

An Investigation of Property Transfers
between 2006 and 2013:

The Transfer of the Property at
83 Spinola Road, St Julian's

Report by the
Auditor General
July 2017

This report has been prepared under sub-paragraph 9(a) of the First Schedule of the Auditor General and National Audit Office Act, 1997 for presentation to the House of Representatives in accordance with sub-paragraph 9(b) of the First Schedule of the said Act.

A handwritten signature in black ink, appearing to be 'CD', with a long horizontal stroke extending to the right.

Charles Deguara
Auditor General

July 2017



An Investigation of Property Transfers between 2006 and 2013:
The Transfer of the Property at 83 Spinola Road, St Julian's

Table of Contents

List of Tables	4
List of Figures	4
List of Abbreviations	5
Executive Summary	6
Chapter 1 – Introduction	12
1.1 Request for Investigation	12
1.2 Media Allegations regarding the Disposal of the Site in Spinola Road, St Julian’s	13
1.3 The Property in Spinola Road, St Julian’s	16
1.4 Methodology	16
Chapter 2 – The Transfer of the Property at 83 Spinola Road, St Julian’s	18
2.1 A Request for Recognition as the New Emphyteuta	18
2.2 The Deeds of Temporary Emphyteusis of 83 Spinola Road, St Julian’s	20
2.3 The Contested Ownership of 83 Spinola Road, St Julian’s	21
2.4 Dispute regarding Ownership of the Foreshore	24
2.5 Resort to Tender	36
2.6 Recourse to Arbitration	48
2.7 The Contract of Sale	63
2.8 Compliance to Contractual Conditions	64
2.9 NAO Valuation of 83 Spinola Road, St Julian’s	66
Chapter 3 – Analysis and Conclusions	74
3.1 Timeline of Key Developments	74
3.2 Analysis of the Disposal of 83 Spinola Road, St Julian’s	81
3.3 Conclusions	92

List of Tables and Figures

Table 1: Company's apportionment of development per level of foreshore area	53
Table 2: Area per floor level as per Arbitration Committee report	55
Table 3: Schedule of payments due at five per cent interest	64
Table 4: Schedule of payments due at eight per cent interest	64
Table 5: Area and use per level as per PA/06580/2001	67
Table 6: Airspace per floor levelling the receding rear façade	68
Table 7: Spinola seafront property index: 2007-2017	70
Table 8: Affordable property rates for Malta: 2002-2017	70
Table 9: Residual valuation of airspace	71
Table 10: Freehold value of 83 Spinola Road based on land and its potential	71
Table 11: Residual valuation of market value less finishing costs	72
Table 12: Freehold value of 83 Spinola Road based on land and structure	73
Table 13: Timeline of key events	74
Figure 1: Shoreline at Spinola Bay	27
Figure 2: Structural alterations proposed by E.G. Property Holdings Ltd	34
Figure 3: Comparison of the footprint of 83 Spinola Road pre-/post-assimilation of the foreshore	40
Figure 4: Determination of airspace from building line	69

List of Abbreviations

AG	Auditor General
CoL	Commissioner of Land
DG	Director General
DoC	Department of Contracts
GCC	General Contracts Committee
GPD	Government Property Department
MEPA	Malta Environment and Planning Authority
MFCC	Ministry for Fair Competition, Small Business and Consumers
MFEI	Ministry for Finance, the Economy and Investment
MJCL	Ministry for Justice, Culture and Local Government
NAO	National Audit Office
NHLP	North Harbours Local Plan
PAC	Public Accounts Committee
PS	Parliamentary Secretary
VAT	Value Added Tax

Executive Summary

1. On 23 June 2015, the four Government Members of Parliament on the Public Accounts Committee (PAC) requested the Auditor General to investigate the disposal of a site in St Julian's, property of Eighty Two Co. Ltd (previously E.G. Property Holdings Ltd). The PAC specifically requested the National Audit Office (NAO) to ascertain whether the principles of good governance, value for money, transparency and accountability were respected, and whether political pressure was exerted. Aside from the site in St Julian's, reference was made to another three property transfers involving Government, undertaken between 2006 and 2013; however, these are reported on separately.
2. In 1998, E.G. Property Holdings Ltd acquired the remaining period of the temporary emphyteusis of 83 Spinola Road, at the time understood to be 47 years from an original term of 150 years. This understanding was in fact incorrect, as the temporary emphyteusis had already expired in 1996. Notwithstanding this, when the Company sought recognition as the new emphyteuta in January 2002, the Joint Office endorsed the transfer against payment of the laudemium and the outstanding ground rent since it was property transferred to Government through the Church-State Agreement. In the interim, the Company had initiated development works on the site, which formed part of a larger development at 80 to 83 Spinola Road, consisting of a residential complex with underlying garages and commercial premises. In February 2003, following verification by the Joint Office, the Company was informed that it held no legal title to 83 Spinola Road.
3. In addition, concerns arose regarding the extent of the development, largely fuelled by public concerns that the site encroached on the foreshore at Spinola Bay. To this effect, the Government Property Department (GPD) initiated legal action against E.G. Property Holdings Ltd in early 2003. The Court ruled in favour of Government in November 2006, declaring the site in question as government land illegally occupied and ordering the Company to restore the site to its original state. The ruling was confirmed on appeal in March 2009.
4. Despite the court ruling, the GPD sought to dispose of 83 Spinola Road, now including the part of the foreshore illegally occupied. A tender for the disposal of the site was issued by the GPD in May 2010. No minimum acceptable offer was stipulated in the tender; however, the GPD established the value of the site at €950,000. By the closing date, Eighty Two Co. Ltd submitted the only offer of €192,225. The GPD accepted this offer subject to its revision to €950,000. The Company objected, leading the parties to resolve the matter through arbitration. The appointed Chair Arbitration Committee determined the value of the site as €550,000. A contract of sale was entered into on 13 April 2012, whereby the Company acquired 83 Spinola Road for the consideration of €525,000, payable over a five-year period.

5. The NAO noted various shortcomings in the process leading to the disposal of the site. Nonetheless, this Office acknowledges the complexity and particular nature of the case. The source of complications that arose may partly be traced back to a notarial error, perpetuated in various deeds of transfer of the original property at 83 Spinola Road, dating back to 1975. The GPD and E.G. Property Holdings Ltd were not involved in the deed when the error was first made; however, the Company was party to a deed of transfer in 1998, when it acquired the temporary emphyteusis of the property. The Company's acquisition occurred at a point when the emphyteusis had already expired. The GPD, when notified of the transfer, initially failed to detect this anomaly and accepted the laudemium payment. In essence, the NAO's review focused on efforts undertaken by the GPD and the Company at resolving this anomalous situation relating to the expired emphyteusis. However, compounding matters was the fact that the Company extended its development of 83 Spinola Road on public land over which it had no title.
6. Although the NAO acknowledges the considerable work involved in verifying the title of ownership of 83 Spinola Road and the complexity of this endeavour, the processing of such verifications may warrant review. The erroneous initial recognition of E.G. Property Holdings Ltd as the new emphyteuta provided the Company with a foothold in claims made over its ownership of the property that the GPD could not entirely dismiss. This might not have changed the outcome of the case, yet it would have strengthened Government's position in the setting of terms of such transfer.
7. By the time Government established that the temporary emphyteusis of 83 Spinola Road had in fact expired and that the foreshore had been illegally occupied by E.G. Property Holdings Ltd, the Company had practically completed the development of the sites as part of a larger complex. In the NAO's opinion, the delay in establishing these facts could not be attributed to Government or the GPD, as the searches required to establish title of 83 Spinola Road were complex and laborious, and the determination of judicial action was certainly not within their control. Therefore, the GPD had limited options when determining if and how to dispose of the property. Given the particular circumstances, it was reasonable for Government to consider the Company as the party most willing to submit the most financially advantageous offer in view of its vested interest in the entire development.
8. However, it was Government's and the GPD's obligation to ensure that revenue from the disposal of this site was maximised, which aspect of the value for money consideration was within their direct control. When one considers that the site was transferred to Eighty Two Co. Ltd for €525,000 against the NAO's valuation of €2,400,000, then value for money was certainly not ascertained. Even if one were to take into consideration the fact that the Company bore construction costs and value the site in terms of its potential, the discrepancy between the NAO valuation under this scenario, that is, €1,500,000 and the sale price remains a significant concern. In establishing the value of the property and in agreeing to enter into negotiations with the Company, the GPD failed to safeguard Government's interests and certainly did not secure revenue that fairly represented the value of the site.

9. Compounding the GPD's failure to ensure value for money was the erroneous consideration of the entire site, including the foreshore, as Joint Office property. The footprint of the foreshore constituted the larger part of the site and therefore, revenue generated from the disposal of the property should have been apportioned accordingly to Government and the Archdiocese. In effect, having considered the entire site as Joint Office property, Government secured €35 of the €525,000 transaction, with the remaining balance transferred to the Archdiocese as Foundation for Church Schools bonds. This outcome could have readily been averted had Government disposed of the site through a perpetual emphyteusis, which would have ascertained that all revenue registered from the disposal of the site be retained by Government. Notwithstanding the fact that the Director General (DG) GPD had highlighted the benefit to Government of a disposal through perpetual emphyteusis, this proposed course of action was discarded in favour of an outright sale following objections raised by the Company. The involvement of the Minister for Fair Competition, Small Business and Consumers (Minister MFCC), the Permanent Secretary MFCC and the Head of Secretariat MFCC remained unclear to this Office, particularly due to the lack of documentation retained in this respect and the fact that this decision followed an internal meeting held for which they were present. Although the Minister MFCC maintained that the DG GPD failed to clearly specify the implications on Government revenue of an outright sale, the NAO has reservations in this respect. Even if this were the case, the NAO is of the opinion that the Minister MFCC should have been aware of this critically important fact, an invariable outcome in the disposal through outright sale of property transferred to Government by way of the Church-State Agreement.
10. The NAO is of the opinion that value for money was not ascertained in this transaction. Responsibility for shortcomings relating to Government's failure to ascertain value for money rests, to varying degrees, with the GPD officials involved, the architects engaged by the GPD and the Minister MFCC. The DGs GPD assume oversight of all of the Department's functions, and hence shoulder an element of responsibility in this respect. More central was the role of the Commissioner of Land (CoL), whose involvement was critical in the Department's recourse to arbitration. The CoL provided partial information of the facts of the case that misled subsequent considerations by the GPD Tender Committee, the Arbitration Committee, the Minister MFCC (at the time Parliamentary Secretary Revenues and Land) and the Minister of Finance, the Economy and Investment (Minister MFEI). The direct implication of arbitration was the unnecessary weakening of Government's position and it is in this context that the CoL bears responsibility in this regard. This weakening was compounded by valuations that effectively understated the true value of the property. The NAO finds the approval of the Minister MFCC for the outright sale of the property, rather than the disposal of the site through perpetual emphyteusis, as injudicious.
11. The NAO noted a lack of documentation, particularly evident at key stages of the process. This critical shortcoming hindered the Office from establishing a comprehensive understanding of the GPD's consideration of the case and the precise involvement of the

Government officials, which detracted from the expected standards of good governance and transparency. The NAO was unable to determine how the decision to dispose of the property after the court ruling in Government's favour was arrived at. Similar concerns emerge with regard to the decision to assimilate the foreshore with the site of the expired emphyteusis and dispose of the entire site through one tender. This Office established that the assimilation of the two sites was discussed during a meeting held with E.G. Property Holdings Ltd; however, the lack of documentation rendered the NAO unable to determine who was involved, what was discussed and how this decision was taken. The NAO was also unable to ascertain on what grounds the resort to informal arbitration was agreed to when the tender for the sale of the site specifically made reference to arbitration through the Malta Arbitration Centre in case of any dispute or claim arising therefrom. Other key meetings for which no documentation was retained included those where the option of transfer through perpetual emphyteusis, as opposed to outright sale, was discussed and eventually discarded. The conspicuous gaps in documentation at the critical stages of the process shrouded the decision-making process, rendering it impossible for the NAO to determine the precise facts and role of all involved as is expected in terms of good governance. Given the lack of documentation, the NAO was constrained to rely on that stated during meetings held with this Office. This invariably resulted in conflicting accounts of events, with the NAO unable to establish a veritable and comprehensive understanding of facts. Aside from concerns in terms of the governance of the process, the lack of documentation raises issues of transparency and accountability.

12. This Office's concern was drawn to the persistent failure of the CoL to indicate developments relating to the foreshore and the court ruling in favour of Government, despite his evident awareness of the case, given that he was directly involved in judicial proceedings. This was rendered evident in various instances, particularly at key junctures, leading to the disposal of 83 Spinola Road. This Office noted such omission in the CoL's endorsement of the tender proposal form referred by the Director Joint Office, wherein no reference was made to the foreshore despite its inclusion for disposal. Again, no reference to the foreshore was made in the recommendation by the CoL for the award of tender to Eighty Two Co. Ltd addressed to the DG Department of Contracts, through the Parliamentary Secretary Revenues and Land and the DG GPD, with reference solely made to details relating to the expired emphyteusis. When referring objections raised by Eighty Two Co. Ltd to the award of tender and the request for a reconsideration of the valuation of 83 Spinola Road to the GPD Tender Committee, the CoL confirmed the account of events as presented in the correspondence submitted by the Company, when in fact the Company made no reference to the matter of the foreshore. The NAO considers this as serious negligence on the part of the CoL and also casts significant doubt on the integrity of the process. Although the CoL maintained that he had verbally informed the DGs GPD of the judicial action regarding the foreshore, the DGs maintained that they were not aware of this. Given the centrality of the matter, the NAO nonetheless maintains that such information was not to be conveyed verbally.

13. A total lack of transparency was also evident in the process that led to significant changes in the footprint of the site that was disposed of. Despite clarifications sought, the NAO was unable to establish who authorised the assimilation of the foreshore with 83 Spinola Road. Although the Director Joint Office endorsed the revised plans, the assimilation of government-owned land with Joint Office property was not within his remit. Contentions that the plan of the site prepared by the GPD was based on drawings submitted by the Company, and which included the foreshore, were deemed unconvincing by the NAO. The decision to dispose of the foreshore with the site of the expired emphyteusis should have been comprehensively documented, with all requisite authorisations clearly sought and recorded on file. Instead, despite the fact that this was a critical development, the assimilation of the sites only becomes apparent in a highly inconspicuous manner, from the change in footprint in the site plans prepared, again drawing this Office's concerns to the integrity of the process.
14. In its consideration of decisions taken by the various officials involved at one stage or another of the process leading to the disposal of the site, the NAO noted instances where incomplete information was provided as the basis for deliberation. In such cases, the responsibility borne by officials involved in decisions taken is somewhat mitigated by their partial understanding of facts, which understanding may have conditioned the pursued course of action. The NAO is of the opinion that the burden of accountability rests with those officials who, although aware of all the facts of the case, failed to draw attention to them despite that it was their responsibility to do so. Reference in this respect is made to the CoL and to others who were possibly aware of more than that rendered evident in documentation reviewed and submissions made.
15. The NAO is of the opinion that, prior to the issue of the tender for the disposal of the site, the matter should have been referred to the Minister MFEI and the Parliamentary Secretary Revenues and Land. While this Office acknowledges that the ministerial direction MFEI 001/08 stipulated that referral for ministerial authorisation was to be made after the endorsement of award by the General Contracts Committee, the NAO considered that the particular nature of this case warranted earlier referral. In fact, this Office is of the opinion that the decision to dispose of the property, rather than enforce the demolition of the site as determined by the Court, required ministerial consultation that should have been adequately documented. The GPD's failure to inform and involve the Minister MFEI and the Parliamentary Secretary Revenues and Land in key decisions relating to the disposal of the site detracted from the process of good governance and fell short of the required standards of transparency.
16. The NAO did not find direct evidence of political pressure exerted in the process reviewed. Notwithstanding this, the involvement of the Minister MFCC and the Head of Secretariat MFCC in the latter stages of the process of disposal drew the Office's attention. It was not possible for the NAO to precisely establish the developments that took place prior to the minute submitted by the DG GPD, wherein he advocated the disposal through outright sale,

when he had previously recommended that disposal was to be effected through perpetual emphyteusis. This Office's limited understanding was conditioned by the absence of any documentation retained with respect to this key stage of the process. In the NAO's opinion, the context of this change from perpetual emphyteusis to sale indicated an element of ministerial involvement, for it was after a meeting held with the Minister MFCC, Head of Secretariat MFCC and the Permanent Secretary MFCC that the DG GPD recommended the disposal through outright sale.

17. Finally, the NAO notes that despite that the amount due should have been settled by April 2017, as at that date, the amount of €309,000 was still outstanding. The NAO noted that the GPD failed to apply the higher rate of interest that should have been charged in case of late settlement, despite delays in the payment of amounts due. Moreover, efforts by the GPD to collect outstanding amounts were minimal.

Chapter 1

Introduction

1.1 Request for Investigation

1.1.1 On 22 June 2015, the Hon. Dr Owen Bonnici, Minister for Justice, Culture and Local Government (hereinafter referred to as Minister MJCL), and a member on the Public Accounts Committee (PAC), requested the Auditor General (AG) to undertake an investigation of properties that had been expropriated or exchanged by Government between 2006 and 2013. This PAC request was being made in the context of an earlier call for investigation, dated 5 June 2015, of the expropriation of two one-fourth undivided shares of the property at 36 Old Mint Street, Valletta.

1.1.2 Correspondence in this respect was received by the AG on 23 June 2015, duly signed by the four Government Members of Parliament on the PAC, namely, the Hon. Dr Owen Bonnici, Minister MJCL, the Hon. Dr Edward Zammit Lewis, Minister for Tourism, the Hon. Chris Agius, Parliamentary Secretary for Research, Innovation, Youth and Sport, and the Hon. Dr Charles Mangion (Appendix refers). The AG was to investigate expropriations and exchanges of property undertaken by the Government Property Department (GPD) between 2006 and 2013, and to ascertain whether the principles of good governance, value for money, transparency and accountability were respected, and whether any political pressure was exerted. The following properties were specifically indicated:

- a. the site at Fekruna Bay, St Paul's Bay;
- b. the purchase of the freehold property at 236 and 237 Republic Street and the temporary emphyteusis of 233 Republic Street, Valletta;
- c. the property in Spinola Road, St Julian's, property of Eighty Two Co. Ltd; and
- d. the site of the former Löwenbräu brewery in Qormi.

1.1.3 The AG acknowledged this correspondence on 11 August 2015. It was indicated that the National Audit Office (NAO) would be adopting that cited in the request by the PAC as the basis for its terms of reference.

1.1.4 Considering the complexity of the transfer of each of the properties indicated in paragraph 1.1.2 (a) to (d), the NAO is separately reporting thereon. Two of the properties were reported on in December 2016, while the other is addressed in another report being issued concurrently. This report focuses on the disposal of the site in Spinola Road, St Julian's.

1.2 Media Allegations regarding the Disposal of the Site in Spinola Road, St Julian's

- 1.2.1 Initial media coverage relating to the site in Spinola appeared in an article on 4 October 2015. According to this article, the previous administration had ignored a court order to demolish an abusively constructed apartment building, which development had extended onto the public foreshore. Not only were the developers, owners of the property, allowed to retain the building extending over government land, but the GPD granted a discount of €425,000 on the land's original value of €950,000 established by the Department, with payment allowed over five years.
- 1.2.2 The article provided details of the court case and its eventual resolution. It was noted that legal action was taken against the owners of the property by the Commissioner of Land (CoL) for having abusively constructed apartments at 83 Spinola Road, which development extended onto the public foreshore at Spinola Bay. In 2006, the Court found in favour of Government, ordering the owners to restore the foreshore to its former condition. This decision was confirmed on appeal in 2009. However, instead of enforcing the Court's decision, the CoL decided to offer the illegally built area for sale by tender, allowing the owners to sanction the abusive extension. The GPD estimated the value of the site, with a footprint of 165 square metres, at €950,000.
- 1.2.3 According to the article, the tender was issued subject to a right of first refusal granted to the owners, who submitted the only bid of €192,225. In August 2010, the CoL informed the owners that the sale could only go through if the offer was raised to €950,000. Failure to revise the offer accordingly would result in the owners forfeiting their right to the tender. The owners, through their company Eighty Two Co. Ltd, objected to the Department's valuation, claiming it was unrealistic and inexplicable, and in December 2010 proposed the setting up of an ad hoc committee to decide on a fair price for the property. Following the endorsement of the Hon. Tonio Fenech, the Minister for Finance, the Economy and Investment (Minister MFEI), to proceed in this manner, an ad hoc committee composed of three architects was established, with an architect nominated by the Company, another by the GPD, and a Chair nominated by the Company from a list of three architects proposed by the GPD.
- 1.2.4 The article further indicated that, by November 2011, the ad hoc committee had agreed on a value of €550,000, a markdown of over €400,000 from the GPD's initial valuation. In correspondence submitted to the Hon. Dr Jason Azzopardi, the Parliamentary Secretary (PS) Revenues and Land, on 29 November 2011, the Director General (DG) GPD proposed two options for the disposal of the property. The first was the reissue of the tender for the sale of the property for €525,000, the result of a 4.5 per cent discount granted to compensate for the property tax payable on the sale. The second was the grant of the site on a perpetual emphyteusis at €15,700 per annum. The DG GPD recommended the second option, which would ensure revenue to Government of the full amount over a period,

unlike the sale option since the site was originally ecclesiastical property transferred to Government through the Church-State Agreement. According to the DG GPD, because of cash flow purposes, the Company also preferred the second option. Notwithstanding this, in February 2012, the DG GPD requested the Hon. Dr Azzopardi, then Minister for Fair Competition, Small Business and Consumers (Minister MFCC) to endorse the sale of the property through tender, which was duly authorised. Subsequently, the DG GPD requested the Company to come forward for the signing of the contract for the sale of the property for the amount of €525,000, to be paid in instalments over a period of five years. The contract was concluded in April 2012, without the issuance of a call for tenders.

