall be deemed to be an emphyteutical grant, although the parties shall have termed it a contract of letting and hiring; and any such grant is null if made otherwise than by a public deed.

(2) On the contrary, where a tenement is granted under a title of emphyteusis, the grant shall be deemed to be an Emphyteutical grant, notwithstanding the shortness of the period for which it is made and the nature of the stipulations attached thereto”



Article 1500.(1) The ground-rent during the continuance of the emphyteutical grant is unalterable.

(2) The emphyteuta cannot claim any reduction of the ground-rent by reason of any change of circumstances.

3) Nor can he claim any remission or abatement of the ground-rent for one or more years if as a result of a fortuitous event, whether ordinary or extraordinary, foreseen or unforeseen, the whole or part of the produce is lost.



Redemption of Perpetual Emphyteusis

Article 1501.(1) Where a grant in emphyteusis is made in perpetuity, the emphyteuta, even though the ground-rent may be revised at stated intervals of time, shall have the option to redeem the ground-rent as provided in the following sub-articles of this article, unless the contract itself, being a contract entered into before the 15th August, 1981, provides for a different manner in which the redemption may be effected.

(2) Such redemption of the ground-rent shall be made by the payment of a sum equivalent to the amount of the ground-rent capitalised at the rate of five per cent (i.e. multiplied by 20)



Provided that where the contract provides that the ground-rent may be revised at a specified time or on the happening of a specified condition, the redemption may be opted for by the emphyteuta within the first year of the date of any such revision, or the happening of such condition, and the sum payable for the redemption of the ground-rent shall, in such case, be equivalent to the amount of ground-rent so revised capitalised at the average rate of interests payable by a commercial bank on deposits of a fixed nature at the time of the redemption



(3) Where there are more than one dominus, the emphyteuta may redeem from one or more of them separately.

(4) Where the tenement is held in sub-emphyteusis in perpetuity, the sub-emphyteuta shall be entitled to redeem the original ground-rent and the increase in ground-rent by the payment of the sum due for the redemption established in accordance with the provisions of this article.

(5) Any clause in any agreement whereby the emphyteuta is deprived of the right of redeeming the ground-rent conferred by this article, shall be considered as if it has not been included in such agreement.



(6) The redemption of the ground-rent may be effected by an agreement between the dominus and the emphyteuta made in a public deed or by means of the schedule referred to in sub-article(7) of this article.

(7) Where the redemption is not made by public deed, the emphyteuta may effect such redemption by filing at his expense in the registry of the competent court, a schedule of redemption and at the same time depositing in the said registry the sum due for the redemption established in accordance with the provisions of sub-article (2); and with respect to such schedule, the following provisions of this sub-article shall, notwithstanding anything to the contrary in any other law contained, have effect:



- a) where the person first granting the emphyteusis or the person to whom the rights of the dominus are assigned is dead, the schedule of redemption may be served on, and the deposit may be made in favour of, one or more heirs of the dominus or his assignee, and such heir or heirs shall, for all purposes of law, be deemed to represent all those persons having a legal interest in the schedule of redemption and in the money so deposited.
- b) the omission from the schedule of the name of any person having an interest in any part of the moneys deposited in accordance with the provisions of this article, shall not affect the right of any person so omitted to any share in the amount deposited.



(c) The schedule shall contain:

- (i) the name and surname of the person of the emphyteuta, his place of birth, his place of residence, his profession, trade or other status, his parent's name, and their surname at birth and after marriage, or in the case of a body of persons the corporate name of such body of persons and the particulars relative to its incorporation;
- (ii) the name and surname of the person named in the schedule, his place of birth, his place of residence, his profession, trade or other status, his parent's name, and their surname at birth and after marriage, or other particulars sufficient to identify such person, or in the case of a body of persons the corporate name of such body of persons and the particulars relative to its incorporation;
- (iii) the designation in accordance with article 7 of the Public Registry Act of the immovable in relation to which the ground-rent redeemed was payable



(d) the emphyteuta shall attach to the schedule a plan showing the extent and location of the immovable subject to the ground-rent redeemed;

(e) service of the schedule shall be effected only on the person named in such schedule and if within three months from the day on which the schedule is filed, service is not effected on the person aforesaid, either by reason of absence or for any other reason, the emphyteuta shall at his expense request the Registrar of Courts to have the contents of the schedule published in the Gazette, and upon such publication the person on whom the schedule was due to be served shall, for all purposes of law, be deemed to be served with the schedule;

(f) the emphyteuta shall cause two copies of the schedule to be served on the Director of Public Registry, who shall keep a register of such schedules, and article 30 of the Public Registry Act shall, mutatis mutandis, apply to such schedules



Article 1502.(1) The ground-rent cannot be divided without the consent of the dominus; but where the tenement is transferred or otherwise belongs to two or more persons separately, the dominus may not refuse his consent for the division of the ground-rent if such division is made substantially in proportion to the separate parts held by the persons requiring the consent.

