

Report on Case No U 0123

Complaint lodged by [omissis] on behalf of [omissis] and [omissis] (complainants) against the Office of the Commissioner for Revenue (CFR) as the said companies, that had acquired property and passed on the amounts due as duty on documents and tax to the notary public upon acquiring the properties. Complainants subsequently became aware that the notary had failed to pass on the said payments to the CFR with the consequence that the respective deeds remained unregistered at the Public Registry and would remain so until any duty, tax and or penalties due was paid to the CFR.

The complaint and facts leading to the grievance

In March 2020 [omissis] filed a complaint with this Office on behalf of the complainants that had acquired two properties in St Julian's and Valletta in 2018 and 2019 respectively. He explained that at the time of the publication of the relative contracts of sale, complainants had paid the amounts due as Duty on Documents as required by Law to the Notary. In respect of the deed where Malta Investments Ltd purchased the immovable property, the sellers and assignors paid the amounts representing the Final Withholding Tax and the Provisional Tax on Capital Gains to the Notary.

[omissis] stated that in terms of Article 51 of the Duty on Documents and Transfers Act¹ the notary is required to pay the amount collected as Duty on Documents (the amount payable by the purchaser on the acquisition of

¹ Chapter 364 of the Laws of Malta.

immovable property), to the Commissioner for Revenue (CFR), within 15 working days. Article 51(1) in fact explains that:

“51. (1) Where a notary receives a deed of transfer of any immovable property or a deed containing a declaration made in accordance with article 33, whether duty is chargeable thereon in accordance with this Act or otherwise, he shall, within fifteen (15) working days and together with the payment of such duty, if any, give notice of such deed to the Commissioner in such form and containing such particulars as may be prescribed”

Likewise, Article 43(9)(b) of the Income Tax Management Act² obliges the Notary to pay the amount collected as tax (Final Withholding Tax, the tax payable by the vendor) or provisional tax (Provisional Tax on Capital Gains, the Tax payable by the assignor) on the transfer of immovable property, to the Commissioner for Revenue (CFR), within 15 working days and “... *Any failure by a notary in connection with the collection and payment of tax or provisional tax, as the case may be, under this article shall for all purposes of the Duty on Documents and Transfers Act, be deemed to be a failure of his duties under that Act.*”

It however later transpired that the Notary, who renounced to the exercise of the profession of Notary Public with effect from 10 December 2019³, had not passed on the amounts collected from the parties to the CFR. This resulted in the legal documentation pertaining to the two properties not being in order as the deeds were not registered with the Public Registry, and the Land Registry (where necessary), as the Public Registry refuses to register such deeds unless the CFR pre-stamps the note of enrolment earmarked for presentation thereat.

² Chapter 372 of the Laws of Malta.

³ Notice 1636 published in the Government Gazette of 20 December 2019.

Complainants maintain that by taking this stance Government is subjecting the registration of the properties acquired legitimately and in good faith through public deeds by third parties, to the Government's own interest of having collected the duties/taxes due on such transactions, from the Notary. Complainants maintain that the documentation relevant to these transfers is not in order as a result of the actions of the Notary – a public officer authorised by the Government to collect its duties/taxes – because the notary failed to fulfil a duty he was entrusted by law, which obligation is completely alien to complainant's rights. Government has thus promulgated legislation where the proprietary rights of third parties are put at risk and their legal title being prejudiced, if one of its appointed public officers fails to perform the assigned duties, independently of third parties having done all that is required by them at law.

Complainants remark that although having ownership of the properties, as ownership passes at the time of the signing of the actual deed of sale, the legal documentation relevant to these transactions is not in order and the properties are still registered in the name of the vendor. Consequently, they can neither dispose of their properties in favour of third parties, nor take a loan. The CFR will moreover only accept to stamp the notes of enrolment earmarked for registration at the Public Registry if the amounts unpaid by the Notary are paid to the CFR, including any penalties due for late registration.

Moreover, even if complainants opt to repay the Duty on Documents under duress, to address the unfair prevailing situation, the Vendors/Assignors have absolutely no interest to repay once again the amounts already paid by them as Final Withholding Tax/Provisional Payment of Tax on Capital Gains, for

properties disposed by them in the past, and in which they exercise no interest whatsoever.

Complainants claim that the inter-connected requirements of the different Government Departments which have been in place since the late 1990s, are at least in so far as they relate to this present situation definitely unreasonable, cause third party harm and can even possibly be considered as unconstitutional. In this regard they maintain that the following fundamental principles of Constitutional Administrative law come into play:

- Article 32 of the Constitution, in respect of the fundamental rights and freedom to the enjoyment of property and the protection of the law; and
- the Administrative principles in respect of reasonableness, legitimate expectations and good faith.

Complainant therefore sought the intervention of the Ombudsman so that the current **untenable situation**, where a Notary (who is a public officer), has failed to carry out the entrusted obligations (and in particular failed to pay to the CFR amounts which the notary has collected on behalf of the CFR from the parties to the public deed), should not lead to third parties being subjected to hardship, as a result of the Notary's failure.

In view of the fact that, having reviewed the letter of complaint, it appeared that the grievance had not been raised with the relevant Ministries, [omissis] was requested to refer the matter for the attention of the said ministries, as the Office of the Ombudsman is one of last resort and to revert to this Office should he not

receive a reply within a reasonable time or should he not be satisfied with the feedback received.

In July 2020, [omissis] referred the grievance once again to this Office as he was not in agreement with the stand taken by the Office of the State Advocate, that had replied to a legal letter sent by complainants to the Minister for Justice, Equality and Governance, the Minister for Finance and the Minister for Home Affairs, National Security and Law Enforcement. In the said reply the Office of the State Advocate observed the following:

“After having sighted your letter along with the documentation attached, the respondents are of the view that Government has fully complied with its obligations emanating from the Constitution and the European Convention when enacting laws regulating the payment of tax on transfer of properties.

As per article 10A of Chapter 55 of the Laws of Malta (Notarial Profession and Notarial Archives Act), a notary has to be adequately insured against all risks of professional liability, during time he is exercising his profession. Regulations 3 of subsidiary legislation 55.07 (Notaries (Compulsory Insurance) Regulations) states that from 1st January 2013, every notary shall be at all times adequately covered by a policy in terms of article 10A of the Act (Chapter 55) for a minimum sum of two hundred and fifty thousand euro (€250,000) or such other sum as may be determined by the Minister from time to time, against any breach, committed by the notary and, or the notary’s employees in a policy year.