- 1.2.5 These allegations were repeated in another article published on 7 October 2015, wherein it was also reported that the NAO was to investigate this disposal of public land after the owners had abusively extended their development onto the foreshore. On 11 October 2015, in response to these articles, a reply by the Company's legal representative was published, wherein the Company provided its version of events.
- 1.2.6 According to the Company, in 1998 it had acquired from third parties a number of properties in the area under a title of perpetual emphyteusis except for one, which was acquired under a title of temporary emphyteusis for 150 years commencing in 1895. This property and the surrounding area were originally owned by the ecclesiastical authorities, and were only transferred to Government in 1993 as a result of the Church-State Agreement. As bound by the contract, the Company had paid the GPD the *laudemia due* over the properties, which were accepted by the Department. The GPD had also accepted the payment in respect of ground rent due, and had provided a receipt in this respect. Following the regularisation of the ground rent, the Company had developed the site; however, the Company maintained that no building or development not covered by a Malta Environment and Planning Authority (MEPA) permit was undertaken. When the development was completed, the Company applied to redeem the ground rent under a scheme issued by the GPD at the time.
- 1.2.7 It was during the processing of this request for ground rent redemption that the GPD raised concerns regarding the portion of the land subject to the temporary emphyteusis, claiming that the emphyteutical term was of 99, and not 150, years. Therefore, the title had expired before it was acquired by the Company in 1998. The Company contested the interpretation of the root of title and, in view of the disagreement and the inability to arrive at a solution, the GPD initiated legal proceedings against the Company. Decided on appeal, the Court declared the parcel of land, forming part of the development, as government property. Nonetheless, the Company argued that had the GPD carried out its responsibilities way back in 1998 and raised the issue that part of the site was government-owned by ownership and not under a title of emphyteusis, then the Company would not have built the development as it had.

- 1.2.8 The GPD had subsequently issued a public call for tenders for the sale of this portion of land. On the basis of a valuation obtained, the Company submitted an offer for €192,000 which, the Company maintained, far surpassed the prevalent market value per square metre of land in the vicinity. The GPD declined the Company's offer, indicating that it had a valuation of the site of €950,000. The Company contested this valuation, noting that contrary to the assumptions of the GPD valuation, the site could not be built up to nine storeys high. In fact, the site could only be developed up to one storey above ground level due to planning restrictions that required receding floors in the upper levels. Moreover, the portion of land was not developable on its own, and its value had accrued solely as a result of it being part of the Company's developed property.
- 1.2.9 Following discussions between the Company and the GPD, it was agreed that a verification board of three experts was to be set up to consider whether the valuation was a correct and realistic one. The parties agreed that the Company would be bound to pay the amount as established by the board. The board subsequently determined the value of the site as €525,000, which amount the Company agreed to pay despite being of the conviction that this was inflated when compared to other property in the vicinity.
- 1.2.10 The Company's legal representative concluded that it was evident that the Company had not carried out any illegal development, was not guilty of any abuse and had not benefitted from any favours or reductions in price. The issue concerned an error on the part of the GPD, as a result of which the Company had incurred substantial financial damages.
- 1.2.11 In the editorial note published in response to this letter, it was noted that the newspaper's article had not indicated that the development was not covered by a MEPA permit. Reference was also made to the court decision that required the Company to render pristine the public land encroached on. According to the editorial note, save for the root of the misunderstanding regarding the title of the site, all other facts mentioned in the Company's submission had been reported on.
- 1.2.12 In a letter to the editor on 11 October 2015, the Minister MFCC also objected to the article being published without any verification of the facts with interested parties and claimed that salient facts had been left out. The Minister MFCC claimed that neither he, nor the Minister MFEI, had ever met the owners to negotiate or interfered in any way in the valuations of the site. He noted that his involvement in 2012 was limited to endorsing the DG GPD's advice to resort to arbitration. Elaborating on the case, the Minister MFCC commented that the Company had paid the GPD a total of €525,000, which amount was three times what the Company considered as fair value for the site in question, that is €192,000. He added that the development was covered by the required MEPA permits, and in this respect argued that there can hardly be usurpation of public land if the development was sanctioned by MEPA. Additionally, the Minister MFCC claimed that the land in dispute covered an area of 90 square metres, and not 165 square metres as stated in the article.

He objected to what he described as the erroneous quotation of the site measurements, as well as the omission of the fact that the GPD had accepted the annual ground rent payment from the Company for the site on a consistent basis, even before 2008.

- 1.2.13 The editorial note, presented in response to the letter by the Minister MFCC, clarified that the article in question did not suggest that there was any ministerial involvement in the case, in so far as the article dealt entirely with the negotiations between the GPD and the owners. Moreover, the article had not suggested that the Minister MFCC had met the individuals concerned or influenced the outcome of the ad hoc arbitration committee. The editorial note concluded by noting that the crux of the article regarded the fact that despite a court order for the removal of the illegal construction on public land, the site was sold for €500,000 in comparison to the original valuation of €950,000. The editor questioned whether this was a fair way of dealing with developers who had encroached on public land.

1.3 The Property in Spinola Road, St Julian's

- 1.3.1 The request for investigation, dated 23 June 2015, referred to the property in Spinola Road, St Julian's, property of Eighty Two Co. Ltd. This description failed to clearly identify which property within Spinola Road was to be subject to the NAO investigation. The NAO forwarded these details to the GPD, and in turn, the Department identified 83 Spinola Road as the property of interest.
- 1.3.2 During its investigation of this property, the NAO became aware that Eighty Two Co. Ltd, previously known as E.G. Property Holdings Ltd, had acquired ownership, at various points in time, of other properties in Spinola Road. The focus of this investigation, however, remained the property at 83 Spinola Road, as identified in its various dimensions by the GPD, due to the issues specific to this particular site.

1.4 Methodology

- 1.4.1 This investigation was conducted in accordance with Article 9(a) of the First Schedule of the Auditor General and National Audit Office Act (Act XVI of 1997), and in terms of practices adopted by the NAO.
- 1.4.2 Findings presented in this report are based on interviews, taken under oath, with persons who were directly involved in the disposal of the property at 83 Spinola Road, St Julian's. These included the Minister MFEI and the Minister MFCC, the latter of whom held the post of PS Revenues and Land between March 2008 and December 2011. Meetings were also held with the various GPD officials involved in key developments that ultimately led to the disposal of the property, namely, the DGs GPD, the CoL, the Directors Joint Office, an Architect GPD and a Draughtsman GPD. Also interviewed by the NAO were the architects

engaged by the GPD to assist at particular stages in the process. All the interviews held were transcribed by the NAO and a copy submitted to the interviewee involved, who was requested to endorse the transcript and submit clarifications, if required. It must be noted that public officers cited throughout the report are referred to by their designation at the time reported on.

- 1.4.3 This Office also sought clarifications from the Permanent Secretary MFCC, the Assistant Director Joint Office, the Assistant Director Enforcement GPD, a Legal Officer GPD and a Principal Officer GPD. Written submissions were made in this respect. Queries relating to the disposal were also put to Eighty Two Co. Ltd; however, the Company failed to submit its views.
- 1.4.4 Aside from interviews held and written submissions obtained, the NAO examined all the documentation retained by the GPD relating to the disposal of the property. In addition, this Office reviewed documentation held at the law courts in connection with the judicial proceedings filed by the CoL against the owners of the site. Reference was also made to documentation retained by MEPA with respect to planning applications submitted. This Office also examined all other documentation and information provided by the interviewees during the course of the audit. Where required, clarifications and substantiating documentation were requested from interviewees, Government departments and other entities that were involved.
- 1.4.5 In seeking to determine whether Government established a fair value for the land in St Julian's, the NAO engaged a technical consultant to assist the Office in its review of valuation-related aspects. In addition, the NAO obtained the advice of its legal consultant with respect to the Office's reporting of matters that related to the court case.
- 1.4.6 In line with its guiding principles of independence, fairness and objectivity, the NAO sought to ensure that the allegations brought to its attention were duly scrutinised and the resultant findings objectively reported on. The relevant documentation and information required were, in most cases and to the best of the NAO's knowledge, made available to this Office by the various parties. The NAO's findings and conclusions are based solely and exclusively on the evaluation of such documentation and information supplied, and the evidence at its disposal. The NAO sought to identify any possible shortcoming or irregularity and put forward recommendations essentially meant to ensure that the best use of public resources is made.

Chapter 2

The Transfer of the Property at 83 Spinola Road, St Julians

2.1 A Request for Recognition as the New Emphyteuta

- 2.1.1** On 7 January 2002, E.G. Property Holdings Ltd requested the Joint Office to recognise the Company as the new emphyteuta of 83 Spinola Road, St Julian's and requested the redemption of ground rent. Enclosed with the correspondence submitted to the Director Joint Office, as proof of its title to the property, the Company forwarded a copy of the deed of the acquisition of the temporary utile dominium together with receipts for ground rent paid. The deed of acquisition was entered into on 24 June 1998, whereby the remaining period of approximately 47 years from the original term of 150 years, as from 25 December 1895, was transferred from the emphyteuta to E.G. Property Holdings Ltd, for the price of Lm21,000 (€48,917). Stipulated in the deed was that the property was subject to an annual and temporary ground rent of Lm0.40,4 (€0.94), payable yearly in advance to the Joint Office, previously payable to the Abbazia Spinola. The last receipt for a payment of Lm1.61,0 (€3.75), corresponding to ground rent due for the period 1 January 1996 to 31 December 1999, had been issued to the emphyteuta by the Joint Office on 2 March 1998. The remaining ground rent due for the period 1 January 2000 to 31 December 2002 was effected by E.G. Property Holdings Ltd on 15 January 2002.
- 2.1.2** The NAO noted that E.G. Property Holdings Ltd was seeking recognition as the new emphyteuta in view of planned investment on site. In fact, on 10 December 2001, the Company had submitted a revised application (PA/06580/2001) – following applications submitted in 1998 (PA/04161/1998 and PA/04163/1998) and 2000 (PA/02265/2000) – to the Planning Authority. The application was for the development of a block of residential apartments, underlying commercial premises and a garage complex following the demolition of existing structures at 80 to 83 Spinola Road.¹
- 2.1.3** On 8 January 2002, the Joint Office referred the matter to its Legal Consultant, who endorsed the transfer yet noted that a laudemium was due. In line with this direction, on 9 January 2002, an official acting on behalf of the Director Joint Office submitted correspondence to E.G. Property Holdings Ltd requesting payment of Lm0.40,4 (€0.94) as the laudemium due in respect of its recognition as the new emphyteuta. E.G. Property Holdings Ltd paid the laudemium on 15 January 2002. Of interest to the NAO was documentation filed after the endorsement of the Legal Consultant yet prior to the correspondence submitted to the

¹ The full MEPA permit granted on 13 June 2002, corresponded to application number PA 6580/01, which application was an amendment to the permits bearing reference PA 4161/98 and PA 2265/00.

Company on 9 January 2002, specifying that the term of the temporary emphyteusis was to expire on 28 August 1996, which term had therefore run out when the Company was recognised as emphyteuta and the payment of the laudemium accepted.

- 2.1.4 The correspondence dated 9 January 2002, recognising E.G. Property Holdings Ltd as the emphyteuta, was subsequently withdrawn by the Joint Office. A minute to this effect was noted on 25 February 2003, wherein the Assistant Director Joint Office requested confirmation that the GPD Cash Office had registered a stop payment in its records so that no further payments of ground rent would be accepted. An undated office note, recorded by the Assistant Director Joint Office on the 9 January 2002 correspondence, indicated that the Joint Office had been misled by a deed dated 17 November 1986. When queried by the NAO, the Assistant Director Joint Office did not provide information as to what drew attention to the matter and prompted instructions to stop payment. An element of clarification was provided by the Director Joint Office, who explained that the Joint Office had come across this incongruence during its routine process of reconciliation and verification of properties transferred to Government through the Church-State Agreement. Prior to these verifications, the Joint Office had been supplied with an erroneous property form. This matter was subsequently brought to the attention of the Control Committee, a board composed of representatives of the Archdiocese of Malta and Government, and tasked with the endorsement of verifications carried out.
- 2.1.5 Further action was taken by the Assistant Director Joint Office who, on 26 February 2003, requested a copy of the deed dated 26 May 1981 from the Public Registry. The NAO noted that this deed was one of several through which the property, originally belonging to the Abbazia Spinola, was transferred to a third party, subsequently transferred to other third parties over the years until acquired by E.G. Property Holdings Ltd.
- 2.1.6 Also on 26 February 2003, the Assistant Director Joint Office submitted correspondence to E.G. Property Holdings Ltd, notifying the Company of an error in the term of the emphyteusis. Although the deed through which the Company had acquired the property made reference to an original emphyteutical term of 150 years, of which approximately 47 years remained, this was in fact erroneous as, according to the Assistant Director Joint Office, the emphyteutical term was for 99 years and had expired on 27 August 1996. Therefore, when the Company had purchased the utile dominium in 1998, the emphyteutical term had already expired. It was in this context that the Company was informed that full ownership had reverted to Government.
- 2.1.7 Again, on 26 February 2003, the Assistant Director Joint Office submitted correspondence to the Archdiocese referring to various deeds relating to 83 Spinola Road. Specific reference was made to the incongruence in the emphyteutical term cited in these deeds, with the original deed indicating a 99-year emphyteutical term while subsequent deeds, including that through which E.G. Property Holdings Ltd acquired the property, citing a 150-year emphyteutical term. Comments were solicited in this respect.

- 2.1.8** On 4 March 2003, the Archdiocese confirmed that the indicated emphyteutical term of 150 years expiring in 2045 was incorrect and provided an explanation as to the source of this error, furnishing documentation to support this assertion. Moreover, the Archdiocese indicated that the applicable ground rent was Lm0.30,0 (€0.70) and not Lm0.40,4 (€0.94), that is, the amount paid by the emphyteuta prior to the property's transfer to E.G. Property Holdings Ltd. The relevant property form was duly updated by the Archdiocese on 10 March 2003 to reflect the revised ground rent, submitted to the Joint Office on 2 April 2003, and approved by the Control Committee on 22 July 2004. Although it was established that the emphyteutical term was erroneously cited in a number of deeds through which the property had been transferred, the Assistant Director Joint Office indicated that deeds of correction were not published.
- 2.1.9** This account of events provides the contextual backdrop to the complex situation that subsequently developed with respect to 83 Spinola Road. Central in this regard was the fact that a MEPA² permit for the development of the property (as part of a larger site) was granted to E.G. Property Holdings Ltd on 13 June 2002, only for the Company to be informed that ownership had reverted to Government on 26 February 2003. Although Government contended that when the Company had acquired the utile dominium in 1998 the emphyteutical grant had already expired, the Company contested this understanding. Hereunder is an account of how Government and the Company sought to resolve the matter.

2.2 The Deeds of Temporary Emphyteusis of 83 Spinola Road, St Julian's

- 2.2.1** The original grant of the temporary emphyteusis of 83 (previously 13) Spinola Road, St Julian's from the Abbazia Spinola to Antonio Coppini was published in a deed dated 28 August 1897. The grant was for 99 years, commencing on 28 August 1897, and therefore expiring on 27 August 1996. An annual ground rent of six shillings, equivalent to Lm0.30,0 (€0.70) was payable to Abbazia Spinola yearly in advance. According to the deed, the property consisted of a site in Spinola Road, St Julian's, having a frontage of two canes and a depth of nine canes, bounded on the North by the road, East by property of the same territory belonging to Giovanni Coppini, South by the seashore, and West by the same territory. Submissions made by the Archdiocese to the Joint Office indicated that this was one of four concessions of temporary emphyteusis for 99 years by the Abbazia Spinola of sites in the same area published on that day by the same notary.
- 2.2.2** The property was eventually inherited by the heirs of Antonio Coppini. On 16 April 1975, two of the heirs acquired, among other properties, the remaining shares of 83 Spinola Road from the other heirs thereby consolidating ownership of the property. According to this deed, the remaining utile dominium was of approximately 72 years, evidently incongruent with the 99-year term stipulated in the original grant of 1897.

² MEPA was, prior to 2002, the Planning Authority.

2.2.3 Compounding matters was a deed entered into on 26 May 1981, whereby the remaining Coppini heir, who at this stage had solely acquired the temporary emphyteusis, transferred the residual period of the term to a third party. According to this deed, the grant of the utile dominium was made for 150 years commencing on 25 December 1895, thereby expiring on 24 December 2045. This was inconsistent with the 99-year term specified in the original deed of 28 August 1897. Moreover, the applicable ground rent was stated as Lm0.40,4 (€0.94), which again differed from that stipulated in the original deed, that is, Lm0.30,0 (€0.70). As indicated in paragraph 2.1.8, the Archdiocese indicated this deed as the source of errors relating to the emphyteutical term and ground rent payment. According to the Archdiocese, the notary of the 1981 deed wrongly attributed a term of 150 years to 83 Spinola Road, when this term in fact applied to properties 1 to 6 and 10 Wied il-Għomor Street, St Julian's. These properties, together with 83 and 84 Spinola Road were held on emphyteusis by Antonio Coppini, and later his heirs, for which £3.12.9 (Lm3.63,7 / €8.47) ground rent was payable. Although the terms of the individual temporary emphyteuses were distinct, payments received were recorded in aggregate on the same folio held by the Archdiocese. The error in ground rent payable in respect of 83 Spinola Road was attributed to the equal apportionment of £3.12.9 among the nine properties located in Spinola Road and Wied il-Għomor Street.

2.2.4 The erroneous details cited in the 1981 deed were repeated in two subsequent deeds, whereby the temporary emphyteusis of 83 Spinola Road was transferred from a third party to another and subsequently to E.G. Property Holdings Ltd. On 17 November 1986, the temporary emphyteusis was transferred for a consideration of Lm7,000 (€16,306), with the relevant deed citing ground rent payable of Lm0.40,4 (€0.94). In addition, specified in the deed was the fact that the remaining period of the temporary utile dominium was approximately 60 years, from the original 150-year term that had commenced on 25 December 1895.

2.2.5 Finally, on 24 June 1998, E.G. Property Holdings Ltd acquired the temporary utile dominium of 83 Spinola Road for the consideration of Lm21,000 (€48,917). Cited in the 1998 deed were the same conditions stipulated in the 1981 and 1986 deeds, albeit adjusted to reflect the remaining period of the 150-year term. In this context, the remaining period, albeit erroneous, was that of 47 years. It must be noted that when the Company acquired the temporary emphyteusis, this had already expired on 27 August 1996, following the lapse of the 99-year period stipulated in the 28 August 1897 deed.

2.3 The Contested Ownership of 83 Spinola Road, St Julian's

2.3.1 Following the initial notification by the Joint Office, dated 26 February 2003, wherein E.G. Property Holdings Ltd was informed that the Company held no legal title to 83 Spinola Road, meetings were held between the parties. This was captured in a minute dated 15

January 2004 by the Director Joint Office to the Director Land GPD³ and the DG GPD. According to the Director Joint Office, the only solution was the sale of the site through the issue of a tender, given that the property had been demolished by the Company to make way for development. However, the Director Joint Office noted that the Company's legal representative had argued that, according to law, the sale of the site was possible through a parliamentary resolution.

- 2.3.2 During the meeting with the NAO, the Director Joint Office indicated that he had proposed the sale of the site through a call for tenders, with the Company granted the right of first refusal, identifying it as the only solution to the situation. The Director Joint Office indicated that the GPD had never considered the option of Government taking possession of the property.
- 2.3.3 The DG GPD indicated that on first being informed of the case, during the meeting with the Director Joint Office referred to in the minute dated 15 January 2004, he had expressed his intention to simultaneously resolve this issue and that of the alleged encroachment by E.G. Property Holdings Ltd on the foreshore adjacent to 80 to 83 Spinola Road, details of which are presented in the ensuing section of the report. Elaborating in this respect, the DG GPD noted that, despite the fact that the encroachment issue was subject to a court case which had not yet been concluded, Government retained the right to sell the site given the necessary political endorsement, adherence to the stipulated tender procedure for its disposal and that the developers agreed to pay the established price. Referring to the possible sale of the site through a parliamentary resolution, the DG GPD indicated that this method of disposal was limited to land or property required for major projects, hence was not applicable in this case. The CoL and the Director Joint Office corroborated this understanding.
- 2.3.4 Initially, E.G. Property Holdings Ltd disputed the claim that the Company had no title to the site. On 10 March 2003, a notary acting on behalf of the Company submitted correspondence to the Director Joint Office claiming that the emphyteusis had not expired, but had in fact been converted from a temporary to a perpetual emphyteusis through a deed published in 1906. In correspondence to the Joint Office dated 18 February 2004, the Company maintained that the emphyteutical grant had been made for a period of 150 years, expiring in 2045. However, despite their disagreement with the position assumed by the Joint Office, the Company agreed without prejudice to the site being offered for sale by tender subject that a right of first refusal be granted to E.G. Property Holdings Ltd. Nonetheless, the Company indicated that its legal advisers were examining the matter.
- 2.3.5 Subsequently, on 20 May 2005, the notary, acting on behalf of E.G. Property Holdings Ltd, acknowledged errors in the deeds of transfer with respect to 83 Spinola Road in correspondence submitted to the Director Land GPD. The notary conceded that the

³ It must be noted that throughout the case, the Director Land GPD served as CoL. Therefore, for purposes of clarity, Director Land GPD is referred to as CoL.

emphyteutical term was incorrectly stated in various deeds and affirmed that the version of events as stated by the Joint Office and corroborated by the Archdiocese was correct. Elaborating in this respect, the notary maintained that the Company had acted in good faith, and that it was seeking a fair solution to regularise its position. The notary attributed an element of responsibility for the perpetuation of the error to the Archdiocese and the Joint Office, since payments of ground rent and laudemia by the previous emphyteutae had been accepted. To this end, the Company remained in favour of the sale of the site by tender subject to a right of first refusal, with the proviso that the price requested by the GPD took into account the events that had happened and the substantial investment financed by the Company on the site.

- 2.3.6 In clarifications provided to the NAO, the DG GPD expressed disagreement with the line of reasoning put forward by the notary in the correspondence dated 20 May 2005. The DG GPD argued that Government was not subject to prescription and that responsibility for the error was to be mainly borne by the notary, who failed to carry out detailed searches going back to the root title, when drawing up the contract of sale. On the other hand, the Director Joint Office was of the opinion that Government was to shoulder an element of responsibility, and it was in this context that he had proposed the sale of the site through a call for tenders. The CoL was of the opinion that although the error of the Joint Office did not legally prejudice the GPD's position, on a moral and practical level, it did somewhat condition the Department.
- 2.3.7 In effect, the administrative process for the issuance of a sale by tender was initiated on 13 July 2004, when Director Land GPD instructed the Director Joint Office to prepare plans and proceed with the sale of the property through tender, subject to a right of first refusal in favour of third parties. In line with this instruction, on 15 August 2004, the Director Joint Office requested technical staff to prepare the relevant plans. In meetings held with the NAO, the CoL and the Director Joint Office confirmed that the site that was to be offered for sale was restricted to the original site of 83 Spinola Road, with a footprint of 68 square metres. The NAO noted that this was incongruent with that stated by the DG GPD, who indicated a preference to resolve both issues, the expired emphyteusis and the encroachment on public land, simultaneously.
- 2.3.8 However, this process was stalled on 11 August 2005, following instructions by the Director Joint Office to halt all action until a court decision was delivered in the case filed by the CoL against a Director of E.G. Property Holdings Ltd involving adjacent property. In a meeting with the NAO, the Director Joint Office stated that he was not involved in the judicial action taken with respect to the land encroached on by E.G. Property Holdings Ltd; however, he understood the direction by the DG GPD to halt the tender process as indicative of the Department's willingness to concurrently resolve both matters. The CoL maintained that the GPD was reluctant to sell the property at 83 Spinola Road while the encroachment issue was still pending. Therefore, according to the CoL, the GPD halted the tender process until the extent of the property was established.