(2) The consent given by the dominus for the transfer of one or more separate parts of the tenement to different persons, or the receipt by him of one or more portions of the ground-rent, from one or more of such persons, shall have the same effect as an express consent given by the dominus for the division of the ground-rent





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Rights of emphyteuta:

Article 1504.(1) The emphyteuta may alter the surface of the tenement, provided he does not thereby cause any deterioration thereof.

(2) He is entitled to any profit which the tenement may yield and has the right to recover the tenement from any holder, even if such holder is the dominus.

(3) He is also entitled to the treasure trove found in the tenement, saving such portion thereof as according to law is due to the person who has found it.



Article 1505. The emphyteuta shall keep, and in due time restore the tenement in a good state.

Article 1506.(1) All improvements made by the emphyteuta appertain to him during the continuance of the emphyteusis.

(2) He may alter the form of such improvements; but he may not destroy them without the express consent of the dominus



Obligations of the Emphyteuta

Article 1507 “The emphyteuta is bound to carry out any obligation imposed by law on the owners of buildings or lands:

Provided that if for the carrying out of any such obligation a considerable expense is required, and the emphyteusis is for a time, the court may, upon the demand of the emphyteuta, compel the dominus to contribute a portion of such expense, regard being had to the covenants of the emphyteusis, to the remaining period of the grant, to the sum of the ground-rent and to other circumstances of the case”



Article 1508: 508.(1) The emphyteuta may, without giving notice to the dominus or requiring his consent, dispose of the Emphyteutical tenement and of the improvements, either by an act inter vivos or by any testamentary disposition.

(2) Any alienation (alienee is a person or entity who receives ownership of property through a transfer or conveyance, such as a sale, gift, or inheritance)), however, made otherwise than by a public deed, is null.

1509.(1) Where the emphyteuta makes any such disposal without the consent of the dominus, he shall not be released from his obligations towards the dominus himself unless the latter acknowledges the alienee.



(2) The alienee, however, although not acknowledged by the dominus, is personally bound towards him for the payment of the whole amount of ground-rents which fall due during his tenure, and for the repair of all damages which take place during such tenure; but he is not liable for the ground-rent which fell due, or for the damages which took place previously to such tenure.

Provided that such rights shall not be available to the proprietor in respect of the said things if the same belong to or are held by or on behalf of any department of the Government of Malta in any case in which such department is not itself liable for the payment of the debt.



Article 1510. “The dominus may not refuse to acknowledge, in lieu of the emphyteuta, the alienee under any title, of the emphyteusis, if the alienee is a competent person to carry out the obligations arising from the emphyteutical grant. When alienee is bound to acknowledge dominus.”

Article 1511. “An alienee, under any title, of an emphyteusis, in possession of the tenement, whom the dominus has acknowledged or has offered to acknowledge, may not refuse to acknowledge expressly the dominus or to bind himself personally towards him for the carrying out of the obligations arising from the emphyteutical grant”



1512.(1) Any of the acknowledgements mentioned in the last two preceding articles may be either express or implied; and the payment or receipt of ground-rent or of a fine by or from the alienee shall operate as an implied acknowledgement, unless an express reservation is made by a judicial act.

(2) Both the dominus and the alienee may require the acknowledgement to be made by a public deed or a private instrument; and in any such case the expenses shall be borne by the party requiring the written form.

The acknowledgement of the new tenant by the dominus brings about the one-time payment of 'laudemium', which is equivalent to one year's ground rent. This is known as 'the recognition fee'.



Dissolution of Emphyteusis:

Article 1515.(1) An emphyteusis is dissolved ipso jure if the tenement perishes in whole by a fortuitous event.

(2) If the tenement perishes in part, and the remaining part is not capable of yielding (giving a product or generating a financial return of a specified amount.) a rent equivalent to the ground-rent, the emphyteuta may not claim a reduction of the ground-rent, but he may demand the dissolution of the emphyteusis, restoring to the dominus the tenement with the improvements even if the remaining part of the tenement consists chiefly of such improvements.

Article 1516. It is incumbent (necessary for (someone) as a duty or responsibility.) on the emphyteuta to prove that the tenement has perished, wholly or in part, by a fortuitous event, and without any fault on his part or on the part of his family, or of his servants, guests or tenants or of the sub-emphyteutae not acknowledged by the dominus



Article 1517. It shall be lawful for the dominus to demand the dissolution of the emphyteusis and the reversion in his favour of the tenement together with the improvements if the emphyteuta owes by way of ground-rent a sum equal in amount to three yearly payments

Article 1518.(1) It shall also be lawful for the dominus to demand the dissolution of the emphyteusis and the reversion in his favour of the tenement together with the improvements, in addition to the repair of any damage, if the tenement has considerably deteriorated, and the emphyteuta fails to show that such deterioration has taken place without any fault on his part or on the part of the persons mentioned in article 1516.