Moreover, according to regulation 2 of the above quoted subsidiary legislation, a breach which gives rise to an indemnity claim includes any

negligent act, error, breach of confidentiality, omission, loss of documents, committed or happening during the exercise of the notary's functions. With reference to the circumstances surrounding your claim, if the notary mentioned in your letter has indeed failed to pay tax as described in your letter, then there is a potential situation of omission on the part of the notary and a party may file a claim for indemnity with the insurance company of the said notary whom has failed to pay such tax. Consequently, once this potential omission has been redressed by means of payment of the taxes from the Professional Indemnity Insurance Policy of the notary, then the registration of the transfer of the property may take place.

In view of the above and in compliance with the applicable laws, the respondents underline that it is not the case that the legislator has failed to provide a remedy to the situation as described in your letter dated 27th April 2020.”⁴

Correspondence and communications exchanged with the respective ministries/entities

This Office sought comments of the Ministry for Finance and the CFR, the Ministry for Justice, Equality and Governance and the Ministry for Home Affairs, National Security and Law Enforcement, as these were responsible for the entities involved in complainants' predicament in August 2020. This Office explained that this case was identical in substance to another complaint that had been referred to the Ministries' comments some weeks before. It further noted that the replies already provided to complainants in the case under examination had not addressed the concerns expressed by [omissis], emphasising that in these cases

⁴ Letter dated 27 May 2020, the content of which was confirmed in subsequent correspondence dated 15 July 2020.

the principles of reasonableness and those related to legitimate expectations should be considered.

The **Ministry for Home Affairs, National Security and Law Enforcement** explained that its involvement in the case was limited to the role of the Public Registry in the registration of public deeds. It explained that the duties of the Public Registry are regulated by the following legislations:

- The Notarial Profession and Notarial Archives Act⁵;
- The Public Registry Act⁶; and
- The Duty on Documents and Transfers Rules⁷.

In terms of Article 50(1) of the Notarial Profession and Notarial Archives Act:

“Every notary must, within fifteen working days from the date of the act deliver to the Director of the Public Registry a note of –

a) any act inter vivos transferring the ownership of immovable property or other real rights over such property; ...”.

Consequently, the notary who draws up the deed is responsible to enrol or register a note at the Public Registry Searches Unit within the stipulated time-frame. Moreover, Regulation 8(1) of S.L. 364.06 provides that *“For the purposes of article 51 of the Act⁸, the notary shall give notice of the relative deed to the*

⁵ Chapter 55 of the Laws of Malta.

⁶ Chapter 56 of the Laws of Malta

⁷ S.L. 364.06

⁸ Article 51 of the Duty on Document and Transfers Act provides that:

*Commissioner⁹ and it shall **not** be lawful to deliver a note of enrolment for registration in the Public Registry of such deed before it has been ascertained that such notice has been filed with the Commissioner”¹⁰. (emphasis added)*

The Ministry therefore explained that the Public Registry Searches Unit cannot accept a note for enrolment unless the tax and/or duty have been duly paid to the CFR, further observing that the Public Registry Act does not provide for the eventuality of a notary not fulfilling his obligations according to law. It further noted that the notary would be liable to criminal and/or civil proceedings if it is established that he had failed to pay the dues owed to the Government of Malta.

“(1) Where a notary receives a deed of transfer of any immovable property or a deed containing a declaration made in accordance with article 33, whether duty is chargeable thereon in accordance with this Act or otherwise, he shall, within fifteen (15) working days and together with the payment of such duty, if any, give notice of such deed to the Commissioner in such form and containing such particulars as may be prescribed: (emphasis added)

Provided that no notice shall be given where the Government or the Housing Authority is the transferee.

(2) Any notary who fails to give such notice within forty (40) working days together with any relative payment as provided in sub-article (1), or gives incorrect or incomplete particulars or details shall incur interest at a rate as prescribed by the Minister on any duty due on the transfer to which such duty refers which interest shall start accruing from the expiration of the fifteen (15) working days mentioned in sub-article (1), provided that the total interest shall in no case exceed the amount of the said duty.

(3) Interest imposed under sub-article (2) shall be imposed by the Commissioner and shall be paid to him, and all actions for the recovery thereof shall be brought by the Commissioner before the courts of civil jurisdiction in terms of article 466 of the Code of Organization and Civil Procedure.

⁹ CFR.

¹⁰ *“(2) The notice shall be made on the forms or means as supplied by the Commissioner for this purpose and shall contain the information required in respect of a deed of transfer of any immovable property and in respect of a deed containing a declaration made in connection with article 33 of the Duty on Documents and Transfers Act.*

(3) The Commissioner shall not accept payment of the relative duty before the said notice has been filed.”

In her reply dated 24 August 2020, the **Director (Property Tax) of the Capital Transfer Duty Division**, confirmed the content of the letters of the Office of the State Advocate and iterated that the CFR does not have the power to waive the payment of taxes in cases where a notary fails to register a deed, even if such taxes would have been given by the parties to the notary, as there is no provision allowing such a waiver. Thus, if a different notary files a notice of a deed published by a defaulting notary, the tax still needs to be paid. It was explained that the position taken by the department was that the taxpayer had to seek a remedy through court proceedings against the notary to claim the amounts which the taxpayer would have paid.

It was further claimed that although a notary is a public officer, in the case *C Galea et vs Nutar Pubbliku Dott. Pierre Falzon*¹¹ the Court of Appeal held that the notary has to exercise professional diligence in the exercise of his profession and thus the CFR should not be held responsible for the notary's failure to give notice of a transfer and pay the tax and duty due. The Department stated that similar cases had been rectified by the publication of a new contract by another notary and the repayment of taxes. Court proceedings against the defaulting notary generally find the notary liable for damages in favour of the contracting parties.

The **Ministry of Justice** informed that the grievance had been discussed with the Office of the State Advocate and the Chief Notary to Government. It explained the following:

¹¹ Application no. 286/2002/1 decided on 9 October 2009.

- In line with Article 17(2) of Chapter 55 of the Laws of Malta, the notary keeper (in this case the Chief Notary to Government) is not responsible for the payment of any registry fees, duty, tax, impost or penalty due by, or which could have been imposed on the notary who drew up the contract of sale in terms of past or current fiscal legislation or any other law, unless and until such time as the notary keeper is put in funds to be able to pay the same. Therefore, the Chief Notary to Government must first receive any pending taxes and duties from the parties to the contract before proceeding to enrol the contract at the Public Registry as the latter does not allow the enrolment of public acts unless all taxes and duties have been settled with the CFR.
- The State has provided an adequate and effective remedy to complainant as Article 10A of Chapter 55 obliges notaries to be adequately insured against all risks of professional liability during the time they are exercising their profession. This Article is further complimented by Regulation 3 of the Notaries (Compulsory Insurance) Regulations which requires notaries to be adequately covered by a policy for a minimum of €250,000 or such other sum as may be determined by the Minister from time to time, against any breach committed by the notary and, or the notary's employees in a policy year.
- Regulation 2 gives a wide definition of what constitutes a breach, by providing that a breach which gives rise to an indemnity includes *“any negligent act, error, breach of confidentiality, omission, loss of documents, committed or happening during the exercise of the notary's functions under any law at any time in force in Malta, and for any preparatory, ancillary or consequential work done with respect to same, by the notary or by his employees, and includes any act which causes damages resulting from a criminal or fraudulent act by any of the notary's employees in the performance of their duties if they are in his*

employment, or in furtherance of the notary's functions if they are third parties engaged by him".