- 2.3.9 The court case referred to related to the alleged encroachment of E.G. Property Holdings Ltd on public land. The land allegedly encroached on was a portion of the foreshore at Spinola Bay, situated adjacent to the development that the Company had undertaken at 80 to 83 Spinola Road, St Julian's. It must be noted that this matter eventually converged with that regarding ownership of 83 Spinola Road. The dispute regarding the alleged encroachment of public land is delved into in the ensuing section.

2.4 Dispute regarding Ownership of the Foreshore

Public Concern regarding the Site

- 2.4.1 Public concern regarding development on the foreshore adjacent to the site at 80 to 83 Spinola Road, St Julian's first emerged in August 1998. Correspondence was submitted by a group of petitioners to the Planning Authority and the CoL, wherein objections were raised with respect to planning applications made by a Director E.G. Property Holdings Ltd for the development of boathouses, garages and a seven-storey apartment block at Spinola Bay (PA/04161/1998 and PA/04163/1998). The petitioners claimed that the land indicated for development extended to the seashore and was public property. Furthermore, the CoL was requested to intervene in the matter, to protect public land and prevent the destruction of the bay to the detriment of the residents and those who frequented it. Aside from an enquiry by the GPD to the Planning Authority regarding the status of the applications for development, no other action was taken by the CoL to address the concerns raised.
- 2.4.2 Subsequently, in May 2001, the contested development on the site was again brought to the attention of the Chair Planning Authority, copied to the CoL, wherein the legal representative of residents of St Julian's and boat enthusiasts objected to the proposed development, claiming that this infringed local planning policies, and argued that the foreshore was government property. Cited in this correspondence was the fact that the Director E.G. Property Holdings Ltd had notified the residents that development work was to commence on site. Other correspondence was submitted by the legal representative to the CoL in May 2001, underlining the fact that planning permission had been granted for the proposed development on public land.
- 2.4.3 Also in May 2001, the Mayor St Julian's requested the CoL to inform the Local Council regarding the title of ownership of the site. In August 2001, the Executive Secretary St Julian's Local Council informed the GPD of the development work carried out on site, expressed concern regarding the legality of the development and the possible damage to the environment and the cultural heritage of the area. The Executive Secretary again raised enquiries as to the ownership of the site.
- 2.4.4 Queries regarding the title of ownership of the site were raised by the Private Secretary to the Minister for Home Affairs in correspondence submitted to the DG GPD on 14 August 2001, 29 August 2001 and 10 September 2001, after the Executive Secretary St Julian's Local

Council brought the matter to the attention of the Minister. A response was submitted on 17 September 2001; however, in the interim, on 14 September 2001, the St Julian's Local Council had filed a judicial protest against the CoL. According to the reply by the DG GPD to the Minister for Home Affairs, searches carried out by the Department regarding the ownership of the site were inconclusive and further investigation was being carried out. Notwithstanding this, the DG GPD indicated that no property reclaimed from the sea had been encroached on.

- 2.4.5 On 14 September 2001, the St Julian's Local Council filed a judicial protest against the CoL regarding development works carried out on the Spinola shore. The works entailed the demolition of the existing structures with access on Spinola Road and excavation of the side of the site overlooking Spinola Bay, allegedly regulated as per Planning Authority permit PA/04161/1998 dated 15 November 1999. Although the developer claimed ownership of the site, the Local Council raised serious doubts with respect to these claims. The Local Council argued that the site consisted of reclaimed land and therefore the original foreshore was not that presently delineated, but was located further inland.
- 2.4.6 The St Julian's Local Council claimed that it sought to protect the interests of the residents and others who made use of the area, particularly fishermen and the general public. In this respect, the Local Council had repeatedly requested the GPD to provide it with information as to the ownership of the site. This information had not been provided and, in the meantime, development works had continued to the detriment of the site. Through this judicial protest, the Local Council was requesting the CoL to provide the required information and to take any necessary legal action to protect the rights of the residents.
- 2.4.7 In response to this judicial protest, the CoL filed a counter-protest on 27 September 2001 claiming that contrary to what was being alleged, on being informed of suspected irregularities regarding public land, the GPD sought to determine the parameters of the property and establish the ownership of the site. This had not yet been concluded, as the process was complex, as titles of ownership stretched back hundreds of years and required documents that were not in the GPD's possession. It was for this reason that no conclusive information had been provided to the St Julian's Local Council. Moreover, the GPD signified its commitment to take action against the developers should the searches carried out establish that the development subject to contestation constituted abuse of public land.
- 2.4.8 On 18 November 2002, the Secretary to the Presidency referred to the CoL a petition filed by a number of entities in St Julian's regarding developments taking place, requesting feedback on the matter. The St Julian's Fishermen and Boat Enthusiasts Association, acting on behalf of various local social and civic groups, informed the President that excavation works on the foreshore had commenced despite concerns expressed that this was public land. Outlining the numerous attempts at drawing the attention of MEPA and GPD to this irregularity, the latter had failed to provide the requested information relating to ownership of the site. It was in this context that the President was requested to intervene in the matter.

- 2.4.9 The CoL replied to the Secretary to the Presidency on 3 December 2002, indicating that the Department was carrying out further searches on the matter. In seeking to determine whether public land had been encroached on, reference was made to a deed dated 21 July 1905, wherein the extent of the property was described as extending to the seashore. The CoL noted that the Department had not yet determined whether government land had been encroached on and therefore was not in a position to halt development.
- 2.4.10 Documentation displayed in an exhibition held by the St Julian's Fishermen and Boat Enthusiasts Association on 14 December 2002 was presented as evidence that the land in question was reclaimed land and therefore government property. The exhibited documents, which were forwarded to the CoL on 16 December 2002, included:
- a. pictures showing the shingles dug up for the foundations, which shingles were below sea level;
 - b. a copy of a map documented as an attachment to a contract between the Abbazia Spinola and a third party, dated 16 March 1904, detailing the contours of the shore. The map clearly illustrated that the sea reached as far as the area where part of the excavations had been carried out and foundations were being built;
 - c. a 1985 map of the coastline;
 - d. old pictures of the area;
 - e. a declaration by elderly residents who recalled the area where excavations were taking place as beyond the shoreline, therefore confirming that this area was reclaimed land; and
 - f. two rock samples, one taken from under sea level where excavations had taken place and the other sample from Spinola Beach.
- 2.4.11 In response to the exhibition, on 16 December 2002, an Opposition Member of Parliament put a parliamentary question to the Minister for Home Affairs and the Environment, querying whether the site of the contested development was indeed government property. Information to this effect was sought by the Ministry from the DG GPD and Chair MEPA. According to the reply submitted by the GPD on 23 December 2002, the Department was still in the process of carrying out searches and obtaining legal advice to unequivocally establish the owners of the site. However, searches carried out until then did not indicate that the development was being carried out on either government or reclaimed land.
- 2.4.12 Notwithstanding this contention, the position of the GPD as to whether the development was being constructed on government land changed shortly thereafter. On 7 January 2003, the Office of the Ombudsman requested feedback from the CoL to correspondence that the Office had received on 23 December 2002 from the St Julian's Fishermen and Boat Enthusiasts Association regarding the development on the site. In reply to this correspondence, on 30 January 2003, the CoL informed the Ombudsman of the outcome of the searches commissioned with regard to the site in question and the subsequent legal position assumed by the GPD.

2.4.13 According to this correspondence, following the commissioned searches and after having reviewed the original deed of transfer dated 31 July 1905 between the Abbazia Spinola and third parties, the GPD determined that the foreshore area in question did not belong to the developers. According to this deed, the area transferred to the third parties was of three canes frontage and ten canes depth, resulting in an area of thirty square canes (equivalent to 132 square metres). This corresponded to the area shaded in the site plan (Figure 1 refers), but excluded the contested area marked in yellow, referred to as the foreshore area. Notwithstanding this, Government was not in possession of documentation that indicated that the foreshore area originally belonged to the Abbazia Spinola, and that it had later come in possession of Government as per the Church-State Agreement. Nevertheless, Government decided to proceed in terms of a court sentence dated 30 June 1917, which sentence defined what constituted a foreshore, since 1898 survey plans showed that the shoreline was originally at closer proximity to the site being developed than at present. After the war, Government had reclaimed part of the seabed and extended the shore by laying concrete. To allow for public enjoyment of the shore, the Government formed a public passageway, marked in blue in Figure 1.

Figure 1: Shoreline at Spinola Bay



2.4.14 In a meeting with the NAO, the DG GPD explained the complexities encountered when carrying out these searches, making particular reference to justifying the difficulties in establishing the root of title and the extent of the property, mainly due to the change in shoreline following land reclamation. This was corroborated by the CoL.

Instigation of Legal Action and Attempts at Arbitration

2.4.15 The decision to initiate legal action against E.G. Property Holdings Ltd was recorded in a minute by the DG GPD to the CoL dated 17 January 2003. The DG GPD made reference to discussions held with the Minister for Home Affairs and the Environment as well as an internal consultation held with the CoL and the Assistant Director Estate Management GPD. It was in this context that the DG GPD instructed the CoL to take immediate legal action against the Company. The decision by the DG GPD was motivated by the fact that the part of the property closest to the foreshore was not owned by the Company and that the 1895 survey sheets illustrated the proximity of the site to the sea, implying that this was part of the foreshore. The DG GPD recommended that the Department instigate legal action through the filing of a warrant of prohibitory injunction.

2.4.16 Consequently, on 17 January 2003, the GPD, represented by the CoL, proceeded with the filing of a warrant of prohibitory injunction against E.G. Property Holdings Ltd and El Dara Ltd.⁴ In essence, the Companies were to desist from carrying out any other works on site and occupying the public passage and the foreshore. The GPD argued that the development had extended beyond the boundaries of the site owned by the Company by approximately 8.5 metres, extending on a public passageway and the foreshore, thereby encroaching on the public's right of use. In substantiating claims made regarding the dimensions of the site, the GPD made reference to a deed of temporary emphyteusis dated 1905.

2.4.17 In a counter-reply submitted by E.G. Property Holdings Ltd on 20 January 2003, the Company contested the prohibitory injunction claiming that the request for a warrant was made at a point when the development was nearing completion. In support of this claim, the Company presented a statement by its architect certifying that construction works at 80, 81 and 82 Spinola Road were practically complete, with the exception of the receded penthouse at fourth floor level. Also cited was that the boathouses situated below street level were structurally complete.

2.4.18 Additionally, E.G. Property Holdings Ltd claimed that a deed of emphyteutical concession dated 31 July 1905 provided evidence that the contested area was property of the Company. According to this deed, the property granted was described as having a frontage of three canes on Spinola Road and extending to the shoreline.

⁴ The CoL indicated that searches undertaken by the GPD Legal Section had indicated El Dara Ltd as a shareholder of E.G. Property Holdings Ltd.

- 2.4.19** In its counter-reply, E.G. Property Holdings Ltd also made reference to a previous dispute regarding the site. According to the Company, in 1994, the CoL had obtained a permit for the development of boathouses on the site as per PA/06247/1994. This had led the then utilista to file a judicial protest against the CoL, the DG Works Division, the Minister for the Environment and the Planning Authority, requesting that the permit be withdrawn since the site formed part of the emphyteutical grant originally made on 31 July 1905. According to the Company, based on searches undertaken, Government had conceded that the land was in fact that of the utilista. Despite a request by the Company to transfer the planning permit from the utilista, following its acquisition of the site, the Company was informed that the permit had since then been revoked by the Planning Authority as work on site had not yet commenced, thereby violating the conditions of the permit. Finally, the Company held the GPD responsible for damages incurred or yet to be incurred and appealed to the Court to reject the request for the warrant of prohibitory injunction.
- 2.4.20** On 22 January 2003, a Director E.G. Property Holdings Ltd made additional submissions in response to the judicial action initiated by the GPD. Aside from the reiteration of previous claims, the Director maintained that Government failed to provide evidence of its ownership of the contested site, arguing that the onus of proof lay with Government. Notwithstanding the counter-protest lodged by the Company, the warrant of prohibitory injunction was upheld by the Court on 27 January 2003.
- 2.4.21** The GPD initiated judicial proceedings against E.G. Property Holdings Ltd and El Dara Ltd on 3 February 2003. The Department submitted plans indicating the extent of the original shoreline and the subsequent extension by Government through land reclamation. Also indicated was the existing development undertaken by the Companies, which encroached on the foreshore and impeded public access through a designated passageway (Figure 1 refers). The CoL concluded that the Companies were occupying public land without due authorisation and that the illegal acts of the Companies were resulting in damages to Government.
- 2.4.22** In the reply dated 14 August 2003, E.G. Property Holdings Ltd and El Dara Ltd reiterated points raised in the counter-reply to the warrant of prohibitory injunction, further arguing that even if the site was Government-owned, the Companies had undertaken development in good faith. Moreover, Government had not opposed this development, which therefore limited claims for compensation in terms of Article 571 of the Civil Code.
- 2.4.23** In parallel with court proceedings, E.G. Property Holdings Ltd recommended the possible recourse to arbitration. This was captured in correspondence submitted to the CoL on 14 March 2003 by the legal representatives of the Company. The Company argued that the warrant of prohibitory injunction had necessitated a halt to all construction work, which resulted in the incurrence of additional costs. In order to limit such damages, as well as possible damages payable by Government in the eventuality of a court ruling in favour of the Company, two proposals were made. First, the Company proposed that the parties file

a joint application to request that the effects of the warrant of prohibitory injunction be limited to the area of the boathouses. Second, the Company proposed that the dispute be referred to arbitration as per Chapter 387 of the Laws of Malta.

2.4.24 A Legal Officer GPD submitted a reply to E.G. Property Holdings Ltd on 8 May 2003 following instructions provided by the CoL and consultation with the DG GPD. The Legal Officer GPD clarified that the warrant of prohibitory injunction was restricted to the foreshore area, and not the whole site, rendering the proposed joint application superfluous. The GPD maintained that it could not be held responsible for any damages resulting from the cessation of works since this was the result of a court ruling. Likewise, the GPD could not be held responsible for damages arising as a result of the time taken by the Court to decide the outcome of the case. Were the case decided in favour of Government, the GPD contended that similar claims for damages could be made by the Department since the Company's actions prevented public use of the land. Finally, the GPD signified its willingness to resort to arbitration in accordance with Chapter 387 of the Laws of Malta. To this end, a meeting was to be scheduled to discuss a way forward in this respect. Notwithstanding that stated by the GPD regarding the proposed joint application, on 30 May 2003, the Department filed a clarification in Court regarding the warrant of prohibitory injunction, indicating that the area subject to contention was limited to the foreshore.

2.4.25 On 22 July 2003, the legal representatives of E.G. Property Holdings Ltd submitted correspondence to the DG GPD, making reference to the various meetings held between the parties following the correspondence sent on 8 May 2003. According to this correspondence, the parties had considered two options, that is, an amicable settlement or referral to arbitration. However, the latter option was no longer viable given Government's insistence on exemption from payment of any damages were arbitration to result in a negative outcome for Government. Aside from reaffirming that the claim to demolish the site was legally unsustainable, as the Company had undertaken the development in good faith and had obtained the required permits, the Company requested a valuation of the compensation due to Government to acquire the title to the site in dispute. The Company indicated that it would consider settling the matter through the payment of a reasonable sum to Government, with the transfer of the site formalised by means of a contract. Copied in this correspondence were the Minister for Justice and Home Affairs and the Attorney General.

2.4.26 Following the receipt of correspondence submitted by the legal representative of E.G. Property Holdings Ltd, the DG GPD sought the advice of the CoL, particularly seeking to establish the veracity of the claims made by the Company regarding the payment of damages and the legal sustainability, or otherwise, of claims to demolish the site. On 4 August 2003, the CoL informed the DG GPD that the Company's claims regarding damages were incorrect, stating that he had informed the Company that neither party would claim damages irrespective of the outcome of arbitration. The matter regarding claims for demolition of the site was referred to the Legal Officer GPD. Although the Legal Officer GPD

acknowledged the veracity of the statement made by the Company's legal representative, he maintained that the circumstances in this case were somewhat different owing to the nature of the land being contested. The Legal Officer GPD argued that the land in concern was foreshore, which was classified as demesial property and therefore, not only property of Government, but deemed extra commercium, that is, not subject to transfer by Government.

- 2.4.27 The views of the Legal Officer GPD were referred to the Attorney General on 12 August 2003. In a minute dated 14 August 2003, the Attorney General expressed an element of disagreement with the Italian law distinction between demesial and other public property. Moreover, the Attorney General stated that he did not believe that the position under Italian law, that demesial property cannot be alienated and is extra commercium, applied to Maltese law. In response, on 28 August 2003, the Legal Officer GPD indicated agreement with elements of that stated by the Attorney General yet cited a number of court judgements wherein demesial property was deemed as extra commercium and not subject to prescription as stipulated in Article 2114 of the Civil Code. The Legal Officer GPD indicated that if the GPD was to insist that the site was in fact foreshore, as argued in Government's claims to Court, then the inalienability of the property was to subsist. On the other hand, if the GPD was amenable to dismiss its claim of the site as foreshore but nonetheless government property, in extra judicial efforts to resolve the matter, then it was possible to sell the site to the developers.
- 2.4.28 In clarifications to the NAO, the DG GPD maintained that irrespective of whether demesial property was in fact extra commercium, it was unclear whether the contested site, originally considered to be foreshore, still constituted foreshore following land reclamation. A similar argument was put forward by the subsequent DG GPD who noted that, due to the extension of the foreshore resulting from land reclamation, the Company's encroachment was not inhibiting the public's enjoyment of the foreshore. The CoL also raised doubts as to whether the site of the illegal encroachment was in fact foreshore.
- 2.4.29 The divergent legal opinions of the Attorney General and the Legal Officer GPD were referred to the Minister for Justice and Home Affairs by the DG GPD, copied to the relevant Permanent Secretary, on 10 September 2003. The DG GPD sought the direction of the Minister on the matter, who in turn, on 26 September 2003, indicated that the Department was to persist with the court case.
- 2.4.30 On 9 October 2003, the legal representative of E.G. Property Holdings Ltd informed the DG GPD of the damages being incurred by the Company as a result of the judicial action taken by Government. The Company claimed daily damages of Lm100 (€233) relating to rent for former residents and bank interest, as well as other losses of Lm300,000 (€698,812) resulting from contracts that could not be concluded, structural damages to neighbouring properties resulting from construction delays and imminent actions of persons who had already purchased apartments in the development. It was in this context that the DG GPD

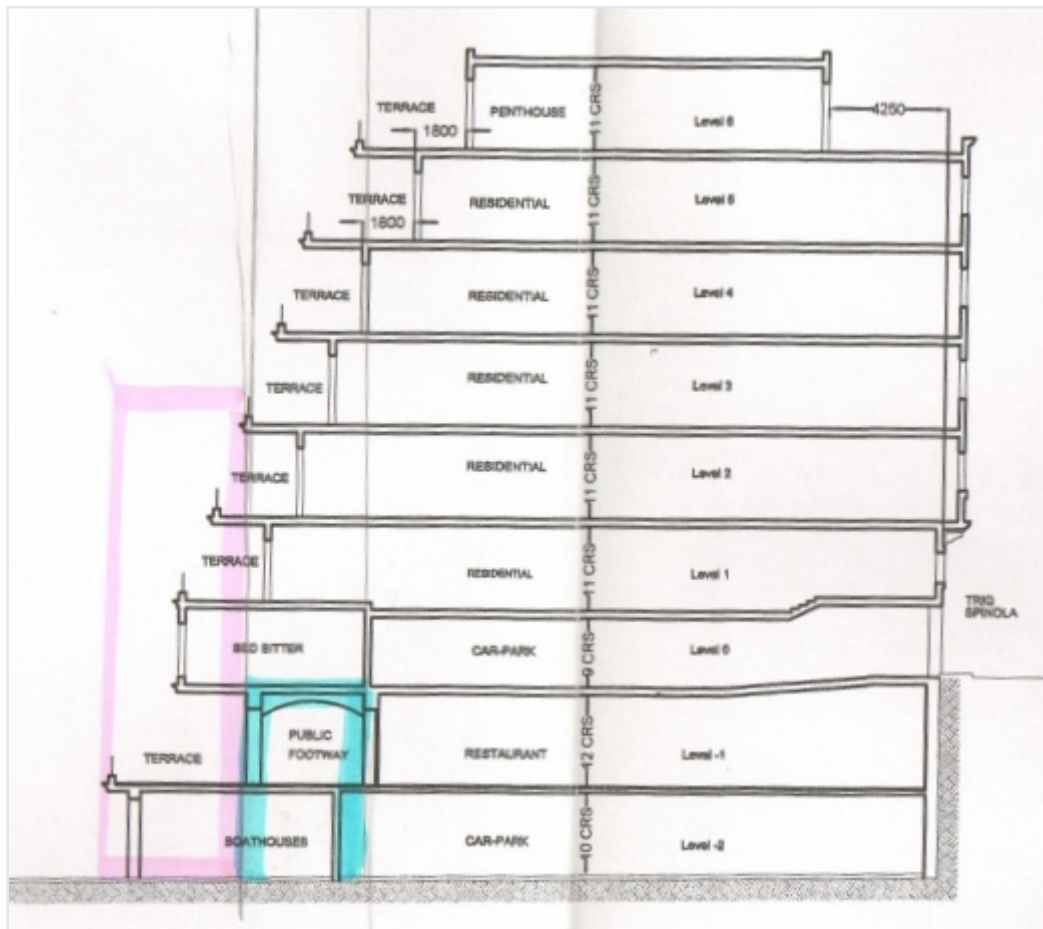
was urged to consider the possibility of an amicable settlement. Notwithstanding this, on 31 October 2003, the legal representative of E.G. Property Holdings Ltd informed the DG GPD of the Company's willingness to resort to arbitration in order to expedite resolution. The Company indicated its cognisance of the fact that the GPD was hesitant to resolve the matter through arbitration rather than the ongoing judicial proceedings since Government did not want to suffer damages in case of an unfavourable outcome of arbitration for the GPD. In this respect, the Company was willing to exempt Government from any eventual responsibility for damages on condition that the arbitration process be concluded within one month from its initiation.