(2) The same shall apply where the deterioration has taken place in the improvements executed on the tenement



Article 1519.(1) In the cases mentioned in the last two preceding articles, it shall be competent to the dominus to demand the dissolution of the emphyteusis and the payment of the arrears of the ground-rent, concurrently.

(2) Nevertheless, the court may, in each of the cases aforesaid, grant to the defendant a reasonable time, according to circumstances, for the payment of the arrears or for the execution of the repairs, and such time may, for a just cause, be extended once to a further reasonable time.



Article 1521.(1) A temporary emphyteusis ceases on the expiration of the time expressly agreed upon, and the reversion, in favour of the dominus, of the tenement together with the improvements takes place, ipso jure.

(2) Any action for the renewal of the emphyteusis for any cause whatsoever, except by virtue of an express covenant in the emphyteutical grant or in any other public deed, is abolished, in regard to any kind of property whatsoever.



Article 1522. In all cases of reversion, any hypothec, burden or easement, even though such easement may have been created without the act of the emphyteuta, shall be dissolved both in regard to the tenement and to the improvements; and the tenement together with the improvements shall revert unencumbered to the dominus, saving, in regard to any lease thereof, the provisions of articles 1530 and 1531.

1523.(1) Upon reversion, the emphyteuta shall not be entitled to any compensation in respect of the improvements, whatever their nature or value



Redemption by means of a contract

When redeeming the perpetual or temporary emphyteusis by means of a public deed, certain formalities are to be followed.

As in all public deeds, the details of the parties, in this case: the dominus and the emphyteuta/ tenant, are to be written down following the provisions in Chapter 55. Subsequently, the description of the property being redeemed must be accurate and distinguishable. This is because it may be the case that only a specific portion of the whole property subject to the Emphyteutical concession is being redeemed. For this reason, it is advisable to always attach a Land Registry site plan, so that one can identify the portion being redeemed.



Regard is also to be had to the amount of ground rent being redeemed. It is crucial to understand that the redemption of ground rent only extinguishes the obligation of the payment of the annual ground rent. This is because the original conditions of the Emphyteutical concession continue to apply and continue to burden the land.

For property which used to appertain to the Ecclesiastical Entities which then was transferred onto the Government in the year 1992, we find certain conditions such as that the property cannot be used for purposes which go against the teachings of the Church, and that it cannot be used for immoral purposes. These conditions continue to apply even after the redemption.



The deed of redemption also mentions the details of the original Emphyteutical concession, that is the Notary who published it, the date, and the commencement date, i.e. from when the concession was effective. In the case of temporary emphyteusis, it also mentions the of expiration of the emphyteusis. This is because it is important that apart from the redemption of the ground rent, the tenant acquires after the date of expiration the subsequent freehold property – “sussegwenti pjena propjeta”.

If the ground rent was revisable, it is also advisable to indicate both the original ground rent as well as the revised ground rent and the date of revision.



In the case of perpetual revisable ground rents and temporary ground rents (revisable and non-revisable) the price for the redemption is agreed upon between the parties themselves.

However if the dominus is a Government Entity such as the Lands Authority, the price is calculated on the basis of the applicable scheme of redemption.

The deed of redemption may also include new conditions, such as that the property is to remain residential for a specific period after the deed of redemption, or else that if the property is going to be sold, the Government needs to be informed.



Since title to the property is being transferred, the deed of redemption is subject to duty on documents and capital gains tax. If the property constitutes the ordinary residence of the emphyteuta, duty on documents is calculated at the rate of 3.5% on the price of redemption, otherwise it is calculated at the normal rate of 5%.

On the other hand, capital gains tax depends on the manner in which the dominus acquired the directum dominium, which could also be through inheritance.



The deed of redemption is to be registered in the Public Registry and it may also be registered in the Land Registry, depending on whether the property falls in a land registration area.

Properties which are subject to ground rent payable to the Government of Malta, are all registered in the Land Registry, and therefore the Land Registrar is to be informed of the redemption and the newly acquired directum dominium is now to be registered in the name of the emphyteuta.

After the redemption, the emphyteuta would have the utile dominium and the directum dominium, and therefore he would be the absolute owner of the freehold property.



Directum dominium vs dominum utile

Directum dominium is a Latin legal term meaning "direct ownership" or "superior ownership," commonly used in feudal and civil law to describe a landlord's or superior's ownership of property, distinct from the right to use it. It represents the legal title to the land, including the right to collect rent or services, while the tenant holds *dominium utile* (the right to use/occupy)





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