The notary's failure to pay the taxes and duties collected from the contracting parties to the CFR amounted to an omission, which falls within the aforementioned definition. The complainant therefore had an effective remedy as she could have submitted a claim for indemnity with the insurance company with which the notary was insured, which indemnity should be sufficient to cover the amounts paid by the clients. Should the insurance company refuse to honour its obligations under the insurance policy complainant can sue the company; and

- it is the client who engages the notary and Government cannot be held responsible to waive tax/stamp duty if the notary has failed to exercise professional diligence in the exercise of his profession.

[omissis] reacted claiming that the arguments raised were "*frivolous, pitiful and demeaning*". He insisted that when collecting taxes and duty due on the publication of a contract, the notary is acting as a mandatary of the Department and that therefore the CFR should waive the payment of the dues already paid by the contracting parties to the notary.

It was further pointed out that the argument put forth by the Ministry for Justice, following consultation with the Office of the State Advocate, was incorrect. Complainants could not claim payment from the insurance company with whom the notary had been insured, as a claim can only be submitted by the insured. Moreover, policies issued to notaries are those of professional indemnity and not client-money protection insurance policies. The insurance company will only proceed with an assessment of the notary's claim if it relates to his professional

work and will not proceed to accept a claim by a notary when this latter has fraudulently and knowingly misappropriated funds entrusted to him by clients. In fact, the requirement imposed on notaries to take out professional indemnity insurances was introduced following the introduction in applicable legislation of the obligation that notaries would be responsible for the property title – thus, should it result that the property title of the property subject to a contract is defective, the notary would be able to revert to the insurer to recover damages claimed by the parties.

He maintained that the judgement of the Court of Appeal referred to by the CFR s revolved around a promise of sale agreement and was being quoted out of context. He remarked that while there is no doubt that all professionals are required to act responsibly in the exercise of their profession, the CFR is ignoring completely the fact that the notary is the CFR's mandatory and that the contracting parties are obliged to act in line with the law. Consequently, they cannot be prejudiced because the person mandated by the CFR to collect dues owed to it by law failed to act with professional diligence.

Meanwhile this Office was copied with correspondence addressed to the CFR, wherein a refund was requested for the duty on documents and interest (charged by the CFR for late registration) which had been paid by one of the complainants¹² on 15 and 16 September 2020.

Having taken into consideration the arguments raised by all parties involved, this Office sought further feedback from the relevant Ministries and the Office of the State Advocate. In its correspondence this Office further remarked the following:

¹² [omissis] – Letter received 3 December 2020.

“This Office observes that the replies provided to this Office did not address the concern expressed in our letter dated 4th August 2020 namely, that contracting parties acting in good faith and in accordance with the law are being prejudiced and subjected to undue hardship because they are unable to register property legally acquired by them as a result of a failure of the notary public (who is carrying out the functions of a public officer when collecting funds in the name and on behalf of the Commissioner for Revenue) to abide by the legal obligations imposed by law. While, there might be no legal provision allowing the CFR to waive the repayment of the tax and duty already paid by the contracting party to the notary, the principles of fairness and reasonableness dictate that the Public Administration implements policies so as to ensure that the failure of the notary does not prejudice those acting in good faith and in accordance with the law. This Office, regrettably notes that the authorities seem to be completely insensitive to the hardship being imposed upon innocent contracting parties by requiring them to re-effect payment and advising them to seek remedy through court action – action which involves additional expenses which the parties might not afford, additional time during which the parties cannot fully exercise their rights of enjoyment on the property acquired and which might not lead to the recovery of the amounts repaid if the notary does not have the necessary funds. Innocent parties are currently being penalised as a result of procedures applied by the relevant departments when they committed no breach on their part. Claiming that the notary was chosen by the parties and that therefore government cannot be held responsible is illogical in the opinion of this Office as the notary is a public officer and the parties could not have foreseen that the notary would not deposit the funds with the CFR. It also appears that the insurance which notaries are required to have in line with the legislation introduced does not

cover cases where the notary has fraudulently and intentionally misappropriated funds.

This Office therefore encourages the Ministries and the State Advocate to consider the difficulties and hardship encountered by those in complainant's situation and to discuss what can be done to implement procedures to protect and limit the prejudice suffered by contracting parties through no fault of their own.”¹³

Following the aforementioned, **the Director (Property Tax) within the Capital Transfer Duty Division** in an email of 27 January 2021 informed this Office that the CFR was discussing a number of remedies to address similar situations. The Director elaborated that in collaboration with the Notarial Council, the Office of the CFR plans to organise an educational campaign in the near future to educate the public about what to look for in such situations – for instance, that if a receipt is not received from the CFR within three weeks from the date of the deed, they can contact the Department to verify whether the amounts due had been passed on to the CFR, so that service users can take action against the notary more promptly, rather than finding out by chance that their deed has not been registered.

Moreover, having taken note of the concerns raised by the Office of the Ombudsman regarding the additional expenses which currently need to be incurred by the contracting parties in order to take criminal and civil action against the notary, internal discussions had been initiated to consider more effective remedies for these situations. The Directorate however observed that such a process would necessarily take some time, since it involves planning,

¹³ Email of the 7 January 2021.

carrying out any necessary amendments to the legislation, as well as implementation.