- 2.4.31 This proposal to resort to arbitration was brought to the attention of the Minister for Justice and Home Affairs by the DG GPD. Following discussions, on 14 November 2003, Government revised its position and considered resort to arbitration as a possible solution. However, a number of conditions were stipulated by the Minister. These entailed that the arbitration process was to be concluded within two months of initiation, the equal apportionment of arbitration-related expenses, the decision whether the site in question was public property, and if so, whether the developers were cognisant of this fact when development work was carried out and the composition of the arbitration panel.
- 2.4.32 Subsequently, a meeting was held between the parties, as recorded by the CoL on 9 January 2004 in a minute addressed to the Minister for Justice and Home Affairs, the DG GPD and the Legal Officer GPD. The parties failed to reach agreement on all key aspects relating to the arbitration process, including the method of disposal of the site should it be determined that it was government-owned, the payment of damages should the process extend beyond one month and the members of the panel. Although an element of progress was registered in subsequent exchanges by the parties between February and April 2004, no agreement was reached. This was indicated in a minute by the Legal Officer GPD dated 12 May 2004, wherein it was stated that E.G. Property Holdings Ltd preferred to proceed with the court case.
- 2.4.33 On 1 November 2006, the Court ruled in favour of Government, declaring the site in question as government land and demesial property, illegally occupied by E.G. Property Holdings Ltd. Consequently, the Court ordered the Company to restore the site to its original state prior to its occupation. The claims for damages to Government were denied. In submissions to this Office, the DG GPD and the CoL confirmed their awareness of the ruling in Government's favour.

Appeal and Disregard of the Court Judgement

- 2.4.34 On 20 November 2006, E.G. Property Holdings Ltd and El Dara Ltd filed an appeal. While the Companies accepted the Court's ruling regarding the fact that no damages were payable to Government, a number of contentions were made. To this end, the Companies argued that El Dara Ltd was to be considered as extraneous to these proceedings and that Government was unable to prove that the land was demesial as required by law. Furthermore, the Companies maintained that the Court had failed to appropriately consider that the original transfer of the site in Spinola by Government to a third party in 1858 had comprised all territory from Spinola Road up to the shoreline. Finally, the Companies contended that Government had failed to take appropriate action to oppose the development on site.
- 2.4.35 The CoL filed a reply on 11 December 2006, wherein the Department maintained that originally claimed in its judicial action of January 2003. The counter-arguments presented by the GPD centred on the fact that the site subject to contention was demesial property and therefore extra commercium, and that the foreshore was not part of the land transferred by Government in 1858.
- 2.4.36 Notwithstanding the appeal lodged by the Companies, the legal representative of E.G. Property Holdings Ltd submitted correspondence to the DG GPD on 7 February 2007, wherein it was indicated that the Company would, without prejudice, prefer to reach an amicable settlement. In addition, the Company acknowledged that the term of the temporary emphyteutical grant of 83 Spinola Road was erroneously indicated in the relative deed of acquisition, having expired prior to the Company's acquisition of the emphyteusis. To resolve both issues, the Company proposed to:
- a. demolish the portion of boathouses and all other structures situated within the area edged in pink on the plan (Figure 2 refers);
 - b. acquire from Government the area edged in blue and the overlying airspace, leaving a right of passage in perpetuity in favour of the general public over the area marked as a public footway (Figure 2 refers);
 - c. acquire from Government the full ownership of tenement 83 Spinola Road and all improvements constructed thereon; and
 - d. withdraw the appeal filed following the successful conclusion of the above.

Figure 2: Structural alterations proposed by E.G. Property Holdings Ltd



2.4.37 The DG GPD referred that proposed by E.G. Property Holdings Ltd to the Director Estate Management GPD on 8 February 2007. The GPD subsequently consolidated its understanding with respect to the ownership of 83 Spinola Road, essentially that the temporary emphyteusis of this property had expired in 1996, prior to the acquisition by the Company, and that the ownership had reverted to Government. Notwithstanding the internal consultation, no further action was taken by the GPD and, on 31 May 2007, the legal representative of the Company submitted a reminder to the DG GPD. Other correspondence was submitted by the Company's legal representative to the CoL on 28 November 2007. In this correspondence, the Company made reference to a tender recently issued by the GPD for the transfer of land in the vicinity of 83 Spinola Road. The Company requested that its pending disputes with Government be resolved through amicable settlement, specifically referring to the issuance of a tender for the land over which the Company had a development permit.

2.4.38 Following consultation with the DG GPD, a Legal Officer GPD submitted a request for clarifications to the legal representative of E.G. Property Holdings Ltd on 24 December 2007. In essence, the Legal Officer GPD noted inconsistencies between the correspondence submitted by the Company on 7 February 2007 and that of 28 November 2007. In the former, the Company had proposed the demolition of a portion of the boathouses and

other structures (Figure 2 refers); however, in the latter, the Company proposed the issuance of a tender for the sale of the site. Finally, the Legal Officer GPD indicated that the Department was amenable to enter into some form of amicable settlement as outlined in the correspondence dated 7 February 2007. The NAO noted that the parties did not exchange any other correspondence regarding the foreshore until the Court delivered its ruling with respect to the appeal lodged by the Companies.

2.4.39 The Court of Appeal delivered its decision on 27 March 2009, wherein it confirmed the original ruling in favour of Government. In this regard, the Court of Appeal ruled that El Dara Ltd failed to provide evidence indicating that the Company was extraneous to the property. With respect to the demesial nature of the site, the Court found that Government presented stronger evidence to its title over the foreshore through its argument that this is demesial property. The claim to ownership by E.G. Property Holdings Ltd through reference to the 7 August 1858 deed was not accepted by the Court in light of the subsequent annulment of this deed through another deed dated 25 September 1858. Finally, the Court acknowledged that Government had in fact taken action when informed of the development on site and therefore refuted the claim made by the Company to this effect. In this context, the Court of Appeal denied all claims by the Company and confirmed, in its totality, the sentence of 1 November 2006. Moreover, the Companies were ordered to restore the site to its original state, within two months of this ruling. In the eventuality that the Companies failed to carry out such works, the Court authorised the GPD to undertake the required works at the expense of the Companies.

2.4.40 In submissions made to the NAO, the DG GPD, who had assumed office in March 2008, indicated that he was uncertain whether he had been provided with the court ruling, though noted that it was likely that he had been informed of the outcome. However, in further clarifications to this Office, the DG GPD stated that the procedure followed on the conclusion of a court case was for the ruling to be filed and referred to the CoL, who would subsequently forward it to the DG GPD. This Office noted that the court ruling was not referred to the DG GPD in accordance with that stated.

2.4.41 The NAO enquired with the Director Joint Office whether he had been informed of the court ruling with respect to the foreshore. The Director Joint Office stated that he could not recall whether he was informed of the outcome; however, he indicated that he was vaguely aware of certain issues related to the court case.

2.4.42 The CoL confirmed that he was aware of the court ruling; however, claimed that following the conclusion of the court case, he was not involved in subsequent matters relating to the property except for his presence at a number of meetings with the Company. Notwithstanding this, the CoL maintained that he was not involved in decisions taken with respect to the eventual disposal of this property. The NAO noted that the assertions by the CoL were inconsistent with the documentation reviewed by this Office.

- 2.4.43** When queried regarding whether the Minister MFEI or the PS Revenues and Land were informed of the court ruling, the DG GPD and the CoL noted that they had never discussed this case with them. The CoL claimed that he had informed subsequent DGs GPD of the details of the case.
- 2.4.44** The NAO noted that the Companies and the GPD failed to abide by the ruling of the Court of Appeal. A Legal Officer GPD brought this inaction to the attention of the Assistant Director Enforcement GPD. The intervention by the Legal Officer GPD followed correspondence exchanged with the Private Secretary to the PS Revenues and Land on 11 May 2011. The Private Secretary to the PS Revenues and Land had enquired whether the GPD had enforced the court ruling. The context to this exchange remained unclear as the Legal Officer GPD did not provide any additional information despite queries raised by the NAO in this regard. Similarly, enquiries with the Private Secretary elicited no further details providing additional context to the exchange. Subsequent developments were registered in a minute by the Assistant Director Enforcement GPD dated 29 November 2011, wherein it was noted that the CoL had issued instructions for the file to be reviewed in six months time. Accordingly, on 21 May 2012, the Assistant Director Enforcement GPD requested the advice of the CoL in light of previous instructions to put the issue on hold, given that he was being pressed to take action. Queried by the NAO as to the nature of pressure exerted, the Assistant Director Enforcement GPD claimed that he could not recall who was exerting pressure on him and whether this originated from the MFCC or from within the GPD. The CoL was similarly unaware as to who was exerting pressure on the Assistant Director Enforcement GPD. Additionally, the CoL stated that he was unaware of any involvement on the part of the Secretariat MFCC. On 28 May 2012, the CoL informed the Assistant Director Enforcement GPD that the matter had been settled as the occupied site had been sold through tender.

2.5 Resort to Tender

- 2.5.1** Temporarily putting aside the developments relating to the foreshore, wherein the Court decided that E.G. Property Holdings Ltd was to restore the foreshore to its original condition in November 2006 and confirmed on appeal in March 2009, focus is now returned to 83 Spinola Road. In May 2005, in correspondence submitted to the CoL, the Company had acknowledged errors in the deeds of transfer with respect to the property and therefore had effectively acquired an expired emphyteusis in 1998. In order to resolve the matter, the GPD had initiated the administrative process for the sale of the property through tender; however, in August 2005, the Department halted the process awaiting the outcome of the above-cited court case.

Developments regarding 83 Spinola Road preceding Court of Appeal Ruling

- 2.5.2 No notable developments took place between August 2005 and 20 June 2007, at which point the Archdiocese submitted correspondence to the Director Joint Office providing an explanation of the source of the error that eventually resulted in the acquisition of an expired emphyteusis by E.G. Property Holdings Ltd. Enclosed with this correspondence was a copy of the deed dated 28 August 1897, by virtue of which the Abbazia Spinola granted Antonio Coppini a site of 18 square canes for 99 years. Plans submitted therewith indicated that the site was in fact 83 Spinola Road. Cited in this correspondence was that the deed of 26 May 1981 was incorrect in terms of the emphyteutical commencement date (incorrectly stated as 25 December 1895), the emphyteutical term (granted for 99 and not 150 years) and ground rent payable (Lm0.30,0 and not Lm0.40,4).
- 2.5.3 Subsequent correspondence was submitted by the legal representative of E.G. Property Holdings Ltd to the CoL on 21 April 2008. The legal representative acknowledged the fact that the Company had acquired the temporary emphyteusis of 83 Spinola Road under the incorrect understanding that it had been granted for 150 years, with a remaining period of 47 years to expiry, when in fact the term had already expired at the point of acquisition. It was in this context that the Company sought recognition as emphyteuta for the remaining period had the term in fact been for 150 years. The Company based its reasoning on the fact that payments of ground rent and laudemia had been accepted, thereby validating its claims. To this end, the legal representative proposed that a corrective deed be published wherein the Company would be granted the right to the property up to 2045, that is, the expiry of the temporary emphyteusis had this been originally granted for 150 years. In a meeting with the NAO, the CoL stated that the GPD did not consider the possibility of extending the emphyteusis in this manner.
- 2.5.4 On 19 November 2008, a Director E.G. Property Holdings Ltd submitted correspondence to the DG GPD referring to a recent meeting held. Besides reiterating that stated in correspondence by the Company's legal representative, the Director indicated that the Company had made a significant investment on the property and had constructed thereon part of a development consisting of a block of residential apartments, underlying commercial premises and a garage complex. Although the Director noted that the Company was in the process of verifying the contention regarding ownership, interest was expressed in identifying possible ways of regularising the Company's position.

2.5.5 In reply, on 21 December 2008, the DG GPD informed the Director E.G. Property Holdings Ltd that this was a legally complex matter and that the Department was seeking legal advice. Although reference was made to earlier correspondence submitted by the DG GPD on 23 November 2008, a copy of this was not traced on file. Also on 21 December 2008, the DG GPD referred the file to the Director Joint Office, who in turn sought the advice of a Legal Officer GPD on 21 July 2009. It must be noted that a new Director Joint Office was appointed in early 2009, assuming office prior to the Court of Appeal ruling in March 2009. The NAO was unable to trace the requested legal advice. Following queries raised, the Director Joint Office indicated that this advice had not been provided.

The Tender Process

2.5.6 The next development recorded on file was a minute by the CoL to the Director Joint Office, dated 13 August 2009. According to this minute, following a meeting held on 7 August 2009, the Director Joint Office was requested to prepare the relevant property drawing of the site for sale through tender. The NAO sought to establish who was present for this meeting and that discussed. Conflicting versions of who attended this meeting were provided by the DG GPD and the CoL. The DG GPD, incumbent at the time of the Court of Appeal ruling and at the time of the CoL's instructions to prepare the property drawings, indicated that it was unlikely that he was present for this meeting; however, given the considerable lapse of time, could not be categorical in this respect. Similarly, the CoL could not recall who was present for the meeting and that discussed; however, indicated that the process was driven by the DG GPD, who had instructed him to proceed with a call for tenders.

2.5.7 In submissions to the NAO, the Director Joint Office stated that he had been requested to attend this meeting with E.G. Property Holdings Ltd by the CoL. The Director Joint Office asserted that he did not actively participate in the discussions held but was merely informed of the decision to resort to tender. In light of the fact that Joint Office property was to be disposed of, the Director Joint Office was to initiate the tender process through the drafting of a tender proposal form, hence his involvement in the meeting.

2.5.8 When queried by the NAO, the Minister MFEI and the PS Revenues and Land affirmed that they were not present for this meeting. Both stated that they had never met with representatives of E.G. Property Holdings Ltd and that their involvement was limited to the endorsements registered in the relative GPD file.

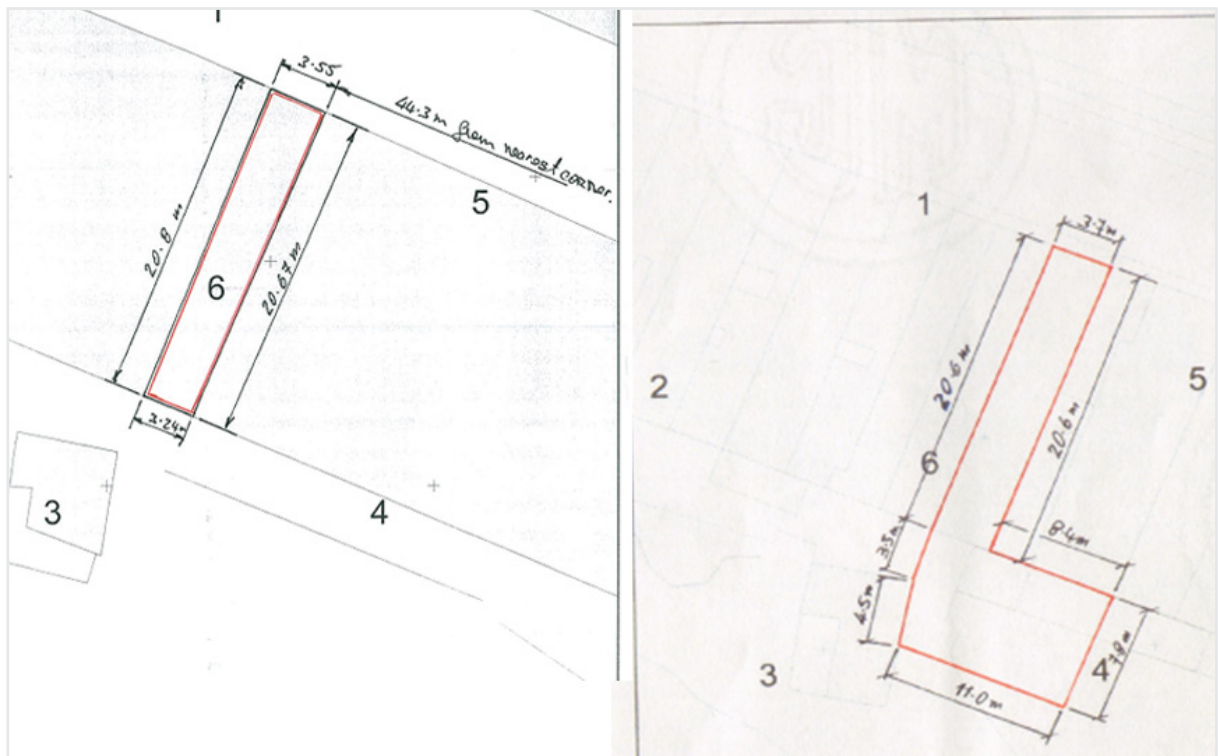
2.5.9 The Director Joint Office then requested an Architect GPD to prepare the property drawing on 25 August 2009. The subsequent minutes, filed by a Draughtsman GPD on 14 April 2010, comprised documents prepared by the architect of E.G. Property Holdings Ltd, namely, plans of the development at 83 Spinola Road and the foreshore adjacent to 80 to 83 Spinola Road, a survey sheet and photographs of the development. The plans prepared by the Company architect, outlining 83 Spinola Road and the foreshore area as part of the entire development, were dated 2 October 2003, 22 March 2004 and 2 November 2004. The ensuing minute was a note by the Draughtsman GPD to the Architect GPD, wherein the property drawing and land registration plans were referred for the latter's signature. The NAO noted that while the land registration plans and other drawings were filed, the property drawing bearing reference JO_20_2010, submitted by the Draughtsman GPD to the Architect GPD for endorsement, was missing.

Assimilation of the Foreshore to 83 Spinola Road, St Julian's

2.5.10 A copy of the property drawing JO_20_2010 was traced in the relevant GPD file, although this was filed with other documents at a later stage. Notwithstanding this, the NAO was unable to ascertain whether the filed property drawing was that submitted by the Draughtsman GPD and endorsed by the Architect GPD. Another copy of the property drawing JO_20_2010 was found in the GPD file relating to the adjacent property at 84 Spinola Road. The property drawing prepared by the Draughtsman GPD was submitted to the Architect GPD on 9 April 2010. On 15 April 2010, the Architect GPD indicated an amendment to the plan relating to the designated public passageway at level -1, as stipulated in MEPA permit PA/06580/2001. This amendment was incorporated into the property drawing by the Draughtsman GPD, with the relevant drawing signed by the Director Joint Office and the Architect GPD on 16 April 2010.

2.5.11 Of concern to the NAO were the dimensions of the site indicated in JO_20_2010, which not only corresponded to 83 Spinola Road but incorporated the foreshore adjacent to properties 80 to 83 Spinola Road. As a result of the assimilation of the foreshore with 83 Spinola Road, the footprint of the site increased from 68 square metres (83 Spinola Road) to 165 square metres (Figure 3 refers). This assimilation resulted in an L-shaped site, with development spread over nine floors, including two basement levels. According to the property drawing JO_20_2010, each level had an area of 165 square metres.

Figure 3: Comparison of the footprint of 83 Spinola Road pre-/post-assimilation of the foreshore



2.5.12 It is unclear who instructed and authorised the assimilation of the foreshore with 83 Spinola Road. While the plans of the development submitted by the architect of E.G. Property Holdings Ltd and the property drawings prepared by the Draughtsman GPD and endorsed by the Architect GPD and the Director Joint Office indicated assimilation of the two areas, the NAO traced no documentation specifically authorising the incorporation of the foreshore as part of 83 Spinola Road.

2.5.13 The NAO sought to establish who authorised the integration of the foreshore with 83 Spinola Road. Queries to this effect were addressed to the Minister MFEI, the PS Revenues and Land, the DG GPD, the CoL, the Director Joint Office, the Architect GPD and the Draughtsman GPD, as well as the Director E.G. Property Holdings Ltd.

2.5.14 In a meeting with the NAO, the Draughtsman GPD indicated that, at the time, it was common practice for the GPD to utilise plans submitted by third parties, in this case, E.G. Property Holdings Ltd. The Draughtsman GPD stated that this limited the need for site inspections by the Department. This was confirmed by the Director Joint Office, and also partly confirmed by the Architect GPD who stated that, due to the significant volume of work and the lack of resources available, the Department requested third parties to submit plans. However, the Architect GPD also indicated that the Department's technical staff would visit the site to verify the plans submitted against the actual site and structure. In this case, the site inspection carried out confirmed the plans submitted by the Company and therefore no queries were raised.

- 2.5.15 The NAO enquired with the Architect GPD as to whether the change in dimensions of 83 Spinola Road was effected following specific instructions and in the affirmative, by whom. In this regard, the Architect GPD failed to directly reply to queries raised and merely made reference to documents on file that illustrated the extent of the property following the assimilation of the foreshore with 83 Spinola Road. Moreover, the Architect GPD indicated that the property drawing JO_20_2010 was endorsed by his superior, that is, the Director Joint Office.
- 2.5.16 When queried by the NAO, the Director Joint Office explained that his remit did not extend to property administered by the GPD, and since the foreshore was not Joint Office property, he had no authority to authorise its sale or its assimilation to 83 Spinola Road. The Director Joint Office affirmed that he was not instructed to assimilate the two sites into one property drawing, nor did he issue instructions to this effect to the Draughtsman GPD or the Architect GPD. Additionally, the Director Joint Office maintained that his endorsement was to be construed as recognition of the fact that the site was to be sold through tender, and indicated his reliance on Architect GPD in terms of the technical specifications of the site.
- 2.5.17 In light of the limited explanations provided, the NAO sought the views of the CoL, seeking to establish whether the decision to assimilate the sites was his. The CoL denied giving instructions to the technical staff and claimed that changes in the site plans merely reflected the actual property dimensions observed on site, and it was in this sense that the Director Joint Office, the Architect GPD and the Draughtsman GPD prepared the property drawings possibly without specific instructions for assimilation. The NAO maintains significant reservations in this respect, deeming the explanations provided incomplete and implausible, since the changes in dimensions of the site were extensive and far from obvious, certainly requiring due authorisation, which was conspicuously lacking.
- 2.5.18 The CoL asserted that, following the Court of Appeal ruling, the intent was to regularise the Company's position through the sale of the site by tender, which disposal was to address the expired emphyteusis and the encroachment on public land. In this respect, the CoL affirmed that the decision to sell both sites did not follow discussions held by the GPD, but was the obvious resolution to the situation. The CoL explained that since the site was within a development zone and was covered by the required MEPA permits, it was in Government's interest to regularise the Company's position and in so doing secure compensation. This was conditioned by the fact that the Company had developed the site in good faith and had made a substantial investment in its development. Elaborating in this respect, the CoL noted that the development extended on both sites and therefore the disposal of only one part of the site without the other would have resulted in the development having to be demolished. It must be noted that the submissions made by the CoL to the NAO were vague and at times contradictory, particularly when referring to the process of authorisation of the sale through tender of the assimilated sites.

- 2.5.19 The DG GPD, in office at the time when the CoL issued instruction for the drafting of property drawings for the sale of the site through tender, stated that during his tenure (which ended in December 2009) the option of the sale through a call for tenders was considered; however, he was not involved in any definitive action taken by the Department to dispose of the site. In addition, the DG GPD affirmed that he was not requested to provide advice or direction to proceed in this respect. Moreover, the DG GPD asserted that his authorisation for the assimilation of the sites had not been sought prior to their sale by tender. In submissions to the NAO, the DG GPD explained that unauthorised encroachment on public land was not uncommon and, in such cases, the Department was faced with either enforcing demolition or, if MEPA compliant, selling the site through tender with the developer granted a right of first refusal. Government ordinarily favoured sanctioning the development rather than resort to enforcement action. In this case, while acknowledging that the GPD could have insisted on the demolition of the illegal development on the foreshore, the Department sought to arrive at an amicable agreement with the developers through the sale of the site by tender, particularly in view of the fact that the development was covered by the required MEPA permits.
- 2.5.20 The next DG GPD, incumbent at the time of the completion and endorsement of the new property drawing, stated that he had no recollection of the incorporation of the illegally developed foreshore with the original 83 Spinola Road site, for eventual sale by tender. The DG GPD maintained that his authorisation had not been sought in this regard. Furthermore, the DG GPD expressed doubt as to whether he had been informed of the case, maintaining that he would have recalled such a complex case and the court ruling in Government's favour. The NAO noted that the assertions by the DG GPD were inconsistent with that stated by the CoL, who claimed that he had informed successive DGs of the details of the case.
- 2.5.21 The Minister MFEI and the PS Revenues and Land maintained that this matter had not been brought to their attention and were therefore not involved in authorising the assimilation of the foreshore with 83 Spinola Road. Nevertheless, the Minister MFEI confirmed that stated by the DG GPD, in that Government generally opted for the sanctioning of irregular developments on public land through sale by tender, provided that such developments were covered by relevant planning permits, rather than the demolition of structures encroaching on public land.
- 2.5.22 On 20 April 2010, the Architect GPD submitted copies of the plans to the Director Joint Office, indicating that the property was to be registered at the Land Registry prior to proceeding with the tender process. In turn, on 21 April 2010, the Director Joint Office submitted a proposal for the issue of tenders for the disposal of government-owned immovable property. The proposal was submitted through the DG GPD to the CoL, who provided the required authorisation on 21 April 2010 and 22 April 2010, respectively. Stated in the form was the fact that the property that was to be disposed of through sale was built on land that had been granted on emphyteusis, which grant had expired on 27 August

1996. A right of first refusal was to be granted to E.G. Property Holdings Ltd. Indicated in the proposal submitted by the Director Joint Office was the fact that the Company had developed the site following the purchase of the property in 1998, with an understanding, albeit erroneous, that the temporary emphyteusis was to expire in 2045. Also outlined was that the property formed part of a larger complex of residential apartments with underlying commercial premises and garages, and that the tender was intended to regularise the Company's position in view of the substantial investment made on the site. The NAO noted that the tender proposal made no reference to the illegal construction carried out on site and also failed to indicate that the Court had deemed the foreshore, now assimilated with 83 Spinola Road, as demesial property.

2.5.23 Queries regarding the omission of any reference to the matter of the foreshore, an undoubtedly fundamental detail, in the proposal for the issue of tenders were addressed to the Director Joint Office, CoL and the DG GPD. According to the Director Joint Office, in line with his remit, he prepared a tender proposal form that provided background information regarding the part of the site that was Joint Office property. In fact, the Director Joint Office noted that the land registration plan corresponded to the Joint Office site and was therefore different from the property drawing JO_20_2010. Notwithstanding this, the Director Joint Office acknowledged that the description of the property presented in the tender proposal did not tally with the property drawing and footprint referred to therein and conceded that this was an oversight on his part. Moreover, the Director Joint Office noted that the tender proposal should have included details of the expired emphyteusis as well as the encroachment on public land and the court ruling regarding this area of foreshore. Elaborating on the matter, the Director Joint Office argued that two tender proposal forms should have been drawn up, one for the original 83 Spinola Road site, with a footprint of 68 square metres, and another prepared by the CoL for the foreshore, even if both sites were to be jointly sold through one tender.

2.5.24 On this point, the CoL conceded that the GPD forfeited an element of bargaining power in negotiations regarding the value of the now assimilated 83 Spinola Road when disposing of the site through one tender. In this Office's opinion, while the party that was to bear responsibility for the expired emphyteusis remained a point of contention, with Government and E.G. Property Holdings Ltd presenting valid arguments, the same could not be said of the foreshore. The party at fault with respect to the foreshore was certainly the Company, as in fact confirmed by the Court on appeal. In the NAO's understanding, Government's negotiating position on the foreshore, which accounted for a substantial portion of the assimilated site, was compromised when disposing of this area with that of the expired emphyteusis through a single tender. The CoL maintained that given the GPD's intention to dispose of the site by tender, then there was no need to provide details allowing for a comprehensive representation of the case. The NAO strongly disagrees with that stated by the CoL, deeming the tender proposal drawn up by the Director Joint Office and endorsed by the CoL as misleading, failing to provide a full account of the property to be disposed of.

2.5.25 These concerns were validated by the DG GPD who, in a meeting with the NAO, asserted that he was unaware that the tender proposal did not include all the details of the case, and that he was consequently approving the sale of the foreshore in addition to the site subject to an expired emphyteusis, when he provided endorsement with respect to the latter. The DG GPD maintained that he did not recall being informed of the illegal development on the foreshore.

The Valuation of 83 Spinola Road, St Julian's and the Publication of the Tender

2.5.26 Following the endorsement of the tender proposal by the CoL and the DG GPD, the Department sought to establish the value of 83 Spinola Road. It must be noted that although reference is solely made to 83 Spinola Road from this point of the process onwards, this also includes an area of the foreshore as per revision in plans elaborated on in paragraph 2.5.11. To this end, on 28 April 2010, the GPD requested an architect (hereinafter referred to as the GPD Consultant Architect) to estimate the freehold value of the site and structure of 83 Spinola Road as indicated in the property drawing JO_20_2010 and stipulate an appropriate bid bond.

2.5.27 The GPD Consultant Architect submitted the valuation of 83 Spinola Road to the DG GPD on 11 May 2010. According to the GPD Consultant Architect, the freehold value of the property bearing a footprint area of approximately 165 square metres was €950,000, while the bid bond specified amounted to €15,000. In arriving at this valuation, the GPD Consultant Architect considered the:

- a. physical considerations such as the size, levels, frontage on opposite streets and configuration of the property;
- b. environmental considerations such as the seafront location, surroundings and street access;
- c. economical considerations such as the good demand for property in the area, the freehold value of adjacent or similar properties previously issued for sale through tenders; and
- d. development potential and development restrictions as subject to MEPA planning policies.

2.5.28 In a meeting with the NAO, the GPD Consultant Architect did not provide additional details to substantiate the basis of the valuation; however, maintained that this valuation accurately reflected the property. Although the L-shaped layout of the site limited development, the site area, location and potential, as well as the fact that the valuation was to factor site and structure, augmented its worth.

2.5.29 The tender advert corresponding to the sale of 83 Spinola Road as indicated in the property drawing JO_20_2010 was published in the Government Gazette dated 28 May 2010. Offers were to be submitted by 17 June 2010. Although the €15,000 bid bond requirement and

the fact that the tender was subject to a right of first refusal were specified, the NAO noted that no reference was made to a minimum acceptable offer. Following queries by the NAO, the DG GPD indicated that the specification of the minimum offer in tenders issued by the Department was not a standard practice at the time; however, noted that this practice was adopted shortly thereafter.

Adjudication of the Tender and Ministerial Authorisation

- 2.5.30** Despite the significant complexity of the case and its more than particular nature, no documentation indicating the GPD's referral of its intent to dispose of the property through tender for ministerial endorsement was provided. This was confirmed by the Minister MFEI and the PS Revenues and Land. In response to queries raised by the NAO, the Minister MFEI made reference to the ministerial direction MFEI 001/08, which specified the procedure to be followed when disposing of public property through tender and that ministerial approval was to be sought after adjudication.⁵ However, given the particular nature of this disposal, the Minister MFEI was of the opinion that the GPD should have informed him of the intended action prior to the issue of the call for tenders. In submissions to the NAO, the PS Revenues and Land stated that it was common practice that ministerial approval for tenders was only requested following adjudication.
- 2.5.31** That stated by the Minister MFEI and the PS Revenues and Land was confirmed by the DG GPD and the CoL, who indicated that it was normal practice for ministerial authorisation to be sought at a later stage in the process, following the evaluation of offers submitted. The NAO noted that the endorsement by the DG GPD and the CoL of the tender proposal submitted by the Director Joint Office was the only authorisation sought with respect to the issuance of the tender.
- 2.5.32** E.G. Property Holdings Ltd were informed of the issued call for tenders by a GPD official acting on behalf of the CoL through correspondence submitted on 1 June 2010. Eighty Two Co. Ltd submitted the only bid received by the GPD with respect to the sale of 83 Spinola Road. The bid, dated 14 June 2010, was of €192,225. Appended to the submission was correspondence addressed to the CoL, wherein the Director Eighty Two Co. Ltd indicated that E.G. Property Holdings Ltd had registered a change in name and was now Eighty Two Co. Ltd.
- 2.5.33** A memorandum, relating to the disposal of 83 Spinola Road by means of tender, was referred to the General Contracts Committee (GCC), Department of Contracts (DoC), for adjudication on 22 June 2010. Referral in this sense was in line with the ministerial direction MFEI 001/08. Indicated in the memorandum was the fact that the property to be disposed

⁵ Ministerial direction MFEI 001/08, titled 'Change of Administrative Procedure in the Adjudication of Tenders of Sale of Public Property by the Government Property Division', was issued on 24 April 2008. In essence, this directive revised the procedure to be followed for the adjudication and determination of tenders relating to the sale of public property. Recommendations for the award of tenders by the CoL were to be referred to the General Contracts Committee, that in turn was to refer its decision to the Minister responsible for lands.

of was built on a portion of land that reverted to Government following the expiration of a temporary emphyteusis in 1996. The property was to be disposed through the sale of absolute ownership, which was subject to a right of first refusal. The NAO noted that while the details provided accurately reflected the original anomalous situation relating to 83 Spinola Road, the assimilation of the foreshore with this property rendered the memorandum inaccurate. Of concern to this Office was that no reference was made to the court ruling that deemed the foreshore, now part of 83 Spinola Road and subject to sale by tender, as demesnil property.

- 2.5.34 On 23 June 2010, the CoL submitted a minute to the DG DoC, through the PS Revenues and Land and the DG GPD. The CoL made reference to the details pertaining to 83 Spinola Road presented in the memorandum and noted that the offer of €192,225 submitted by Eighty Two Co. Ltd was the only bid received by the GPD. In this context, the CoL recommended that the tender be awarded to Eighty Two Co. Ltd provided that the Company raises its offer to €950,000. The DG GPD and PS Revenues and Land endorsed that indicated by the CoL on 24 June 2010 and 25 June 2010, respectively.
- 2.5.35 The GCC concurred with that recommended by the CoL, namely, that the tender be awarded to Eighty Two Co. Ltd if the Company raised its offer from €192,000 to €950,000. To this end, on 8 July 2010, the DG DoC referred the decision arrived at by the GCC to the Minister MFEI, for due consideration and approval. The Minister MFEI approved the award of the tender for the disposal of 83 Spinola Road to Eighty Two Co. Ltd on 14 July 2010, subject to the revision of the submitted bid to €950,000. This approval, with award subject to an upward revision in bid, was acknowledged by the DG DoC and referred to the CoL on 28 July 2010.
- 2.5.36 In turn, on 3 August 2010, the CoL issued a letter of acceptance to Eighty Two Co. Ltd, wherein the Company was informed that the offer submitted would be accepted were this to be revised to €950,000. The Company was informed that should it be willing to accordingly revise its bid, then it was to call at the GPD on 15 September 2010 for the signature of the relevant contract. Failure to attend at the specified date would result in the Company forfeiting any rights to this tender.
- 2.5.37 Queries regarding the authorisation of award of tender were addressed to the Minister MFEI, the PS Revenues and Land, the DG GPD, the CoL and the Director Joint Office. Specifically, the NAO sought to establish whether details relating to the foreshore and the Court's decision in this respect were brought to the attention of those involved. In this context, the Minister MFEI indicated that he was unaware of any other details regarding the case than those specified in the minute addressed to him. The Minister MFEI noted that at this stage of the process, approval focused on the tender evaluation and award processes, and was not to determine whether the site was to be issued for sale by tender and whether a right of first refusal was to be granted. In this case, since there was only one

bidder, this authorisation was restricted to the approval of the offer. On the other hand, the role of the GCC was to ensure that the tender evaluation procedure was compliant with existing regulations and to ensure that revenue to Government was maximised. It was in this respect that the Minister MFEI maintained that reference to all the pertinent facts of the case should have been made at the point when the tender was yet to be issued. Failure to do so at that early stage conditioned subsequent actions.

2.5.38 Commenting with respect to the authorisation of award of tender, the PS Revenues and Land stated that in his understanding at the time, this was a standard disposal of public land through tender and his approval was granted in this context. The PS Revenues and Land maintained that he was unaware of the circumstances regarding the court case and ruling, and argued that such important details ought to have been documented at the instance when his authorisation was sought. The PS Revenues and Land could not explain or justify the reason for this failure.

2.5.39 While the DG GPD reiterated that he was unaware of the details regarding the foreshore, the CoL maintained that, at this stage of the process, the tender had already been issued and therefore there was no need to provide all the details of the case. Moreover, the CoL noted that the DG DoC and the GCC were tasked with the review of the award of tender and, in this context, only required details regarding the bid submitted and the valuation of the site. Of significant concern to the NAO were assertions by the CoL that there existed no obligation to inform the Minister MFEI or the PS Revenues and Land of the full details of the case. The NAO fails to understand the basis of this statement and deems it imperative and essential that a comprehensive account of the facts of the case be presented when ministerial authorisation is sought. In this case, the Minister MFEI and the PS Revenues and Land were not made aware of all the pertinent facts, hence conditioning the decision taken. Of greater concern was the CoL's failure and reluctance to bring all facts to the attention of the Minister MFEI and the PS Revenues and Land, with the reason for this omission entirely unclear. In this Office's opinion, this omission casts doubt on the integrity of the process.

2.5.40 When informed of that stated by the CoL, the Minister MFEI was adamant that he should have been provided with all the details of the case, as it was not expected of a minister to review a file in detail, but rely on that brought to his attention when approval was sought. The Minister MFEI disagreed with that stated by the CoL that as long as a legitimate method of disposal was employed, then there was no need for the Minister to be informed of the court ruling. The Minister MFEI substantiated his argument through reference to the ministerial direction MFEI 001/08, which clearly specified that the submission to the Minister was to include a summary of each proposed sale, clearly indicating what initiated the process of sale, the present title of the property and any burdens thereon. In the case of 83 Spinola Road, this was not adhered to.

Objections Raised by Eighty Two Co. Ltd

2.5.41 On 11 August 2010, the legal representative of Eighty Two Co. Ltd submitted correspondence to the CoL with regard to the tender submitted for the purchase of 83 Spinola Road. While making reference to a meeting held on the matter, the Company's legal representative maintained that the position assumed by the GPD, that is, acceptance of the bid subject to its increase to €950,000, was unreasonable. The Company contested the position taken by the GPD and requested the Department to review its stance, particularly in view of various facts that were not considered in the determination of value. Furthermore, the Company indicated that the time limit imposed by the GPD for acceptance of the tender offer be indefinitely postponed up to and until the matter was resolved. In the Company's understanding, the factors that were to be considered before determining whether any compensation was to be paid to the GPD were that the:

- a. valuation arrived at by the GPD was unrealistic, inexplicable and significantly higher than that obtained by the Company. To this end, the Company proposed that another valuation be obtained by the GPD;
- b. property belonged to the Company, and was purchased and held in good faith for more than ten years;
- c. considerable investment undertaken by the Company had raised the value of the property;
- d. Company was recognised by the GPD as the lawful owner of the property for the remaining period of the emphyteusis, hence the retraction by the GPD was not acceptable or legally possible; and
- e. GPD had misguided the Company in 2002, which misguidance led to the investment in question and the current situation.

2.6 Recourse to Arbitration

2.6.1 Following the objections raised by Eighty Two Co. Ltd, the CoL referred the matter to the GPD Tender Committee⁶ on 31 August 2010. Referring to the correspondence received from the legal representative of Eighty Two Co. Ltd, the CoL indicated that the facts of the case were as explained in this correspondence and that the GPD Tender Committee was to possibly consider the revaluation of 83 Spinola Road in light of the reasons cited by the Company and the fact that it was the only bidder. A timeline of the key events relating to the property was prepared for the GPD Tender Committee. The NAO noted that, as in previous instances, no details regarding the extension of the property to incorporate the illegally developed footprint pertaining to the same development were provided, hence rendering the confirmation of facts by the CoL as anomalous.

⁶ It must be noted that a GPD Tender Committee was set up on 24 May 2010, effectively assuming control of the process through which the Department disposed of public land. The first meeting of the GPD Tender Committee was held on 10 June 2010; therefore, the tender for the disposal of 83 Spinola Road, published on 28 May 2010, yet initiated in August 2009, preceded the setting up of the Committee. It was in this context that the NAO arrived at an understanding that the tender for the disposal of 83 Spinola Road was not referred to the GPD Tender Committee prior to August 2010.

- 2.6.2 Queried by the NAO with regard to the omission of crucial facts in his referral to the GPD Tender Committee, the CoL reiterated that at this stage in the process the decision to dispose of the site through sale by tender had already been made; therefore, the CoL did not deem it necessary to present any additional details of the case. Nonetheless, the CoL conceded that he could have clarified the details of the case in his submission to the GPD Tender Committee.
- 2.6.3 This Office sought to establish whether the GPD Tender Committee was somehow made aware through other means of the matter regarding the foreshore. Questions to this end were put to the DG GPD, who chaired the Committee. The DG GPD stated that, to the best of his recollection, this matter was not brought up during any Committee meetings and that the deliberations by the GPD Tender Committee were solely based on that referred by the CoL.
- 2.6.4 The sale by tender of 83 Spinola Road was discussed during a meeting of the GPD Tender Committee on 18 October 2010 and attended by the DG GPD as Chair, a Director DoC and an Adviser to the PS Revenues and Land (an architect by profession) as members, and a Principal Officer GPD serving as Secretary to the Committee. According to the minutes of this meeting, the GPD Tender Committee was of the opinion that the estimated value established by the Department was fair and reasonable. In this respect, the Committee agreed that a meeting was to be scheduled with Eighty Two Co. Ltd, wherein the Company was to be presented with the following options:
- a. compensation to Government through the transfer of three apartments;
 - b. payment of €1,500,000; or
 - c. institution of court action against the Company by Government.
- 2.6.5 No documentation supporting the revision in estimated value, from €950,000 to €1,500,000, was noted by the NAO. When queried on the matter, the DG GPD stated that he could not recall the details of these proposals; however, commented that most likely, these were merely a record of the discussions held within the GPD Tender Committee which were not subsequently presented to the Company. The Secretary GPD Tender Committee could not recall the details of these proposals.
- 2.6.6 In fact, there was no record on file indicating whether these recommendations were communicated to Eighty Two Co Ltd; however, in subsequent correspondence dated 7 December 2010, the Company's legal representative noted that the parties had failed to reach agreement on the way forward. It was in this context that the Company proposed resolution through the nomination of an ad hoc committee of three persons, with one member to be nominated by the Company and another by the GPD. The third, who was to chair the committee, was to be selected by the Company from a list of three possible alternatives proposed by the GPD. The committee was to be entrusted with obtaining the views of both parties and was to come to a decision on the fair price to be paid after due

consideration of all the relevant facts. Both parties were to sign an agreement that would render the compensation declared as fair by the ad hoc committee as final and not subject to appeal by either party.

- 2.6.7 The proposed recourse to arbitration was discussed during the GPD Tender Committee meeting of 20 January 2011. In attendance were the DG GPD as Chair, the former DG GPD as Vice Chair, the Adviser to the PS Revenues and Land and two other GPD officials, one serving as Secretary. In sum, the GPD Tender Committee decided to contact the Malta Arbitration Centre to ensure conformity with arbitration regulations and determine costs involved. If such costs were acceptable, the matter was to be referred to the Malta Arbitration Centre; if not, then the GPD Tender Committee was to proceed as proposed by Eighty Two Co. Ltd. In either case, the Committee was to seek ministerial approval. In addition, the Committee was to establish the revenue due to Government from this sale, since the property was transferred through the Church-State Agreement. The residual revenue to Government would determine whether the property was to be transferred through an outright sale or the grant of an emphyteusis. In either scenario, the approval of the Minister MFEI and the PS Revenues and Land was to be obtained. Finally, the GPD Tender Committee indicated that an ad hoc committee was to be established to determine the value of the property.
- 2.6.8 Queries were addressed to the DG GPD, who took office in January 2011 and served as Chair GPD Tender Committee, as to whether he had been informed of the court case regarding the foreshore prior to approving the recourse to arbitration. The DG GPD indicated that he could not recall the details of the case yet maintained that, in view of the documentation on file, he was probably not aware of all pertinent information. This was somewhat inconsistent with that stated by the CoL, who claimed that he had informed subsequent DGs GPD of the details of the case. Notwithstanding this, the DG GPD indicated that, in his opinion, knowledge of the court ruling would not have changed the outcome of the proceedings.
- 2.6.9 The Secretary GPD Tender Committee requested the Director Joint Office to estimate the residual revenue to Government were 83 Spinola Road disposed of for €950,000. According to calculations submitted by the Director Joint Office on 21 January 2011, the amount to be retained by Government following the sale of the property was €35. According to Article 7 of the Ecclesiastical Entities (Properties) Act (Chapter 358), the remaining balance would be transferred by Government to the Church by way of issuance of Foundation for Church Schools bonds.
- 2.6.10 The option of resort to the Malta Arbitration Centre was not pursued, as inferred in a minute addressed to the Minister MFEI, through the PS Revenues and Land and the DG GPD, submitted by the Secretary GPD Tender Committee on 14 April 2011. According to this minute, Eighty Two Co. Ltd had proposed the setting up of a committee to determine a minimum value, since the offer of €192,225 submitted by the Company fell short of the Department's estimate of €950,000. Consistent with the committee structure proposed by

the Company, the Department nominated the GPD Consultant Architect as its member and presented three alternatives as Chair for selection by the Company, namely, an Architect GPD, the Adviser to the PS Revenues and Land and another Consultant Architect. The other member of the committee was to be nominated by the Company. A summary of the case history was presented in this minute, which included details relating to the expired emphyteusis, the attempted sale of the property by tender, the bid submitted by Eighty Two Co. Ltd (who were the only bidders), and the Company's request for an arbitration process to revalue the property. It was in this context that the Secretary GPD Tender Committee sought the approval of the Minister MFEI. The DG GPD and the PS Revenues and Land endorsed this minute on 18 April 2011 and 20 April 2011, respectively, while the authorisation of Minister MFEI was granted on 10 May 2011.