Additional feedback was received from the Office by the CFR on the 5th April 2021 further elaborating on the previous reply and commenting on the observations made by this Office. The CFR stated the following:

- while it is true that the notary as per Chapter 55 of the Laws of Malta is a public officer and is expected to exercise his/her profession with due diligence and full responsibility, it is also the responsibility of every tax payer to: a) diligently choose the right professionals to whom they delegate their power to pay on their behalf the tax due; and b) to take the proper precautions to avoid the risks of such failure;
- the statements made in the Ombudsman's correspondence that the authorities "*... seem to be completely insensitive to the hardship being imposed upon innocent contracting parties by requiring them to re-effect payment and advising them to seek remedy through court action ...*" and that "*... innocent parties are currently being penalised as a result of procedures applied by the relevant departments when they committed no breach on their part*" are factually and legally unfounded. Chapter 364 of the Laws of Malta stipulates clearly the rights and duties of the taxpayer, notaries and the CFR and reverting the aggrieved parties to seek court action is not an insensitive approach but the rightful option for these cases to be independently and impartially investigated and adjudged by the Courts. In a democratic society those accused of a crime or contravention are deemed innocent until proven guilty beyond reasonable doubt before a court of criminal jurisdiction, or proven to have acted contrary to law on a basis of probability before a court of civil jurisdiction. It is therefore

inconceivable that the CFR assumes the role of judge and decides beyond what the law provides by waiving the taxpayer's obligation to pay the tax due – this will create a precedent and ignite a scenario where the alleged offender is denied a fair trial;

- suggesting a waiver of the payment of taxes in these circumstances is very dangerous as this can instigate room for abuse by those who wilfully intend to evade paying the tax due. Such a precedent would lead to a situation where people will ultimately expect to acquire ownership notwithstanding the tax is unpaid.
- the proposal made would inevitably lead to abuse of power and the initiation of law suits by all parties involved for a breach of laws and the fundamental human rights involved throughout the said process, particularly the right to a fair and impartial hearing;
- the remedy to be sought in these cases is that of the institution of civil and criminal proceedings against the notary who allegedly acted negligently or with the intent to defraud his clients. The Judiciary is the guardian of human rights and the Constitution and ensures that victims are compensated for the damages suffered from those who breached the law and possibly re-instate these latter to their *status quo ante*;
- this unfortunate situation stems from the lack of knowledge the public has about the law and how the tax system works and not from how the law is enacted or implemented. The public who delegates a notary as their mandator (*recte* mandatary) to pay the duty or tax due, should not hand over cash. They should use a cheque or bank statement (*recte* draft) as this serves as evidence of how and

when the money was passed on to the notary. Moreover, the general public should know that one can verify with the office of the CFR whether the tax was fully paid after 15 working days from the signing of the contract. Chapter 364 imposes penalties on notaries who fail to comply with the obligations imposed upon them by the Act; and

- ultimately this is not a question of why the authorities do not co-operate with the public when faced with similar situations, but rather why the public still blindly trusts their chosen notary without taking the proper precautions, notwithstanding other known cases of notaries who failed to pay tax due on behalf of their clients. For this reason, the CFR and the Notarial Council are working to promote an educational campaign to educate the public about the workings of the procedure of duty on documents and transfers, including information about the duties of notaries and those of the tax payer.

This Office also sought feedback from the **Notarial Council** that had publicly commented in 2021 about similar situations and explained that it was collaborating with the CFR to implement an integrated online system that would allow real time registration of deeds and the payment of taxes, so that these occurrences are avoided. The Council explained the following:

- Notaries, as public officers, are entrusted by the state to attribute public faith and ensure legal certainty for citizens and businesses requesting their services. Anything that tarnishes or appears to tarnish their independence and impartiality or diminishes legal certainty is taken seriously by the Notarial Council and relevant authorities. The law strictly regulates the procedures to be followed in such cases. Article 88 of Chapter 55 requires the Council to “... *inquire into the professional conduct of any notary which is considered to be*

repugnant to the decorum of his profession, or into any charge of negligence or abuse made against any notary in the exercise of his profession ...” unless the power to take cognizance and deal with this conduct is vested in another authority by the legislator. In the case under examination, there is a clear element of fraudulent misconduct and the power to take action and prosecute rests with the police and the office of the Attorney General. The Council intervenes to direct these entities to make representations to the Court for the suspension or revocation of the notary and for the appointment of a notary keeper;

- While exercising their profession notaries are obliged to keep an indemnity insurance in line with Article 10A of Chapter 55 and S.L. 55.07. This insurance will not cover instances of criminal activity or fraud, leaving aggrieved parties in a limbo as to how they are to have their rights redressed in case of fraudulent misconduct;
- Currently Government insists that the rights of the aggrieved parties can only be registered if all the amounts due for property transfer tax and duty on documents are remitted. This in essence requires a double payment on the part of the purchasers, which in itself creates an added burden on the juridical system as the purchasers would then have to sue the fraudulent notary civilly. The prejudice is aggravated when there are insufficient assets to satisfy the outstanding amounts;

The Council has repeatedly made its submissions to the Government for the situation to be addressed by having an adequate system of timely redress, whereby the deed will be registered through the Office of the Chief Notary to Government (Keeper of the Acts of the defaulting notary) and Government reserves the right of action against the notary, as in any other case where money

is owed to the public exchequer. One needs to balance Government's fiscal requirements with the interest of safeguarding the juridical order and the rights of property of private citizens, which outweigh fiscal considerations. This especially in the light of the fact that had the modern adequate systems suggested been properly implemented, such abuse could have been detected and stopped upon inception;

- there was a lack of action or delay by aggrieved third parties, which although exposed to instances of similar abuse never formally brought their case to the Council's attention or to that of other competent authorities for proper investigations. Had such action been taken at the first occurrence or suspicion, the instances of such fraudulent misconduct could have been mitigated;
- the Notarial Council has formulated a clear agenda for the digitisation of all notarial services, in particular for a paperless property tax payment and a registration system. This aims to achieve a more efficient, secure and transparent system using a combination of decentralised technology, smart contracts and self-executing tokens having built-in features and verification, like escrow and KYC mechanisms, also through the use of Distributed Ledger Technologies (DLT).

The idea of an integrated system that brings together all the key elements in property transfer, registration and payment was discussed in a dedicated Symposium in October 2016. A dedicated framework was subsequently developed and presented to various key players over the past years, including the Office of the Principal Permanent Secretary, the Ministry for Justice, the Ministry for Finance, Cabinet and the Office of the Prime Minister. Presently, the online registration and payment of deeds had been initiated, but the current

implementation leaves the crucial element of tokenisation through DLT out of the workflow.

In August 2021 this Office was informed that the Office of the State Advocate was discussing the matter internally and may have devised a possible solution which however required further discussion with the respective stakeholders.

Matter brought to the attention of the Court of Revision of Notarial Acts¹⁴

Before proceeding with my considerations about this grievance, this Office considers it appropriate to refer to the comments made by the Court of Revision of Notarial Acts after this issue was brought to its attention by [omissis]¹⁵. In the said correspondence it further transpired that both companies (complainants) had paid the amounts due by way of tax and duty so as to be able to register the deeds¹⁶.