- 2.6.11** The NAO sought to determine why the option to refer the matter to the Malta Arbitration Centre was discarded. While one DG GPD could not provide an explanation as to why formal arbitration was not pursued, the other DG GPD indicated that this option was not pursued due to cost and time constraints. Elaborating in this respect, the DG GPD argued that formal arbitration entailed lengthy proceedings and the GPD did not intend to prolong the process as this would have resulted in Eighty Two Co. Ltd incurring additional costs. Moreover, the DG GPD maintained that resort to informal arbitration was common practice in cases of disagreement on the value of properties subject to sale by tender. The Secretary GPD Tender Committee could not recall why formal arbitration was not resorted to.
- 2.6.12** The PS Revenues and Land maintained that his approval of resort to arbitration was to be understood in terms of the considerable difference in valuations submitted by both parties. The Minister MFEI and the PS Revenues and Land stated that their involvement in the arbitration process was limited to the approval of the appointment of the committee members, and that there was no ministerial intervention with respect to the determination of the revised property value. Again, the Minister MFEI and the PS Revenues and Land denied being informed of the court case and rulings at this stage.
- 2.6.13** On 17 May 2011, the Secretary GPD Tender Committee informed the legal representative of Eighty Two Co. Ltd that the GPD had obtained the necessary approvals to proceed with the proposed committee in order to establish the freehold value of the property. Also indicated in this correspondence was the architect that was to represent the Department in arbitration proceedings, as well as the names of another three architects, one of whom was to be chosen by the Company as Chair. In addition, the Company was to nominate its representative as member. Moreover, the Company was reminded that the decision of the Committee (hereinafter referred to as the Arbitration Committee) regarding the value was final. The date of the hearing was to be determined once the Company indicated its choice of Chair and nominated its representative. Documentation sourced by the NAO indicated that, on 23 May 2011, the Company chose the Adviser to the PS Revenues and Land as Chair (hereinafter referred to as Chair Arbitration Committee) and proposed an architect (hereinafter referred to as the Company Architect) as its representative on the Committee.

- 2.6.14 When queried by the NAO, the Chair Arbitration Committee stated that he could not recall receiving a formal letter of appointment; however, indicated that he was informed of this task by the DG GPD. The Chair Arbitration Committee elaborated with respect to the terms of reference set, noting that the Committee was to establish a just and freehold estimate of the site, after considering the view of both parties. In addition, the Chair indicated that he had requested the GPD Consultant Architect and the Company Architect to submit their valuations. During meetings held by the Arbitration Committee, the Architects and the Company's legal representative made submissions on behalf of their respective party. Although the Chair Arbitration Committee indicated that at least two meetings were held by the Committee, the NAO was not provided with minutes of these meetings. The Chair Arbitration Committee also indicated access to the original property drawing, referenced as JO_20_2010, on which the tender was based. Since both Architects would not amend their original valuation and therefore reach some form of compromise, the Chair indicated that he was left with no option but to revalue the property directly.
- 2.6.15 The GPD Consultant Architect corroborated that stated by the Chair Arbitration Committee, noting that at least one meeting was held wherein the valuations were discussed. Furthermore, the GPD Consultant Architect indicated that he was not involved in the revised valuation of 83 Spinola Road or with the drawing up of the arbitration report. According to the GPD Consultant Architect, the report presented the conclusions arrived at by the Chair Arbitration Committee.
- 2.6.16 As part of the submissions made on behalf of Eighty Two Co. Ltd, dated 1 August 2011, the Company Architect submitted correspondence to the Chair Arbitration Committee. The Company Architect indicated that for the purpose of the valuation, the area between the development and the sea (previously referred to as the foreshore) and 83 Spinola Road were considered separately. The value of the seafront area was considered to be higher than that of the back part of the property (83 Spinola Road less the foreshore). In addition, the Company Architect noted that 83 Spinola Road was valued as freehold, although acknowledged that the Company had to enter into separate negotiations with the GPD in order to mitigate the current situation of the property.
- 2.6.17 The Company Architect claimed that the GPD valuation of €950,000 was exorbitantly high, and presented various arguments supporting this claim. In this context, the Company Architect argued that the valuation was based on the notion that the site could be developed in its entirety for the full height allowable in the area – namely, two basements, a semi-basement, five floors and a penthouse – totalling 850 square metres, based on a footprint of 94 square metres. This valuation failed to take into account the changes dated 6 July 2011, with receding areas of development, as illustrated in the property drawing JO_2010_A. The revised property drawing took into account the fact that MEPA had not

allowed the development of the full area on all floors of the building, effectively implying a receding façade at the higher levels. The Company Architect argued that the limitations of the actual development potential of the property were to be factored when valuing the site. First, the Company Architect claimed that, by itself, the site was not developable and was only developed since it formed part of a larger property that had façades on Spinola Road. In this respect, the Company Architect maintained that this tract of land, on its own, did not have the value attributed to it by the GPD and that its value was enhanced by the fact that it was attached to the Company's property. Second, the Company Architect noted that the servitude at level -1, consisting of public access along the entire façade, severally limited the commercial use of this floor and therefore was to be taken into consideration. Third, the Company Architect asserted that terrace space, which constituted a large part of the floor areas, was to be valued differently from the internal areas.

2.6.18 A summary of the internal and terrace areas as well as the public passage at level -1, understood by the NAO as corresponding solely to the foreshore area, were presented by the Company Architect (Table 1 refers). The Company Architect argued that the footprint area under discussion was 94 square metres, having excluded the 70 square metres occupied by 83 Spinola Road. According to the Company Architect, the actual built up area allowed by MEPA permits was 252 square metres, with a further 238 square metres of open terraces and a public passageway consisting of 40 square metres. These constraints in terms of use were to be taken into consideration when determining the value of this portion of the site.

Table 1: Company's apportionment of development per level of foreshore area

Floor level	Built area (m ²)	Terrace area (m ²)	Public passage area (m ²)
-2	94	-	-
-1	-	53	40
0	75	-	-
1	41	37	-
2	27	38	-
3	15	39	-
4	-	39	-
5	-	27	-
6	-	5	-
Total	252	238	40

- 2.6.19 The Company Architect noted that the valuation carried out by the GPD Consultant Architect was not revised to acknowledge the actual built envelope of the property as reflected in the updated property drawing JO_20_2010_A. On the basis of the reduction in area alone, the Company Architect argued that the value of €950,000 was to be reduced accordingly. Moreover, the valuation of the property was to consider the differing values of the terraces and the internal areas, the 'front' and 'back' portions of the property (here understood as the foreshore and 83 Spinola Road, respectively), the effect of the public passage at level -1, and the development restriction imposed by MEPA. In view of these considerations, the Company Architect maintained that the €192,000 valuation was a fair and reasonable price for the site, that is, 83 Spinola Road and the parcel of land along the seaside (the foreshore). This submission by the Company Architect to the Arbitration Committee was made without prejudice to the request by the Company's legal representative to address the Committee on general and specific issues.
- 2.6.20 The arbitration report, signed by the Chair Arbitration Committee and dated 10 October 2011 was submitted to the GPD Tender Committee on 11 November 2011, outlining details of the proceedings and the documents reviewed. In establishing value, the Chair Arbitration Committee considered the North Harbours Local Plan (NHLP), which regulated development on site. Specific reference was made to the fact that building height was limited to five floors from the highest street level as per Map SJ4, while land use was to be predominantly residential as per Map SJ2 of the NHLP. In the case of the site subject to arbitration, the development consisted of a semi-basement level, five floors and a penthouse level, which was in line with the local plan requirements. Due to the difference in levels between the street frontage and the bay area frontage, the site comprised a development of nine floors overlooking Spinola Bay, with a public passage being retained. Also noted was that the site was L-shaped, with a superficial area of 165 square metres, which decreased due to imposed setbacks for each floor, with an area of 71 square metres at the penthouse level.
- 2.6.21 Cited in the report were the factors considered by the Chair Arbitration Committee as bearing influence on the valuation. These comprised the site location, the public passage within the site, the building height, the reduction in area at higher levels and the acceptance of the laudemium by the GPD. The Chair Arbitration Committee considered the valuations put forward by the GPD and Eighty Two Co. Ltd as extreme. In this context, the Chair noted that the valuation by the GPD failed to consider the decreasing site area at each floor level and that the Department had accepted the payment of the laudemium. On the other hand, the Chair deemed the valuation by the Company Architect as assigning too much weight to the bay area of the site, which area decreased per floor increase, and little weight to the inner part of the site. In a meeting with the NAO, the Chair Arbitration Committee severely criticised the valuation by the Company Architect, claiming that, other than the reference to the floor setbacks, the valuation lacked technical details justifying the low value attributed to the site. Similar criticism of insufficient detail was levied at the valuation prepared by the GPD Consultant Architect.

2.6.22 In view of the limitations outlined with respect to the valuations put forward by the GPD Consultant Architect and the Company Architect, the Chair Arbitration Committee carried out a valuation based on the revised property drawing, now featuring the receding floors. Utilising a base value of €475,000 for a plot measuring 150 square metres and a development of five floors, the Chair Arbitration Committee established a rate of €633 per square metre per floor.⁷ The rate was subsequently reduced by 20 per cent to take into consideration the acceptance of the laudemium by the GPD. This resulted in a revised rate of €506 per square metre. For comparison purposes, the Chair Arbitration Committee cited €292 per square metre per floor as the rate for sites within any scheme.

2.6.23 The Chair Arbitration Committee proceeded to estimate the usable area per floor. This resulted in a total floor space of 1,139 square metres spread over nine floors as indicated in Table 2. Applying the rate of €500 per square metre to the 1,139 square metres resulted in a site estimate of €569,500. In this context, the Chair Arbitration Committee concluded that a fair and reasonable freehold estimate of the site was €550,000.

Table 2: Area per floor level as per Arbitration Committee report

Floor level	Area (m ²)
-2	165
-1	136
0	143
1	164
2	134
3	120
4	108
5	98
6	71

Note:

- a. Although the arbitration report cited an area of 136 square metres at level -1, the NAO noted that property drawing JO_20_2010_A indicated an area of 126 square metres at this level.

2.6.24 In submissions to this Office, the Chair Arbitration Committee argued that the base rate applied by the GPD Consultant Architect was consistent with the €633 per square metre established in his valuation. The Chair Arbitration Committee indicated that, were the GPD Consultant Architect's estimate of €950,000 divided by nine floors of 165 square metres per floor, then this would result in a rate of €640 per square metre.⁸ According to the Chair Arbitration Committee, the revised value of the property, from €950,000 to €550,000, was to be considered in terms of the reduction in floor area, from 1,485 square metres to 1,139 square metres, effectively resulting in the application of a similar rate.

⁷ €475,000/(150m² x 5 floors) = €633/m²

⁸ €950,000/(165m² x 9 floors) = €640/m²

- 2.6.25 When queried by the NAO, the Chair Arbitration Committee and the GPD Consultant Architect indicated that they were unaware of the court case and ruling regarding the illegal development on the foreshore at the time of arbitration. Notwithstanding this, the Chair Arbitration Committee asserted that as long as the GPD still intended to dispose of the property, and issued instructions to determine the freehold value of the property to this end, then knowledge of the court ruling would not have influenced his valuation.
- 2.6.26 The NAO noted that the 20 per cent deduction applied to the per square metre rate by the Chair Arbitration Committee was not limited to the site of the expired emphyteusis, that is, 83 Spinola Road, but extended to encompass the foreshore area. This resulted in an unjustified reduction in value of €70,000, which Chair Arbitration Committee explained by reiterating that he was unaware that the original site subject to the expired emphyteusis was limited to a footprint of 68 square metres and not 165 square metres.
- 2.6.27 On 20 October 2011, the legal representative of Eighty Two Co. Ltd submitted correspondence to the Head of Secretariat of PS Revenues and Land, asserting that the delay in the presentation of the arbitration report was due to the disagreement of the GPD with the conclusions arrived at by the Chair Arbitration Committee. The Head of Secretariat made enquiries with the DG GPD, requesting an update on the case. Internal correspondence exchanged between the DG GPD and the Secretary to the DG GPD disproved that claimed by the Company's legal representative, since the report had not yet been submitted to the GPD.
- 2.6.28 The arbitration report was submitted to the parties by the Secretary to the DG GPD on 14 November 2011 following instructions to this effect by the DG GPD. A meeting was convened for 28 November 2011, wherein the report was to be discussed. No record of this meeting was made available to the NAO; however, according to the DG GPD, Eighty Two Co. Ltd contested the valuation, claiming that the Company was being overcharged for this property, more so in light of the scheme for the redemption of temporary emphyteusis introduced at the time and that the Company had already paid third parties for its acquisition.
- 2.6.29 The matter was referred to the Minister MFEI by the DG GPD, through the PS Revenues and Land, on 29 November 2011. In this minute, specific reference was made to the facts of the case as presented by the Secretary GPD Tender Committee on 14 April 2011, the ministerial authorisation to proceed with arbitration granted on 10 May 2011, and the arbitration report dated 10 October 2011 that set the final value of the property at €550,000. The DG GPD also made reference to a meeting that he had held earlier that day with the Director Eighty Two Co. Ltd and the Company's legal representative regarding the arbitration report and the final value of the site.

- 2.6.30** The DG GPD indicated that in view of the circumstances, two options were being considered. The first option entailed the cash sale of the entire site shown on the property drawing JO_20_2010_A through a call for tenders, granting Eighty Two Co. Ltd the right of first refusal at the minimum value of €525,000, representing a nominal discount of 4.5 per cent over the final value established by the Arbitration Committee. In a meeting with the NAO, the DG GPD explained this discount as a gesture of goodwill were the property to be transferred through outright sale, which would have required a lump sum payment. The second option was the grant of a perpetual emphyteusis through a call for tenders at the minimum value of €15,700 per annum, redeemable after the first revision, as per index of inflation, on the fifteenth year from the date of contract. The annual rate was established by dividing the €550,000 value determined by the Arbitration Committee by 35 years. This second option would have guaranteed Government a minimum income of €235,500 in ground rent received, equivalent to the payment of €15,700 for 15 years, as well as the redemption value of €314,000 on the fifteenth year, equivalent to €15,700 for the remaining 20 years. In total, the second option would have resulted in revenue to Government of €549,500, as well as the revision amount as per index of inflation on the fifteenth year. Since the site was transferred to Government by the Archdiocese through the Church-State Agreement, the DG GPD recommended that the second option was to be pursued, as this ensured net revenue to Government of the full amount, that is, €549,500 over a period of time. According to the DG GPD, the Company also preferred the second option for cash flow purposes.
- 2.6.31** Correspondence submitted by the legal representative of Eighty Two Co. Ltd to the DG GPD, dated 28 November 2012, confirmed that the Company preferred the second option, that is, acquisition through a perpetual emphyteusis. However, the Company's legal representative objected to the revision of ground rent on the fifteenth year, claiming that contrary to what had been stated by the GPD, this revision was discretionary and hence, in view of its non-obligatory nature, proposed its exclusion.
- 2.6.32** In a meeting with the NAO, the DG GPD maintained that he had proposed the inclusion of a revision on the fifteenth year as this would materially impact revenue to Government. According to the DG GPD, a conservative average inflation rate of two per cent per annum would result in a 30 per cent increase in ground rent on the fifteenth year. The DG GPD acknowledged that the imposition of such a revision was not required at law, despite that applicable legislation stipulated that redemption of ground rent may only be effected following its first revision. The DG GPD argued that the Company had initially agreed to this revision; however, its legal representative had objected to it at a later date.
- 2.6.33** The PS Revenues and Land endorsed the minute submitted by the DG GPD on 30 November 2011, indicating agreement with the second option. Authorisation by the Minister MFEI followed shortly thereafter, for on 18 December 2011, the Minister specifically approved the second option.

- 2.6.34 On 4 January 2012, the Tenders Section GPD was instructed to prepare the necessary documentation for the issuance of a call for tenders in line with the approvals provided by the Minister MFEI and the PS Revenues and Land. Also on 4 January 2012, the Secretary GPD Tender Committee informed Eighty Two Co. Ltd that the Department had received ministerial authorisation for the issue of a tender for the grant of the site on perpetual emphyteusis. Specified were the conditions of the proposed emphyteutical grant, that is, a minimum value of €15,700 per annum and the possibility of redemption on the fifteenth year after the first revision as per index of inflation from the date of contract.
- 2.6.35 The reply submitted by Eighty Two Co. Ltd to the DG GPD and the Secretary GPD Tender Committee, copied to the Head of Secretariat of PS Revenues and Land, indicated disagreement with that proposed by the Department. In correspondence submitted on 4 January 2012, the Company's legal representative maintained that the proposal submitted by the GPD was inconsistent with what had been agreed with the Department under the previous DG GPD and pursued under the stewardship of the incumbent DG GPD. The legal representative claimed that since the Company had submitted the only offer for the tender for the sale of the property, the bid had never been rejected, and the bid bond had been kept valid to date at the GPD's request, then Government was free to accept the Company's offer. The legal representative argued that since no minimum acceptable offer had been specified in the tender, then the decision not to accept the Company's offer was arbitrary. Moreover, both parties had agreed on the procedure of arbitration, which procedure had been carried out and concluded, with the value determined not subject to contestation. It was in this context that the Company's legal representative deemed the GPD's resort to tender as unacceptable, and insisted that the procedure agreed on be followed, if necessary through an outright sale.
- 2.6.36 In turn, in correspondence submitted to Eighty Two Co. Ltd on 17 January 2012, the DG GPD made reference to the letter of acceptance issued by the Department on 3 August 2010, wherein the Company was informed that its bid would be accepted on condition that the offer be raised to €950,000 and the contract signed on 15 September 2010. The Company had been informed that failure to conclude the contract on the specified date would result in its forfeiture of any rights to the tender. Moreover, the DG GPD emphasised the fact that any transfer of government property was regulated by the Disposal of Government Land Act (Chapter 268), which in this case necessitated the issuance of a call for tenders.
- 2.6.37 The legal representative of Eighty Two Co. Ltd further contested the position taken by the GPD in correspondence submitted on 17 January 2012, addressed to the DG GPD and copied to the Prime Minister, the Minister MFCC (previously PS Revenues and Land) and the Head of Secretariat MFCC. The Company's legal representative asserted that the negotiations undertaken with the GPD for over a year and the understanding reached went beyond the communication exchanged on 15 September 2010. The understanding was that since the GPD had not specified a minimum offer in the tender advert, and the Company was the only bidder, then the valuation determined by the Arbitration Committee was to be

considered as a fair price for the property. According to the Company's legal representative, the GPD had not agreed with the valuation established by the Arbitration Committee and had insisted that the amount determined be doubled. In his opinion, this went against the agreement reached between the two parties. The Company's legal representative requested that a meeting be convened to resolve this matter amicably in the interest of justice, noting that he had copied the relevant authorities since it was their responsibility to ensure that injustices were not perpetuated. To this end, the Company's legal representative proposed that the GPD accept the offer submitted by Eighty Two Co. Ltd (understood as €192,225) and impose an additional ground rent to arrive at the established price (understood as the difference between the Company's offer and the value established by the Arbitration Committee, that is, €550,000).

- 2.6.38** On that same day, the DG GPD submitted a reply to the legal representative of Eighty Two Co. Ltd, copying in the Prime Minister, the Minister MFCC, the Head of Secretariat MFCC, the Secretary GPD Tender Committee, and a Legal Officer GPD. The DG GPD indicated that there was no scope for further negotiations and therefore no need to schedule another meeting. Instead, the DG GPD maintained that the Department was to proceed with a call for tenders as soon as possible.
- 2.6.39** Subsequently, the legal representative of Eighty Two Co. Ltd submitted a reply to the DG GPD, keeping all parties in copy. The Company's legal representative reiterated his objection to the re-issuance of a call for tenders, claiming that this was not in line with the agreement reached. The NAO noted that the Company's legal representative made reference to the fact that the property pertained to the Joint Office, when part was in fact government-owned foreshore that had been illegally encroached on.
- 2.6.40** Following this exchange of emails, the Minister MFCC queried the DG GPD regarding the details of the case, copying the Head of Secretariat MFCC. On 18 January 2012, the DG GPD, replied, indicating that Eighty Two Co. Ltd had agreed to the issuance of a call for tenders; however, the Company's legal representative had subsequently objected to this agreement. The DG GPD emphasised that Government property transfers were to be effected according to the applicable legal provisions, in this case, the Disposal of Government Land Act (Chapter 268), and not according to verbal agreements entered into with the Department. In a reply also dated 18 January 2012, the Head of Secretariat MFCC noted that the Company's legal representative maintained that the tender process initiated in 2010 was still valid and therefore there was no need for a new call for tenders to be issued. The DG GPD expressed disagreement with this assertion, leading to the Minister MFCC requesting that a meeting be held between the parties to resolve the matter.
- 2.6.41** On 19 February 2012, the legal representative of Eighty Two Co. Ltd raised a number of points that were to be brought to the attention of the Arbitration Committee in correspondence submitted to the DG GPD and the Head of Secretariat MFCC. This correspondence was submitted following instructions by the Minister MFCC for the parties to meet. The legal

representative contended that the value of the site was to be limited to the value of the land and not extend to the development on site. Other contentions raised were that 83 Spinola Road had no intrinsic value and only derived value from the fact that it formed part of a larger development, the rate applied did not reflect market rates, and that the obligation to leave public access at level -1 reduced the value of that floor.

- 2.6.42 Based on documentation reviewed, the objections put forward by Eighty Two Co. Ltd were not referred to the Arbitration Committee. Instead, a Legal Officer GPD drafted a reply rebutting statements made by the Company's legal representative. Of interest was the counter-argument regarding the value of the land, which extended to any tenements built thereon and the impact that 83 Spinola Road had on the rest of the development, were this property not part of the development. Although this draft reply was retained on file, the NAO established that this was not submitted to the Company.
- 2.6.43 Further correspondence reviewed by the NAO indicated that a meeting was scheduled on 23 February 2012. Although the NAO was not provided with records of this meeting, the Office established that the Permanent Secretary MFCC, the Head of Secretariat MFCC, the DG GPD, the CoL, the Chair Arbitration Committee, other GPD officials and representatives of Eighty Two Co. Ltd were present.
- 2.6.44 Notwithstanding the broader context of the case, where efforts were being undertaken to resolve the matter amicably, the ensuing development recorded on file was an objection lodged by the GPD with MEPA. In this respect, on 23 February 2012, the GPD objected to the application filed by Eighty Two Co. Ltd to extend the apartments at levels 3 to 6 over the existing terraces. It must be noted that MEPA approved the application submitted by Eighty Two Co. Ltd on 16 May 2012.
- 2.6.45 Despite the seemingly enduring disparate positions taken by the parties, on 27 February 2012 the DG GPD sought the authorisation of the Minister MFCC for the outright sale of the property. The minute by the DG GPD, copied to the Permanent Secretary MFCC, made reference to a meeting held shortly earlier, understood by the NAO as attended by the Minister MFCC, the Permanent Secretary MFCC and the DG GPD, and possibly others. The DG GPD made reference to the fact that the Minister MFEI and the PS Revenues and Land (now Minister MFCC) had originally approved the issue of a tender for the grant of the site on perpetual emphyteusis. However, notwithstanding this initial approval, it was now agreed that, in order to avoid a new call for tenders, the site was to be offered through an outright sale. This was one of the two alternatives proposed to the Minister MFEI and the PS Revenues and Land by the DG GPD on 29 November 2011, but which was at the time discarded with preference given to the option of perpetual emphyteusis. Nonetheless, the DG GPD indicated that this offer for the outright sale of the site could prejudice the Department's position, considering its previous offer and deadline for acceptance issued by the GPD in August 2010. In the circumstances, the Minister MFCC was requested to approve (a) the outright sale of the property and (b) that a letter be submitted to Eighty

Two Co. Ltd stating that this was the GPD's final position. The Permanent Secretary MFCC and the Minister MFCC granted their authorisation on 29 February 2012 and 6 March 2012, respectively.