From a review of the documentation made available to this Office it transpires that by application filed on 11 May 2021 [omissis] filed an application to bring to the attention of the Court “... *l-anomalija li qed tinholoq meta Nutar li jkun ġabar it-taxxi dovuti mill-partijiet fuq att pubbliku jibqa’ ma jgħaddix lill-Kummissarju tat-Taxxi Interni u minħabba f’hekk l-att ma jkunx jista’ jiġi insinwat.*”. The Court had ordered notification to the CFR, the State Advocate, the Attorney General and the Director of the Public Registry. Respondents had raised the procedural inadmissibility of the application and noted that the issue

¹⁴ Application No 406/2021 decided on 19 July 2021.

¹⁵ Letter dated 13 October 2021.

¹⁶ [omissis] had effected payment of duty on documents, provisional capital gains and final withholding of tax on the 27 July 2021.

went beyond the remit of the Court that is limited to the supervision of all notaries, the Notarial Archives and the Public Registry in terms of Article 110(1) of Chapter 55. The CFR had raised identical arguments to the ones raised with this Office, as did the Director, Public Registry who further pleaded that the contract could not be registered once the relative taxes had not been passed on to the CFR as the Public Registry would be in breach of the relevant provisions of the law if it were to accept such registration. Said replies were notified to the applicant who insisted, as in the case under examination, that once the notary is appointed to collect the tax and duty due on a transfer on behalf of the CFR, there is a mandator-mandatory relationship between the two and consequently the parties to the contract should not be subjected to penalties, by being requested to pay once again the tax and duty which they had already passed on to the notary, in line with their obligations at law.

Having considered the submissions of all the parties involved the Court declared that the application filed was not admissible, and made the following observations:

“Pero`, fiċ-ċirkostanzi, hasset id-dmir li tinnotifika lill-uffiċjali pubbliċi li huma involuti biex tissentizhom dwar il-portata ta’ din il-problema li qed iġġib hafna tbatija fuq il-partijiet f’atti nutarili li jiġu traduti fil-fiduċja tagħhom minn xi Nutar li huwa ukoll uffiċjal pubbliku skont il-liġi. Mit-tenur tar-Risposti jidher li sfortunatament dan l-għan tal-Qorti ma intlaħaqx.

Illi huwa ċar li de lege lata u sakemm il-liġi tibqa’ kif inhi l-uffiċjali pubbliċi involuti ma jistgħu jagħmlu xejn fir-rigward ta’ dawn il-kazijiet hliet li jissolevaw dawn il-kazijiet mal-Ministeri li huma jaqgħu taħthom biex

jgħarrfuhom dwar din l-anomalija u jissoleċitaw xi forma ta' rimedju jew palattiv li għall-inqas inaqqas mill-konsegwenzi tal-aġir abbużiv tan-nutar ...”

This Office subsequently sought feedback from the Ministry of Justice about the outcome of the discussions that had been ongoing with the various stakeholders, pointing out that it shares the same concerns expressed by the Court. This Office had in fact communicated with the relevant entities on various occasions soliciting them to consider the difficulties and hardship encountered by those in complainants' situation and to implement procedures to protect the public and limit the prejudice suffered by contracting parties as a result of an omission on the part of defaulting notaries. No update was however provided to this Office.

Considerations

Complainants observe that notaries are considered public officers by applicable legislation and maintain that they act as mandatories of the CFR when collecting stamp duty and transfer tax on public deeds. They insist that the notary's failure should not prejudice the rights of third parties who acted in good faith and in accordance with applicable legislation when they deposited the amounts due to the CFR with the notary. In their opinion, it is unreasonable to burden laypersons with the obligation to oversee the actions of public officers in the proper discharge of their duties and to hold the former liable for the notary's failure to do so, obliging them to make good on the misconduct of a public officer. They contend that the CFR should bear responsibility for the notary's conduct as the latter is carrying out the duties of a public officer representing Government and not the parties to the contract - Government should therefore register these deeds without

requesting further payments. They further observe that the professional indemnity which a notary is obliged to have in terms of Article 10A of Chapter 55 does not extend to criminal and/or fraudulent acts of the notary, as in the case under consideration.

The CFR noted that there is no provision in the law allowing a waiver of the payment of taxes or/and stamp duty in cases where a notary fails to register the deed, even if said dues would have already been tendered by the parties to the notary. According to the CFR any such waiver could lead to abuse by those seeking to avoid paying tax. The Department claims that although the notary is a public officer in terms of Chapter 55, the Court of Appeal considered that the notary is required to exercise due diligence while practicing his profession, and consequently the CFR should not be held responsible for the notary's failure to give notice of a transfer and payment of the tax and duty due. The Department contends that taxpayers are required to diligently choose the right professionals to whom to delegate their power to pay on their behalf the tax due and to take proper precautions to avoid the risks of such a failure, such as for instance, by not handing over cash to the notary.

According to the CFR rectification of the purchaser's title to the property can only be made by the registration of the contract by another notary (in this case the Chief Notary to Government) and the repayment of the tax and duty due. The purchaser would then have a right of action against the defaulting notary who is generally found liable for damages by the Courts, that are the guardians of human rights and ensure that victims are compensated for the damages suffered from those who breached the law, and possibly re-instate the former to their status *quo ante*. The Department opines that similar situations stem from a lack of knowledge about how the tax regime works, noting that the public still trusts

blindly their chosen notary without taking precautions, notwithstanding known cases of notaries who failed to pay tax due on behalf of their clients.

On its part, the Ministry for Justice contends that the State has provided an adequate remedy to those in complainant's predicament referring to Article 10A of Chapter 55 which requires notaries to be adequately insured against all risks of professional liability while in the exercise of their profession. According to the Ministry the law gives a wide definition to the term 'breach' and the Notary's failure to pay taxes and duties collected from the contracting parties constitutes an omission which falls within the definition of term 'breach' in Regulation 2. Complainants can therefore seek compensation from the insurance company after they repay the dues already paid to the notary.

It is to be clarified that this Office does not concur with the interpretation given by the Ministry of Justice and the Office of the State Advocate of the term 'breach' contained in Regulation 2 of the Notaries (Compulsory Insurance) Regulations. This Office considers that the term 'omission' in Regulation 2 does not include acts of a criminal or fraudulent nature committed by a notary, but refers to other omissions of the notary in the carrying out of the duties connected or ancillary to the publication of notarial acts and other functions specified by Chapter 55 (as opposed to 'acts which cause damages resulting from criminal or fraudulent acts' committed by third parties in the notary's employment or engaged by him', which are specifically mentioned in the said definition and which appear to be covered). As rightly pointed out by the Notarial Council the professional indemnity which notaries are obliged to keep will not cover instances of criminal activity, thus leaving aggrieved parties in a limbo as to how they are to obtain redress in cases such as the one under consideration. Moreover, the contracting parties cannot claim payment from any professional indemnity

insurance subscribed to by the notary, as a claim can only be submitted by the insured – that is, the defaulting notary, who in this case cannot be expected to submit such a claim, when he himself reported his actions to the Police and has been charged with aggravated misappropriation¹⁷. The insurance policies issued to notaries are those of professional indemnity and not client-money protection insurance policies, and the insurance company will only proceed with an assessment of the notary’s claim if it is related to his professional work – it will not proceed to accept a claim by a notary when this latter has allegedly fraudulently and knowingly misappropriated funds entrusted to him by clients.