- 2.6.46 In line with the above, on 13 March 2012, the GPD informed Eighty-Two Co. Ltd that Government was willing to offer the outright sale of the property for the price of €525,000. The offer was made subject that the development was according to attached plans, that is having receding balconies. The Company was notified that the contract was to be signed on 13 April 2012. Furthermore, Government would be free to dispose of the property as deemed fit if the Company failed to enter into the contract.
- 2.6.47 Government's decision to resort to the outright sale rather than grant the property on a perpetual emphyteusis had a direct and significant impact on revenue earned by Government. Whereas the option of perpetual emphyteusis would have generated a minimum revenue of €550,000, the outright sale secured €35 in revenue to Government, with the remaining balance (€525,000 less €35) derived from the sale transferred to the Archdiocese in bonds payable to the Foundation for Church Schools as stipulated in the Church-State Agreement.
- 2.6.48 In view of its significant impact on Government revenue, the NAO sought to establish the rationale for the GPD's shift from a grant of a perpetual emphyteusis to an outright sale. In a meeting with the NAO, Minister MFCC justified his approval of an outright sale on the basis that the minute by the DG GPD requesting ministerial approval made no reference to the fact that a sale would limit Government's income to €35. The Minister MFCC indicated that he was unaware that the change from perpetual emphyteusis to outright sale would reduce Government revenue so severely, explaining that the interpretation of the Church-State Agreement with respect to revenue from the sale of property previously owned by the Archdiocese was rather complex. On the other hand, the DG GPD noted that although the Department generally disposed of Joint Office property through emphyteutical terms of 15 years, to ensure maximum revenue to Government, exceptions to this practice were occasionally made. In this particular case, since the Company opposed the issuance of another call for tenders, and a solution had to be found, then the GPD decided to proceed with an outright sale. According to the DG GPD, this decision was taken during a meeting for which the Permanent Secretary MFCC was present.
- 2.6.49 Elaborating in this respect, the Minister MFCC maintained that one would not expect the DG GPD to put forward a course of action that reduced the Department's income from a potential figure of over €500,000 to a mere €35. The Minister MFCC stated that, in this case, he would have expected the DG GPD's minute to alert him to the exact financial implications of the two options. Moreover, the Minister MFCC insisted that the fact that the greater part of the revenue went to a Foundation established by the Church-State Agreement was neither immoral nor illegal. Finally, the Minister MFCC commented that it was acceptable for decisions and recommendations to change, and he did not find any justifiable objective reason why not to approve the revised course of action.

- 2.6.50 The NAO questioned the approval of a course of action that the DG GPD had indicated as possibly prejudicing the Department's position in a minute dated 27 February 2012. Reference in this sense was made to the fact that the letter of acceptance issued to Eighty Two Co. Ltd on 3 August 2010, the last official correspondence exchanged, had specified that failure to appear for the signing of the contract on 15 September 2010 would result in the Company forfeiting its rights to the tender. In this respect, concerns arose whether the outright sale authorised by Government could be linked to the tender originally issued in May 2010. Commenting in this regard, the Minister MFCC stated that the minute by the DG GPD was vague and did not raise concern. Moreover, the Minister MFCC noted that since the bid bond had been renewed, Eighty Two Co. Ltd had the right to assume that the tender was still valid. In submissions to the NAO, the DG GPD indicated that he was in agreement with the claim made by the Company that the original call for tenders issued in 2010 was still valid. Furthermore, the DG GPD indicated that his concerns were not related to procedural or legal matters, but centred on the possible attempts at price renegotiation by the Company.
- 2.6.51 In view of the diverging perspectives put forward by the Minister MFCC and the DG GPD, the NAO sought an element of corroboration from the Permanent Secretary MFCC. To this end, the NAO raised queries with the Permanent Secretary MFCC, specifically seeking to establish whether he was present for the February 2012 meeting/s referred to by the DG GPD, and in the affirmative to indicate who was present and provide details of that discussed. Moreover, this Office sought to determine whether the Permanent Secretary MFCC was aware of the financial implications to Government of the decision to resort to the sale option, and if so, whether he drew the Minister's attention to the fact that the revenue to be retained by Government from the sale of this property was insignificant. The Permanent Secretary MFCC indicated that he had no particular recollection or notes about the indicated meeting.
- 2.6.52 The offer by Government for the outright sale of 83 Spinola Road was accepted by Eighty Two Co. Ltd on 29 March 2012, on condition that the payment of €525,000 was effected over a ten-year period as reportedly discussed during negotiations. Correspondence exchanged between the DG GPD and the Permanent Secretary MFCC in early April 2012 indicated that, originally, the DG GPD objected to the ten-year payment term proposed by the Company and instead recommended a three-year settlement period, with an interest rate of five per cent to be revised to eight per cent and backdated in the event of defaults in payment. However, the Permanent Secretary MFCC provided direction to set the repayment period to five years in view of the market conditions. Subsequently, on 10 April 2012, the DG GPD indicated acceptance of the Company's request for payment by instalments; however, informed the Company that equal payments were to be effected over a five-year period, with the first payment to be made on the signing of the contract. Interest of five per cent was to be charged by Government on the outstanding balance.

2.6.53 In submissions to the NAO, the DG GPD maintained that the final decision to dispose of 83 Spinola Road was one collectively taken, with the Permanent Secretary MFCC and the Head of Secretariat MFCC involved in the process. The DG GPD added that the Head of Secretariat MFCC was present for the various meetings held with Eighty Two Co. Ltd, which were held at either the GPD or the Ministry, and was also copied in correspondence exchanged. Finally, the DG GPD indicated that the Minister MFCC did not attend any of the meetings held; however, the Minister MFCC would enquire on developments and sought to ensure that the case was concluded in an expedient manner. Queries addressed to the Permanent Secretary MFCC proved futile as he had no recollection or notes relating to the case.

2.7 The Contract of Sale

2.7.1 The contract of sale was signed on 13 April 2012, with the CoL appearing on behalf of Government. Through this contract, Government sold and transferred to Eighty Two Co. Ltd the site, exclusive of airspace, at 83 Spinola Road, St Julian's. Specified in the contract was the area of each floor, indicated as follows: 165 square metres at level -2, 126 square metres at level -1, 164 square metres at level 0, 146 square metres at level 1, 134 square metres at level 2, 120 square metres at level 3, 108 square metres at level 4, 98 square metres at level 5 and 71 square metres at level 6. In the case of level -1, a public passage way measuring 39 square metres was excluded and its retention as a public space, as stipulated in MEPA Permit PA/06580/2001, was cited in the contract. The area and layout of the property was defined in accordance with the property drawing JO_20_2010_B, which specified the footprint as 165 square metres. The NAO noted that the floor area at level 0 increased from 143 square metres as per property drawing JO_20_2010_A to 164 square metres in property drawing JO_20_2010_B appended to the contract. In addition, the floor area at level 1 decreased from 164 square metres in property drawing JO_20_2010_A to 146 square metres in property drawing JO_20_2010_B.

2.7.2 The sale of the property was for €525,000, of which €105,000 was paid on the signing of the contract. The balance of €420,000 was to be paid over five years, with annual payments of not less than €105,000, with the first payment due within one year from the date of the contract. Payments were to be effected in this manner until the remaining capital due and interest was paid in full by Eighty Two Co. Ltd to Government. On the remaining balance of €420,000, interest of eight per cent was due, which interest was to be determined and effected with each capital repayment. Were the Company to effect payments as indicated in the contract, then the rate of interest was to be reduced to five per cent. If the Company defaulted on a payment of the capital amount or the interest owed, and remained in default for a period of one month after a verbal or written notice by the GPD, then the Company would forfeit these payment terms and render every payment immediately due without the need for prior notification. Were the Company to regularise its position in a manner deemed acceptable to Government, then the Company would again benefit from an interest rate of five per cent on the balance owed. No capital gains tax was due, while the Company paid €26,250 as duty on documents.

2.7.3 Although the contract of sale stipulated that the property was sold for €525,000, it must be noted that the residual revenue to Government was €35, as in fact indicated by the Director Joint Office in January 2011. The deduction of the revenue to Government from the proceeds of the sale resulted in a balance of €524,965, which balance was transferred as bonds issued to the Foundation for Church Schools in 2013. The NAO is of the opinion that the GPD failed to secure the revenue that was in fact due to Government as the site disposed of was not entirely Joint Office property. The original site of 83 Spinola Road that was Joint Office property only accounted for a footprint of 68 square metres of the overall 165 square metre footprint. The difference, that is, the portion of the site referred to as the foreshore was Government-owned land that was not subject to the Church-State Agreement. Hence, this Office considers the amount transferred as bonds issued to the Foundation for Church Schools as erroneous, for the income earned from the disposal of the site should have been apportioned according to ownership.

2.8 Compliance to Contractual Conditions

2.8.1 The NAO sought to verify whether payments were made by Eighty Two Co. Ltd according to the conditions stipulated in the contract. Interest was estimated at five per cent on the assumption that payments would be effected in a punctual manner (Table 3 refers) and at eight per cent on the assumption that the Company would be in default on payments (Table 4 refers). According to the contract, interest would accrue on any capital and interest balances that remained unpaid when payment was due.

Table 3: Schedule of payments due at five per cent interest

Year	Remaining Capital Due	Capital Payment Due	Interest Due	Total Due
13/04/2012	€525,000	€105,000	€0	€105,000
13/04/2013	€420,000	€105,000	€420,000*5% = €21,000	€126,000
13/04/2014	€315,000	€105,000	€315,000*5% = €15,750	€120,750
13/04/2015	€210,000	€105,000	€210,000*5% = €10,500	€115,500
13/04/2016	€105,000	€105,000	€105,000*5% = €5,250	€110,250

Table 4: Schedule of payments due at eight per cent interest

Year	Remaining Capital Due	Capital Payment Due	Interest Due	Total Due
13/04/2012	€525,000	€105,000	€0	€105,000
13/04/2013	€420,000	€105,000	€420,000*8% = €33,600	€138,600
13/04/2014	€315,000	€105,000	€315,000*8% = €25,200	€130,200
13/04/2015	€210,000	€105,000	€210,000*8% = €16,800	€121,800
13/04/2016	€105,000	€105,000	€105,000*8% = €8,400	€113,400

- 2.8.2** Aside from the initial payment of €105,000 made by Eighty Two Co. Ltd on the signing of the contract, the Company was to effect capital payments amounting to €420,000 up to April 2016. In this context, the second instalment fell due on 13 April 2013, and according to GPD records, an invoice for payment of the capital due, €105,000, was submitted to the Company on 4 April 2013. The Company effected a €126,000 payment, corresponding to the second instalment and interest at five per cent, on 11 July 2013. The NAO noted that interest was charged at a rate of five per cent despite the fact that payment was overdue and therefore subject to an interest rate of eight per cent, following notification by the GPD. It is unclear whether the GPD considered the late payment as regular and therefore charged the lesser rate of five per cent interest as contemplated in the contract. Had the GPD applied an interest rate of eight per cent, then the interest due on the second instalment was of €33,600 and not the €21,000 paid.
- 2.8.3** According to a ledger history corresponding to the property, on 2 April 2014, the GPD issued a request for payment for the amount of €105,000. The NAO understood this as the capital payment due for the third instalment, which the Company effected on 1 July 2014. The NAO noted that the interest due was charged approximately two years later, for on 20 January 2016, the GPD issued an invoice for the amount of €15,750. Furthermore, interest was charged at five per cent, when the delay in payment allowed for the application of interest at eight per cent. Calculated at eight per cent, interest incurred would have amounted to €25,200. In view of the fact that interest corresponding to the third instalment remained unpaid as at April 2017, the interest due amounted to €31,745.
- 2.8.4** The GPD issued an invoice for €105,000, corresponding to the fourth instalment, on 1 April 2015. The interest due was charged by the GPD on 20 January 2016, when this should have in fact been charged in April 2015. The interest charged was €10,500, implying that a rate of five per cent was applied. An invoice for the fifth and final instalment of €105,000 and interest of €5,250 was issued by the GPD on 11 April 2016.
- 2.8.5** The NAO noted that Eighty Two Co. Ltd failed to settle the balance due with respect to the fourth and fifth instalments as at April 2017, that is, the date of last verification of the GPD ledger history relating to 83 Spinola Road. Given that this balance remained unpaid up to April 2017, capital and interest due accrued to €264,540 as at this date. In total, the outstanding amount due by Eighty Two Co. Ltd with respect to 83 Spinola Road as at April 2017, the point when all payments due to Government should have been effected, amounted to at least €308,885.

2.9 NAO Valuation of 83 Spinola Road, St Julian's

2.9.1 In view of the considerable difference in the value of 83 Spinola Road originally assigned by the GPD (€950,000), that by Eighty Two Co. Ltd (€192,225), and that subsequently agreed to by the Arbitration Committee and contracted (€525,000), the NAO sought to obtain an independent valuation of the property. In this regard, this Office was to establish:

- a. the freehold value of the site based on the land and its potential; and
- b. the freehold value of the site based on the land and structure.

2.9.2 The valuation was to reflect market rates as at 2011, the point at which the Arbitration Committee established the value of the property that was to be transacted. Furthermore, the valuation was based on the area and layout of the property as defined in property drawing JO_20_2010_B, appended to the contract of sale entered into on 13 April 2012.

2.9.3 In addition, the NAO sought to determine whether revenue to Government was maximised. Essentially, this Office queried whether it was possible for:

- a. the development of lower basement levels, that is lower than level -2;
- b. the development to be extended by not receding the floor levels, applied from level 1 upwards; and
- c. other development that could have rendered a greater return to Government, possibly through alternative use of the site.

2.9.4 The valuation obtained by the NAO ascertained that the property, bearing a footprint of approximately 165 square metres, now formed part of a larger complex, spread over nine floors, of residential apartments with underlying commercial premises and garages. The property is subject to a servitude at level -1, consisting of a public passageway along the entire façade. The coastal part of the site is designated for the construction of fishermen's stores, with the upper basement level (level -1) providing unrestricted open public pedestrian and boat access. The L-shaped portion of land has a narrow frontage of 3.7 metres onto Spinola Road for a depth of 20.6 metres. The frontage at the rear facing onto Spinola Bay increases to 11 metres for a depth of 7.8 metres. At the upper basement level, a public passageway 4.45 metres wide faces onto an outside terrace 4.95 metres in depth. Presently, the property is still in shell form, with only one apartment at the lower level being occupied. Government retained ownership of the airspace above the present construction, mainly at level 6. As the site was Joint Office property, there were certain limitations imposed as to its use; however, these bore no impact in this case. Planning policy NHHO01 delineates the locality as a residential zone, allowing for commercial outlets not exceeding 75 square metres, while supermarkets may be accepted if compliant with NHRE04. In addition, policy NHSJ09 defines possible land use in the Spinola Bay area, safeguarding areas required for the local fishing industry, boat hardstanding and related storage facilities.

2.9.5 The latest approved planning application, PA/00359/2014, submitted by the Company was for full development permission for the demolition of the penthouse level and reconstruction in order to match the building envelope of approved adjacent development. This application was approved by the Planning Authority on 12 April 2016. A later application, PA/05643/2016, for a change in height of level 5, was refused on 13 January 2017.

2.9.6 For purposes of valuation, the floor areas and corresponding use per level of the site at 83 Spinola Road were based on plans approved by the Planning Authority on 28 May 2002, as per PA/06580/2001 (Table 5 refers).

Table 5: Area and use per level as per PA/06580/2001

Level	Use (m ²)						Total Area (m ²)
	Boathouse	Parking	Access	Restaurant	Apartment	Terrace	
-2	68.32	84.22	12.65	-	-	-	165.19
-1	-	-	42.60 ^a	70.92	5.34	62.46	138.71 ^a
0	-	34.33	23.42	13.23	81.55	-	152.53
1	-	-	23.42	-	91.48	35.53	150.43
2	-	-	-	-	102.82	35.53	138.35
3	-	-	-	-	90.60	36.06	126.66
4	-	-	-	-	75.66	36.27	111.93
5	-	-	-	-	68.98	32.43	101.41
6	-	-	-	-	44.23	31.89	76.12
Total	68.32	118.55	102.09	84.15	560.66	270.17	1,161.33

Note:

a. The access at level -1, measuring 42.60 square metres, is public property and does not form part of this development. For this reason, the total area at level -1 does not include this measurement.

2.9.7 At the lowest level, along the Spinola seafront, three boathouses were constructed, with a depth of 7.33 metres. At the rear of the boathouses are eight car spaces with an exit linking level -2 to the Spinola seafront. Overlying, at level -1, is a restaurant floor area overspilling onto the public passageway, then leading onto a terrace overlooking Spinola Bay, intended for use by the restaurant operator. Four other car spaces are located at level 0, at level with Spinola Road. In addition, two bedsitters are situated at the rear, recessed from the underlying front terrace, but overlying the public passageway. Level 1 consists of four one-bedroom apartments, with a rear terrace onto Spinola Bay extending up to the edge of the bedsitters. Two two-bedroom apartments are constructed on each floor from level 2 to level 5. These apartments have a recessed rear façade, stepped at each level, overlooking Spinola Bay. The uppermost floor, at level 6, comprises a three-bedroom penthouse.

2.9.8 Although Eighty Two Co. Ltd contended that this rear façade stepping was imposed by MEPA, the NAO noted that there was no planning policy applicable at the time specifying such a requirement. In fact, MEPA documents dated October 1999 made reference to developments in the immediate vicinity that exceeded five floors and where no setbacks had been imposed. Notwithstanding this, with respect to 83 Spinola Road, MEPA imposed

setbacks of 4.25 metres from the building line from level 4 upwards for this development. Nonetheless, setbacks at the lower levels were self-imposed.

- 2.9.9 Given that the recessing of floors was not a requirement in terms of the then applicable planning policies yet bore an impact on the valuation of the site, the NAO sought to determine the airspace in square metres per floor had this been constructed without any setbacks. The extent of possible construction is illustrated in Table 6.

Table 6: Airspace per floor levelling the receding rear façade

Level	Airspace (m ²)
-2	168.34
-1	138.71
0	153.68
1	117.93
2	117.93
3	117.93
4	117.93
5	117.93
6	57.80
Total	1,108.18

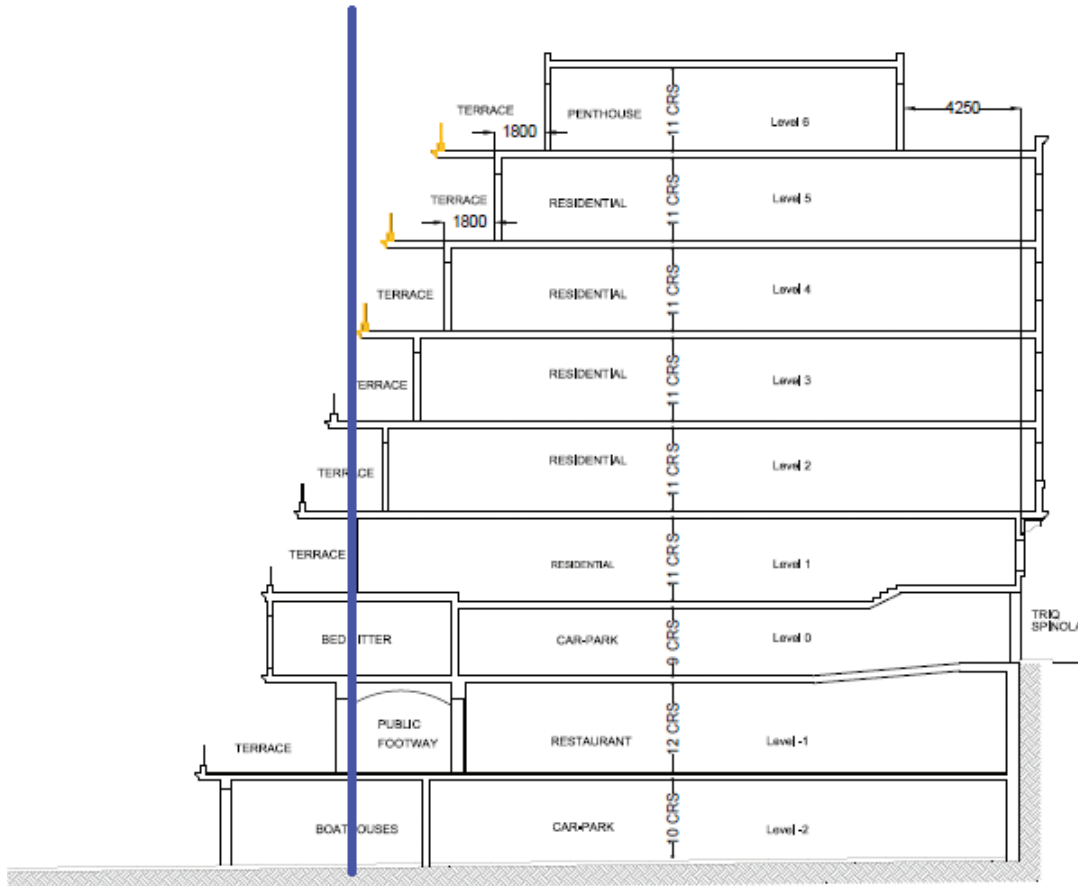
- 2.9.10 The incongruence that may be noted were one to compare the areas cited in Table 5 with those indicated in Table 6 are to be understood through reference to Figure 4. The blue line noted in Figure 4 represents the building line and therefore airspace measurements were established from this line inwards.