Moreover, this Office cannot fault the stand taken by the Public Registry. A review of existing provisions applicable to the case at hand prohibits the Searches Unit from accepting a note of enrolment for registration unless notice and duty due has been paid to the CFR. As observed by the relevant Ministry, Chapter 55 does not provide for the contingency of a notary not fulfilling his obligations in terms of the law. As observed by the Court of Revision of Notarial Deeds in the aforementioned decision, as the law stands the public officers involved are unable to do anything in regard to these cases “... *ħlief li jissolevaw dawn il-każijiet mal-Ministeri li huma jaqghu taħthom biex jgharrfuhom dwar din l-anomalija u jissoleċitaw xi forma ta’ rimedju jew palattiv li għall-inqas inaqqas mill-konsegwenzi tal-aġir abbużiv tan-nutar...*”.

This Office acknowledges that presently the law does not provide for a waiver of the payment of taxes or/and stamp duty in instances when a notary fails to register the contract and convey the funds entrusted to him by the parties to the CFR as

¹⁷ The said information transpires from the acts of a civil case instituted against the same notary – Application No. 1179/20.

required to do by law, as complainants suggest. It also concurs that notaries are bound to exercise their profession prudently and with due diligence. In this regard this Office refers to the decision of the Court of Appeal in the case *C Galea et vs Nutar Pubbliku Dott. Pierre Falzon*¹⁸, referred to by the CFR in his replies to this Office, where the Court noted the following about the functions of a notary public:

“14. Il-funzjoni tan-Nutar Pubbliku Malti hija doppja: dik ta’ uffiċjal pubbliku, fejn in-nutar għandu l-funzjoni illi jagħti fidi pubblika lil atti jew dokumenti li jirredigi u li jirċievi, u dik ta’ professjonist liberu u indipendenti, li għandu responsabbiltà lejn il-partijiet li jkunu talbu s-servizz tiegħu u jkun allura parteċipi fl-att minnu redatt. Dawn iż-żewġ funzjonijiet jipproteġu żewġ interessi separati iżda li huma intrinsiċi fil-professjoni ta’ nutar pubbliku; in-nutar għandu r-responsabbiltà li jissalvagwardja l-interess pubbliku kif ukoll l-interess privat. In-nutar pubbliku jissalvagwardja l-interess pubbliku billi jirredigi bil-formulatajiet (recte formalitajiet) kollha skont il-liġi, atti fost il-ħajjin u testmenti, jagħtihom fidi pubblika, jippreservahom u jagħti kopja u estratti ta’ dawn l-atti u testmenti (art. 2(1) tal-Kap 55 - Att dwar il-Professjoni Nutarili u Arkivji Nutarili). In-Nutar huwa obligat li jissalvagwardja l-interessi tal-partijiet illi jkunu inqadew bis-servizz tiegħu billi, inter alia, jassigura ruħu li jistabbilixxi l-volontà tal-partijiet u wara li jkun irrediga l-att jaqrahulhom u jfissirulhom, isaqsihom jekk dan hux skont il-volontà tagħhom (art. 25(4) Kap 55)...Il-funzjoni pubblika u l-funzjoni ta’ libero professionista tan-nutar pubbliku ma tistax tiġi separata u tali dottrina hija ormai aċċertata minn diversi ġuristi prominenti Taljani...

¹⁸ Appeal no. 286/2002/1 decided on the 9th October 2009.

15. Il-funzjoni pubblika tan-nutar pubbliku ġgħib magħha responsabbiltajiet li jaqgħu taħt l-isfera pubblika rregolati mill-Kapitolu 55 tal-Liġijiet ta' Malta. Jekk nutar pubbliku ma josservax il-forma li biha huwa għandu jirredigi l-atti notarili kif ukoll il-proċeduri preskritti, allura jkun qed jivvjola dan l-Att, fil-kapaċità tiegħu ta' uffiċjal pubbliku. Tali responsabbilita' normalment titqies bħala waħda extra-kontrattwali. Min-naħa l-oħra, in-Nutar Pubbliku għandu wkoll responsabbilità kuntrattwali, fil-kapaċità tiegħu bħala libero professionista, u dan a bażi tal-mandat mogħti lil mill-partijiet.

...

16. Jekk imbagħad jirrizulta minn xi liġi oħra, barra dik notarili, illi n-Nutar Pubbliku kellu d-dover li jaġixxi b'ċertu mod f'ċirkostanzi partikolari jew li kellu xi obbligu impost fuqu minn xi liġi partikolari, allura jekk jonqos minn dawn id-dmirijiet, titwieled ir-responsabbilità akwiljana li hija msejsa fuq il-prinċipji tad-delitt u kważi delitt fil-Kodiċi Ċivili.”

Does this however entail that the Public Administration, that is in a stronger position to apply the law and the sanctions therein envisaged vis-à-vis the defaulting notary, should persist in its stance that the proprietary rights of the aggrieved purchaser can only be registered once the amounts due for the property transfer tax and duty on documents are proffered to the CFR, without providing some form of redress to said aggrieved contracting parties? This Office has reflected on the arguments raised by the CFR in the reply dated 27 January 2022 at length, and considers some of said arguments as unfounded, particularly the contention that a waiver of the payment of taxes in these circumstances could lead to abuse by those who wilfully intend to evade paying the tax due; and that a waiver could bring about a situation where people will ultimately expect to acquire ownership notwithstanding that tax and duty due are unpaid.

Complainants’ proposal for a waiver of tax and duty due – amounts which have already been passed on to the notary in line with the provisions of applicable legislation – refers to “*the specific circumstances under examination*” and is aimed at alleviating the hardship caused by the actions of a public officer. While there is no doubt that the parties to a contract must act diligently in their choice of notary and that they should take proper precautions to avoid similar risks (particularly that of tendering payment in cash), it is noted that the public’s chances of becoming aware of similar behaviour by a notary are in practice very limited and generally depend on such behaviour being rendered public through the media. It is also noted that legal professionals can only exercise the notarial profession after having satisfied the requirements stipulated by the legislator for the attainment of the requisite warrant and having attained said warrant – the warrant, granted by the State, can be looked upon as a guarantee provided to the service users that the service provider (the notary who is in possession of a warrant) has the skills and competences to perform the duties and functions of the profession.

The CFR’s standpoint basically obliges a purchaser, who acted in good faith and in accordance with the law, to make not only a double payment of the amounts due by the latter, but also a payment of the capital transfer tax already passed on to the notary by the seller, as the seller has no interest to effect said payment a second time. This Office iterates that those in complainants’ situation are being prejudiced and subjected to undue hardship as they are unable to register property legally acquired by them, unless they incur a considerable expense and fork out the sums due to the public exchequer once again (in the case under examination, complainants were eventually compelled to do so since the documentation pertaining to these transfers was not in order). Moreover, in some cases, such as the one under consideration, instituting civil action against the defaulting notary

to recoup the amounts passed on to him, would not lead to the purchaser recouping the amounts paid and any judicial costs involved, as the claims against the defaulting notary would be considerable and there would not be enough assets to satisfy outstanding dues.

While there might be no legal provision allowing the CFR to waive the payment of the tax and duty already tendered by the contracting parties to the notary, the tenets of fairness and reasonableness, as well as the principle of legitimate expectations, dictate that the Public Administration implements effective policies and practices so as to ensure that the failure of the notary – who has been designated by the legislator as the official to whom the parties to the contract are bound to give the tax due to the CFR - does not prejudice laymen acting in good faith and in accordance with the law. It is imperative that Government addresses this anomaly without further delay as the current state of affairs is causing much stress and worry to contracting parties who fall victim to a defaulting notary in whom they would have put their trust. The notary is a public officer in terms of Article 2(1) of Chapter 55; he/she is exercising the function of a public officer when collecting the tax due on the contract from the contracting parties and exercises said profession as a result of a warrant accorded by the State after satisfying the requirements set out in relevant legislation for the attainment of said warrant. The parties have no choice but to hand over the tax and/or duty owed to the Tax Department to the notary, as the legislator himself designated notaries as the officials who must collect dues owed on public deeds to the CFR and to subsequently pass them on to the Department.

In this regard this Office refers to a recent judgement delivered by the Court of Criminal Appeal where a notary who had collected the tax due following the publication of a declaration of transfer of property *causa mortis* had not passed

on the amount deposited to the Department. The court noted that in this case (as in the case of a transfer *inter vivos*) the transfer is carried out by a deed published by a notary public who is required to register the declaration in the Public Registry and collect the tax due in line with article 32 *et seq.* of the Duty on Documents and Transfers Act (Cap 364) and pass it on to the CFR. The Court observed that:

“34. L-obbligi tan-Nutar taħt l-Att dwar id-Dokumenti u Trasferimenti huwa wieħed oneruż tant li l-istess Liġi żzommu responsabbli, in solidum mal-benefiċjarju, li jhallas it-taxxa li tkun dovuta u ngabret fuq dak l-att¹⁹. Anzi, bis-saħħa tal-artikolu 50 tal-Kapitolu 364 tal-Liġijiet ta’ Malta, kull Nutar li –

(a) jonqos li jhallas it-taxxa dovuta kollha jew parti minnha taħt id-dispożizzjoni ta’ dak l-Att fuq xi att riċevut minnu; jew...

ikun ħati ta’ reat u jeħel, meta jinstab ħati, penali ta’ mhux inqas minn ħdax-il euro (11) iżda mhux iżjed minn erba’ mija u ħamsa u sittin euro (465), u l-proviso li hemm mal-artikolu 11 tal-istess Kapitolu 364 tal-Liġijiet ta’ Malta għandu jgħodd għal dan l-artikolu.

35. Illi dan kollu juri li n-Nutar Pubbliku mhux biss ritenibbli Uffiċjal Pubbliku bis-saħħa tal-Liġi li tikkostitwixxi u tirregola l-professjoni tiegħu; iżda bis-saħħa tal-Att dwar id-Dokumenti u Trasferimenti, il-Liġi tafdalw wkoll rwol speċifiku fl-amministrazzjoni tal-ġbir ta’ dik it-taxxa.

...

40. Meta Nutar Pubbliku jkun qiegħed jopera u jeżegwixxi l-obbligi tiegħu taħt il-Kapitolu 364 tal-Liġijiet ta’ Malta, huwa jkun qiegħed jaġixxi bħala Uffiċjal Pubbliku. Meta Nutar jippublika att ta’ dikjarazzjoni ta’

¹⁹ Artikolu 49(1) tal-Kapitolu 364 tal-Liġijiet ta’ Malta.

trasferiment causa mortis, u b' mod partikolari meta jkun qed jiġbor it-taxxa dovuta bis-saħħa ta' dak l-att, huwa ma jkunx qiegħed jagħmel sempliċi att professjonali minn suġġett professjonali privat, iżda jkun qed jaġixxi fil-vesti tiegħu t'Uffiċjal Pubbliku inkarigat mill-ġbir ta' taxxa pubblika u li tkun trid tiġi konsenjata lill-Kummissarju tat-Taxxi. Ikun għalhekk qed jaġixxi fil-kwalità tiegħu t'Uffiċjal Pubbliku, inter alia, kemm taħt l-Att dwar il-Professjoni Notarili u l-Arkivji Notarili kif ukoll tal-Att dwar it-taxxa fuq id-Dokumenti u Trasferimenti.

41. Il-klijent ikun qiegħed iħallas din it-taxxa lin-Nutar fuq l-att mhux fil-kwalità tiegħu personali, jew bħala professjonist, iżda bħala Uffiċjal Pubbliku, b'Liġi speċifikatament delegat biex jiġbor dik it-taxxa u jikkonsenjaha, f'isem il-klijent tiegħu, lill-Kummissarju tat-Taxxi.

...

45... Meta l-benefiċċjarju jkun qiegħed jikkonsenja l-flejjes rappreżentanti t-taxxa lin-Nutar, il-benefiċċjarju jkun qiegħed jagħmel dan għax bil-Liġi obligat li jħallas it-taxxa, u li din trid tingabar minn dak il-professjonist diżenjat bil-Liġi li huwa n-Nutar Pubbliku, li jaġixxi fil-vesti tiegħu t'Uffiċjal Pubbliku fil-qadi tal-funzjonijiet leġittimi tiegħu, in kwantu huwa obligat bis-saħħa tal-Liġi li jirċievi dik it-taxxa biex tiġi mghoddija lill-Kummissarju tat-Taxxi.”²⁰

This Office acknowledges that the relevant Ministries, that are aware of the existing situation, have sought to alleviate and improve the current situation by holding discussions between the various stakeholders but, in so far as this Office has been informed, said discussions have not resulted in any **tangible** solution to

²⁰ Il-Pulizija vs Peter sive Pierre Falzon, Appeal No 171/2018; Court of Criminal Appeal decided on 18 June 2020).

mitigate the hardship of those in complainants' situation and provide them with some sort of redress. While the CFR's proposal to organise educational campaigns alerting the public about the signals to look for in these circumstances and to educate the general public about the workings of the tax system and the precautions that should be taken so as to avoid the risks of such failures are well-meaning, this action is certainly inadequate. Advising the general public to verify with the office of the CFR after fifteen days of the publication of the contract whether the tax and/or duty were fully paid by the notary, is a positive step, but it is inadequate protection, as the tax due would have already been passed on to the notary, who might have used them for other purposes and might not have sufficient funds to cover outstanding dues.

This Office was informed by the Notarial Council that the Council has repeatedly made its submissions to the Public Administration about the matter, insisting that the Government needs to address the situation by having an adequate system of timely redress, whereby through the Office of the Chief Notary to Government, the deeds of said notaries are registered with Government reserving the right of action against the defaulting notary, as in other cases where money is owed to the public exchequer. As correctly noted by the Council one must balance Government's fiscal requirements with the supreme interest of safeguarding the juridical order and the proprietary rights of private individuals, which outweigh fiscal considerations. Moreover, the Government is in the strongest position in applying the full weight of the law against the public officer designated by law to collect tax due to the CFR. This Office was further informed that the Notarial Council had formulated a clear agenda for the digitisation of all notarial services, particularly for a paperless property tax payment and registration system and that a detailed framework had since been developed and presented over the years, at various instances and to various key players, including the Ministry for Justice,

the Ministry for Finance, the Office of the Principal Permanent Secretary, the Government Cabinet and the Office of the Prime Minister. It appears however that although the online registration and payment of deeds has been initiated, other crucial proposals made by the Council were not taken up.

Conclusions and recommendations

This Office acknowledges that presently the law does not provide for a waiver of the payment of taxes or/and stamp duty in instances when a notary fails to register the contract and convey the funds entrusted to him by the parties to the CFR as required by law, as complainants requested. Chapter 55 does not provide for the contingency of a notary not fulfilling his obligations in terms of the law. Moreover, this Office cannot fault the stand taken by the Public Registry as a reading of existing provisions applicable to the grievance prohibit the Searches Unit from accepting a note of enrolment for registration unless notice and duty due has been paid to the CFR.

This Office concurs with the comments made by the Court of Revision of Notarial Acts and shares the concerns expressed therein. As stated by the Court, in terms of current legislation the public officials involved are unable to do anything in regard to these cases “... *ħlief li jissolevaw dawn il-każijiet mal-Ministeri li huma jaqgħu taħthom biex jgħarrfuhom dwar din l-anomalija u jissoleċitaw xi forma ta’ rimedju jew palattiv li għall-inqas inaqas mill-konsegwenzi tal-aġir abbużiv tan-nutar...*”. The Public Administration however should not ignore the plight of those in complainant’s situation, also in the light of the fact that the professional indemnity insurance notaries are required to subscribe to in terms of Article 10A of Chapter 55 does not extend to fraudulent behaviour of notaries.

The stand taken by the CFR basically obliges a purchaser, who acted in good faith and in accordance with the law, to affect not only a double payment of the amounts due by the latter, but to pay also the capital transfer tax already passed on to the notary by the seller, and in this case the assignors – complainants were in fact faced with no choice but to make the said payments as the documentation relative to the transfers were not registered in their names. This stance prejudices the contracting parties and perpetuates an added burden on the juridical system, as purchasers would then have to seek redress through the courts to try and recover the amounts repaid as a result of the irresponsible and fraudulent actions of the notary. This Office reiterates that those in complainants' situation are being prejudiced and subjected to undue hardship as they are unable to register property legally acquired by them, unless they incur a considerable expense and fork out the sums due to the public exchequer once again. Moreover, in some cases, such as the one under consideration, such judicial action would not lead to the purchaser recouping the amounts paid and the judicial costs involved, as the claims against the defaulting notary would be considerable and there would not be enough assets to satisfy outstanding dues.

The tenets of fairness and reasonableness dictate that the Public Administration implements effective policies and practices so as to ensure that the failure of the notary – **who has been designated by the legislator as the officer to whom the parties to the contract are bound to pass on the tax due to the CFR** - does not prejudice laymen acting in good faith and in accordance with the law. **The notary is a public officer in terms of Article 2(1) of Chapter 55; he/she is exercising the function of a public officer when collecting the tax due on the contract from the contracting parties and exercises said profession as a result of a warrant accorded by the State after satisfying the requirements**

set out in relevant legislation for the attainment of said warrant. The parties have no choice but to hand over the tax and/or duty owed to the Tax Department to the notary as the legislator himself designated notaries as the officials who must collect dues owed on public deeds to the CFR and to subsequently pass them on to the Department. It is imperative that Government addresses this anomaly without further delay and that a balance is found between Government's fiscal requirements and the interest of safeguarding the juridical order and the proprietary rights of private citizens.

I therefore recommend that the Public Administration:

- i) addresses the situation **without further delay** by providing **adequate and tangible** redress to complainants, who have had to effect payment of the amounts owed by way of duty and taxes while this investigation was still ongoing, and others who have found themselves in this predicament, so that contracting parties can register their proprietary rights without being required to pay taxes and/or duties which have already been passed on to the notary as required by law. In this regard the Ministries might consider the proposal of the Notarial Council that the deed is registered through the Office of the Chief Notary to Government without further expense and Government reserves a right of action against the defaulting notary;
- ii) that the Ministries involved, as well as the Office of the State Advocate, hold discussions about these situations with the Notarial Council so as to introduce legal provisions and policies that provide more robust protection for the service user. Online systems whereby tax and duty payments are made directly to the Department on the same day of the publication of the contract, with the consequent registration of the deed should be considered, as this would

provide contracting parties with an instant confirmation that the amounts due to the public exchequer have been in fact passed on to the CFR; and

iii) that the Notarial Council together with the Ministry of Justice discuss the possibility of the Council being provided with the resources necessary to adequately and effectively carry out its functions stipulated by law, particularly its powers to “... *inquire into the professional conduct of any notary which is considered to be repugnant to the decorum of his profession, or into any charge of negligence or abuse made against any notary in the exercise of his profession*”.

A C Mifsud
Ombudsman

25 January 2023