- 2.9.11 The NAO sought to establish the realisable potential of the site as at 2011. This Office established that the construction of additional basement levels below level -2 was not feasible, as construction and pumping costs due to seawater infiltration would exclude any financial gains. The construction of boathouses at level -2 was a condition imposed by the applicable planning policies and it was in this respect that the coastal level forming part of this site was designated for the construction of fishermen's stores. Therefore, no more advantageous development could have been undertaken at level -2. Likewise, the development undertaken at level -1 was in consonance with the applicable planning policies and could not be maximised further. However, having considered the fact that the adjacent development impeded access for which the public passageway at this level was designated, the NAO questions the imposition of this requirement and its detrimental effect on the valuation of the property. This Office established that the impeded access resulted from MEPA approval of the development of the adjacent site in May 2010, that is, prior to the valuation by the Arbitration Committee.

Figure 4: Determination of airspace from building line

APPROVED (PA PA/06580/01)

 TO DEMOLISH



2.9.12 This Office considered an alternative use for level 0, presently utilised for car spaces and bedsitters. The NAO is of the opinion that this level could have housed another retail outlet, linked or independent of the underlying proposed restaurant. This level could have also been used as office space; however, the restriction of the applicable planning policy, limiting office space to 75 square metres, was to be noted. The overlying floors, with all apartments having views of Spinola Bay, maximised the return for this development. However, this Office considered that the self-imposed recesses ascending the building's elevation entailed a reduction in the airspace areas at the upper levels, which unutilised areas could have been constructed. In fact, shortly after the contract of sale of 83 Spinola Road, Eighty Two Co. Ltd obtained MEPA approval (PA/00170/2012) for the extension of the apartments over existing terraces at levels 3 to 6. Finally, the NAO noted that the full allowable building height was utilised.

2.9.13 The valuation of the site at 83 Spinola Road was undertaken according to the Kamra tal-Periti Valuation Standards issued in 2012 for appraisals of developable land based on the comparative method of valuations. The NAO sought to determine the market value of the site according to two distinct scenarios, that is, the freehold value of the site based on the land and its potential and the freehold value of the site based on the land and structure.

2.9.14 The market rate for a modern, fully finished seafront apartment on the Spinola waterfront as at 2011, the point at which the Arbitration Committee determined the value of the property, was established at €3,050 per square metre. In arriving at this rate, this Office made reference to an index corresponding to Spinola seafront property rates compiled by the NAO Consultant based on in-house valuations undertaken between 2007 and 2017 (Table 7 refers).

Table 7: Spinola seafront property index: 2007-2017

Year	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Rate (€/m ²)	2,975	2,855	2,990	2,905	3,050	3,150	3,205	3,495	4,300	5,610	4,925

2.9.15 Taking into consideration existing office use restrictions, the market rate utilised for the residential component of the property was applied to level 0. For the restaurant at level -1, this rate was increased to €5,000 per square metre. For the lowest floor at level -2, designated for boathouses and garage car spaces, the market rate was decreased to €1,750 per square metre. Estimating interest charges incurred on development costs at 5.75 per cent for half of the development period, taken at 30 months, an estate agent fee of 3.5 per cent and developer's profit at 27.5 per cent of the market value, total development costs amounted to €1,525 per square metre. Therefore, the residual value for the land was €1,525 per square metre (€3,050 less €1,525 per square metre).

2.9.16 It must be noted that 2011 coincided with a period of decline in property rates, as rendered evident in Table 8. As a result, developers' profit margins as at 2011 generally declined to 17.5 per cent from highs of over 25 per cent; nonetheless, profit margins towards the 40 per cent mark could be registered for upmarket developments. Taking into consideration these margins, developer's profit in respect of 83 Spinola Road was scaled down to 27.5 per cent.

Table 8: Affordable property rates for Malta: 2002-2017

Year	2002	2003	2004	2005	2006	2007	2008	2009	Percentage Growth Rate 2002-2017
Rate (€/m ²)	629	692	841	1,030	1,202	1,211	1,183	1,144	
Year	2010	2011	2012	2013	2014	2015	2016	2017	4.113%
Rate (€/m ²)	1,130	1,146	1,134	1,168	1,203	1,282	1,336	1,718	

2.9.17 The NAO considered that works would be undertaken over a 30-month period and the sale would occur over a further six-month period. Discounting the €1,525 per square metre at a rate of 5.75 per cent to account for this period resulted in a rate of €1,290 per square metre ($€1,525 / 1.0575^3 = €1,290$) (Table 9 refers). Applying the same considerations to levels -1 and -2, the resulting rate per square metre was that of €2,425 and €645 per square metre, respectively.

Table 9: Residual valuation of airspace

Market value of airspace	Unit	Quantity	Rate (€)	Estimated value (€)	Asking price (€)
Spinola seafront rate for 2011					3,050.00
Development costs	Unit	Quantity	Rate (€)	Estimated cost (€)	
Construction and finishing costs	m ²	1	420.00	420.00	
Professional fees at 8%				33.60	
Sub-total				453.60	
VAT 18%				81.65	
MEPA Levy	m ²	1	5.66	5.66	
Total construction and finishing costs				540.91	
Interest costs at 5.75% ^a				38.88	
Estate agent fees at 3.5% of market value				106.75	
Developer's profit at 27.5% of market value				838.75	
Total development costs					1,525.29
Residual value considered in 30 months time					1,524.71
Present vacant land value: 30-month development and 6-month selling period at 5.75% interest					1,289.28

Note:

- a. Interest on development costs, levied at 5.75 per cent, was calculated on a period of 15 months, that is, half the 30-month development period ($€540.91 \times 5.75\% \times 1.25$).

2.9.18 Applying the established rates to airspace per floor level indicated in Table 6 resulted in an estimated value of the site at 83 Spinola Road as at 2011 as €1,478,474. This valuation did not take into consideration any additional airspace above the existing construction and reflected that transferred by Government in 2012 (Table 10 refers).

Table 10: Freehold value of 83 Spinola Road based on land and its potential

Level	Rate (€)	Area (m ²)	Value (€)
-2	645	168.35	108,586
-1	2,425	138.75	336,469
0-6	1,290	801.10	1,033,419
Total		1,108.20	1,478,474

2.9.19 Having established the freehold value of the land and its potential, the NAO sought to determine the freehold value of the site and structure at 83 Spinola Road, as in fact transacted in 2012. To this end, a construction rate of €187.50 per square metre was applied to the site's existing floor areas as indicated in Table 5. While the rate of €187.50 was inclusive of Value Added Tax (VAT) and professional fees, a 15 per cent provision for demolition, excavation works and other expenses was factored in. Also applied was a 12.5 per cent consideration, imposed to compensate for MEPA levies due. Applying these rates to the areas established in Table 5, excluding access and calculating terraces at half the area, the value of construction works as undertaken in 2011 was estimated at €250,000 $((890\text{m}^2 + (270\text{m}^2/2)) \times €187.50/\text{m}^2 \times 1.15 \times 1.125)$.

2.9.20 Under the scenario of sale of the site and structure in shell form in 2011, the rate of €3,050 per square metre for a finished apartment was revised to €2,295 per square metre. This rate was arrived at following the consideration of finishing costs estimated at €275 per square metre, revised to €350 when accounting for professional fees at eight per cent and VAT. Estimating interest charges incurred on finishing costs at 5.75 per cent for half of the development period, taken at nine months, an estate agent fee of 3.5 per cent of the market value and a developer's profit at 35 per cent of the finishing costs, resulted in total finishing costs amounting to €587 per square metre. Therefore, the residual value for the land was €2,463 per square metre (€3,050 less €587 per square metre). The NAO considered that works would be undertaken over a 9-month period and sale would occur over a further six-month period. Discounting the €2,463 per square metre at a rate of 5.75 per cent to account for this period resulted in a rate of €2,295 per square metre $(€2,462.57 / 1.0575^{1.25} = €2,296.75)$ (Table 11 refers). Applying the same considerations to levels -1 and -2, the resulting rate per square metre was that of €4,050 and €1,125 per square metre, respectively.

Table 11: Residual valuation of market value less finishing costs

Market value of airspace	Unit	Quantity	Rate (€)	Estimated value (€)	Asking price (€)
Spinola seafront rate for 2011				3,050.00	3,050.00
Development costs	Unit	Quantity	Rate (€)	Estimated cost (€)	
Finishing costs	m ²	1	275.00	275.00	
Professional fees at 8%				22.00	
Sub-total				297.00	
VAT 18%				53.46	
PA Levy	m ²	1	0.00	0.00	
Total finishing costs				350.46	
Interest costs at 5.75%				7.56	
Estate agent fees at 3.5% of market value				106.75	
Developer's profit at 35% of finishing costs				122.66	
Total development costs					587.43
Residual value considered in 9 months time					2,462.57
Present vacant land value: 9-month development and 6-month selling period at 5.75% interest					2,296.75

2.9.21 Considering the shell form market rates per level, together with the floor area at each respective level as indicated in Table 5, the market value of the site in shell form as at 2011 was estimated at €2,350,640 (Table 12 refers). In arriving at this value, terrace space was calculated at 50 per cent of the floor area.

Table 12: Freehold value of 83 Spinola Road based on land and structure

Level	Rate (€)	Area (m ²)	Value (€)
-2	1,125	165.19	185,839
-1	4,050	107.49	435,335
0-6	2,295	753.58	1,729,466
Total		1,026.26	2,350,640

2.9.22 In sum, the NAO established that the freehold value of the land at 83 Spinola Road and its potential as at 2011 was €1,478,474. In arriving at this value, the NAO maximised the site’s development potential, taking into consideration the number of levels and floor area per level. In addition, this Office sought to maximise revenue to Government by ensuring that each level of the development was assigned to its optimal use allowable according to MEPA planning policies.

2.9.23 If one were to consider the freehold value of the site and structure in shell form as at 2011, which was the basis of the Arbitration Committee’s valuation, then the value of the site established by the NAO was €2,350,640. While this valuation was based on the principle of maximisation of revenue through optimal use, it was limited to the existing structure, which did not necessarily optimise available area due to the receding rear façade.

Chapter 3

Analysis and Conclusions

3.1 Timeline of Key Developments

3.1.1 Hereunder are the key developments noted by the NAO with respect to Government's disposal of 83 Spinola Road. Outlined are the source of the error in the emphyteutical term that would lead to Eighty Two Co. Ltd acquiring an expired temporary emphyteusis, the contested development undertaken by the Company which extended to part of the foreshore adjacent to the property, efforts at resolution undertaken between the parties, arbitration and eventual sale of the site through tender (Table 13 refers).

Table 13: Timeline of key events

Date	Details
28 August 1897	Deed whereby the temporary emphyteusis of 83 Spinola Road was transferred by the Abbazia Spinola to Antonio Coppini for a period of 99 years against an annual ground rent of £0.6,0 (Lm0.30/€0.70).
16 April 1975	Deed whereby two heirs of Antonio Coppini acquired the remaining shares of 83 Spinola Road from the other heirs, thereby consolidating ownership of the property. The remaining utile dominium was of approximately 72 years, evidently incongruent with the 99-year term stipulated in the 1897 deed.
26 May 1981	Deed whereby the remaining heir of Antonio Coppini transferred the residual period of temporary emphyteusis to a third party. According to the deed, the grant of the utile dominium was made for 150 years, commencing on 25 December 1895, thereby expiring on 24 December 2045. Moreover, applicable ground rent was stated as Lm0.40,4 (€0.94). This was inconsistent with the 99-year term and applicable ground rent specified in the 1897 deed.
17 November 1986	Deed whereby the remaining emphyteutical term of 83 Spinola Road was transferred from a third party to another for a consideration of Lm7,000 (€16,306). According to the deed, the remaining period of emphyteusis was approximately 60 years from the original term of 150 years commencing on 25 December 1895, against annual ground rent of Lm0.40,4 (€0.94). This deed perpetuated the errors originating in the 1981 deed.

24 June 1998	Deed whereby the remaining emphyteutical term of 83 Spinola Road was transferred by the third party to E.G. Property Holdings Ltd for Lm21,000 (€48,917). According to the deed, the remaining period of emphyteusis was approximately 47 years from the original term of 150 years commencing on 25 December 1895 and ground rent payable amounting to Lm0.40,4 (€0.94). Again, this deed perpetuated the errors cited in the 1981 and 1986 deeds.
10 August 1998	Petition submitted by the residents of St Julian's to the Planning Authority and the CoL, claiming that the land indicated for development at 80-83 Spinola Road extended to the foreshore and was public property.
7 May 2001	The residents of St Julian's, through their legal representative, submitted another petition wherein objections were raised with respect to the proposed development. Cited in this petition was that E.G. Property Holdings Ltd had notified the residents that development work was to commence on site.
11 May 2001	The St Julian's Local Council enquired with the CoL as to the title of ownership of the site, expressing concern regarding the legality of the development on the foreshore.
14 September 2001	The St Julian's Local Council filed a judicial protest against the CoL regarding development works carried out on the Spinola shore. The Local Council argued that the site consisted of reclaimed land and therefore was public property.
27 September 2001	The CoL filed a counter-protest, claiming that the GPD was in the process of determining ownership of the site.
10 December 2001	E.G. Property Holdings Ltd submitted a revised application to MEPA (PA/06580/2001) for the development of a block of residential apartments, underlying commercial premises and a garage complex following the demolition of existing structures. The development was planned on 80-83 Spinola Road, and extended onto the foreshore.
7 January 2002	E.G. Property Holdings Ltd requested the Joint Office to recognise the Company as emphyteuta of 83 Spinola Road. Appended to the correspondence was the deed entered into on 24 June 1998, which cited an erroneous emphyteutical term.
9 January 2002	Following legal advice obtained, the Joint Office recognised E.G. Property Holdings Ltd as the new emphyteuta of 83 Spinola Road subject to payment of a laudemium of Lm0.40,4 (€0.94).
15 January 2002	E.G. Property Holdings Ltd effected payment of Lm0.40,4 (€0.94) as laudemium.
13 June 2002	MEPA granted a full development permit for PA/06580/2001.
23 December 2002	The St Julian's Fishermen and Boat Enthusiasts Association submitted correspondence to the Office of the Ombudsman regarding the development on the foreshore.
7 January 2003	The Ombudsman referred the matter raised by the St Julian's Fishermen and Boat Enthusiasts Association to the CoL.
17 January 2003	The CoL filed a warrant of prohibitory injunction against E.G. Property Holdings Ltd and El Dara Ltd. The Companies were to desist from carrying out any other works on site and occupying the public passage and the foreshore.
20 January 2003	E.G. Property Holdings Ltd filed a counter-reply claiming that the request for a warrant of prohibitory injunction was made at a point when the development was nearing completion and that the contested area (the foreshore) was property of the Company.

30 January 2003	The CoL informed the Ombudsman that the GPD determined that the foreshore area in question did not belong to E.G. Property Holdings Ltd and legal action against the Company was to be taken.
3 February 2003	The GPD initiated judicial proceedings against E.G. Property Holdings Ltd and El Dara Ltd, maintaining that the Companies were occupying public land (foreshore) without due authorisation, resulting in damages to Government.
25 February 2003	Joint Office issued stop payment instructions and withdrew recognition of E.G. Property Holdings Ltd as emphyteuta of 83 Spinola Road.
26 February 2003	Joint Office informed E.G. Property Holdings Ltd of an error in the term of emphyteusis of 83 Spinola Road that had expired on 27 August 1996.
26 February 2003	Joint Office informed the Archdiocese of the incongruence in the emphyteutical term, soliciting comments in this respect.
4 March 2003	The Archdiocese confirmed that the emphyteutical term for 83 Spinola Road was granted for 99 years, corroborating that indicated by the Joint Office.
14 March 2003	E.G. Property Holdings Ltd recommended the possible recourse to arbitration with respect to the foreshore in correspondence submitted to the CoL.
8 May 2003	The GPD agreed with that proposed by E.G. Property Holdings Ltd, that is, resort to arbitration.
22 July 2003	E.G. Property Holdings Ltd indicated its willingness to settle the matter regarding the foreshore in an amicable manner, since arbitration was no longer a viable option given failure of the parties to reach agreement on arbitration terms.
14 August 2003	E.G. Property Holdings Ltd and El Dara Ltd submitted a counter-reply to the warrant of prohibitory injunction, arguing that the Companies had undertaken development in good faith and that Government had not opposed the development on the foreshore.
26 September 2003	The Minister for Justice and Home Affairs indicated that the GPD was to persist with the court case. The matter had been referred to the Minister following divergent views expressed by the Attorney General and a Legal Officer GPD regarding the nature of the foreshore, essentially whether this was demesial property and therefore not subject to transfer by Government, or otherwise.
31 October 2003	E.G. Property Holdings Ltd informed the DG GPD of its willingness to again attempt to resort to arbitration in order to expedite resolution of the foreshore matter.
14 November 2003	Government revised its position and agreed to resort to arbitration as a possible solution.
18 February 2004	E.G. Property Holdings Ltd agreed without prejudice to 83 Spinola Road being offered for sale by tender subject to a right of first refusal being granted to the Company.
12 May 2004	E.G. Property Holdings Ltd indicated its preference to proceed with the court case with respect to the foreshore in view of the fact that the parties failed to reach consensus on key aspects of the arbitration process.
13 July 2004	The CoL instructed the Director Joint Office to proceed with the sale of 83 Spinola Road through tender, subject to a right of first refusal in favour of the Company.

20 May 2005	A notary acting on behalf of E.G. Property Holdings Ltd conceded that the emphyteutical term of 83 Spinola Road was incorrectly stated in various deeds; however, attributed an element of responsibility for the perpetuation of the error to the Archdiocese and the Joint Office as ground rent and laudemium payments had been accepted.
11 August 2005	Director Joint Office issued instructions to halt all action with regard to the issuance of the tender for 83 Spinola Road until a court decision is delivered in the case filed by the CoL against E.G. Property Holdings Ltd involving adjacent properties, that is, the foreshore.
1 November 2006	The Court ruled in favour of Government, declaring the foreshore as Government land and demesial property, illegally occupied by E.G. Property Holdings Ltd. The Company was to restore the site to its original state.
20 November 2006	An appeal was lodged by E.G. Property Holdings Ltd and El Dara Ltd.
11 December 2006	The GPD filed a reply to the appeal lodged by E.G. Property Holdings Ltd and El Dara Ltd.
7 February 2007	E.G. Property Holdings Ltd informed the DG GPD that the Company would, without prejudice, prefer to reach an amicable settlement regarding the foreshore. In addition, the Company acknowledged that the term of the temporary emphyteusis of 83 Spinola Road was erroneously indicated in the relevant deed of acquisition, having expired in 1996, that is, prior to the Company's acquisition of the emphyteusis. Proposals to resolve issues relating to the expired emphyteusis and the foreshore were made by the Company.
20 June 2007	The Archdiocese submitted correspondence to the Director Joint Office providing an explanation of the source of the error that eventually resulted in the acquisition of an expired emphyteusis of 83 Spinola Road by E.G. Property Holdings Ltd.
21 April 2008	The legal representative of E.G. Property Holdings Ltd acknowledged, in correspondence to the CoL, that the Company had acquired the temporary emphyteusis of 83 Spinola Road under the incorrect understanding that it had been granted for 150 years, when the term had in fact already expired at the point of acquisition.
19 November 2008	E.G. Property Holdings Ltd submitted correspondence to the DG GPD indicating that the Company had made a significant investment on the property (83 Spinola Road and the foreshore) and had constructed thereon part of a development consisting of a block of residential apartments, underlying commercial premises and a garage complex. The Company expressed interest in identifying possible ways of regularising its position.
21 December 2008	The DG GPD acknowledged the correspondence received from the Company and referred the matter to the Director Joint Office.
27 March 2009	The Court of Appeal delivered its decision, wherein the original ruling in favour of Government was confirmed, effectively deeming the foreshore as Government land and demesial property.
21 July 2009	The Director Joint Office sought legal advice regarding the expired emphyteusis of 83 Spinola Road.
13 August 2009	The CoL requested the Director Joint Office to prepare the property drawing of the site for sale through tender.

25 August 2009	The Director Joint Office requested an Architect GPD to prepare the property drawing.
16 April 2010	The Architect GPD endorsed the property drawing JO_20_2010, which incorporated 83 Spinola Road with the foreshore adjacent to properties 80 to 83 Spinola Road. As a result of the assimilation of the foreshore area, the footprint of the site increased from 68 square metres to 165 square metres, yet continued to be referred to as 83 Spinola Road.
21 April 2010	The Director Joint Office submitted a proposal for the sale of the site, measuring 165 square metres, through tender. Reference was made to the expired emphyteusis of 83 Spinola Road and that E.G. Property Holdings Ltd had developed the site. It was in this context that a right of first refusal was to be granted to the Company. Although the foreshore was assimilated into the site, no reference was made to the court ruling regarding the foreshore. The CoL and the DG GPD endorsed this proposal.
11 May 2010	A GPD Consultant Architect established the freehold value of the property at €950,000.
28 May 2010	The tender for the sale of 83 Spinola Road was published in the Government Gazette.
17 June 2010	By the closing date, Eighty Two Co. Ltd (formerly E.G. Property Holdings Ltd) submitted the only bid of €192,225.
23 June 2010	The CoL recommended that the tender be awarded to Eighty Two Co. Ltd provided that the Company raised its offer to €950,000. The details presented failed to make reference to the court ruling regarding the foreshore. This recommendation, addressed to the DG DoC, was endorsed by the PS Revenues and Land and the DG GPD.
14 July 2010	The Minister MFEI approved the award of tender to Eighty Two Co. Ltd subject that the bid be revised to €950,000, as referred by the DG DoC in line with that recommended by the CoL.
3 August 2010	The CoL issued a letter of acceptance to Eighty Two Co. Ltd, subject to the offer being revised to €950,000. The Company was to call at the GPD on 15 September 2010 for the signing of the contract. Failure to attend was to result in the forfeiture of any rights to this tender.
11 August 2010	Eighty Two Co. Ltd objected to the revision of its bid.
18 October 2010	Following referral by the CoL, who recommended the possible revaluation of 83 Spinola Road, the GPD Tender Committee maintained that the valuation by the Department was fair and reasonable. Again, the referral by the CoL made no reference to the court ruling regarding the foreshore.
7 December 2010	Noting the lack of progress, Eighty Two Co. Ltd proposed resolution through the nomination of an ad hoc committee (hereinafter referred to as the Arbitration Committee) that was to determine the fair value of the property.
20 January 2011	The GPD Tender Committee discussed the proposed recourse to arbitration, possibly through referral to the Malta Arbitration Centre. Furthermore, the GPD Tender Committee was to establish the revenue due to Government from the sale of the property since it was transferred through the Church-State Agreement.
26 January 2011	According to the Director Joint Office, the amount to be retained by Government following the sale of the property was €35.

10 May 2011	The Minister MFEI authorised resort to arbitration following a minute by the GPD Tender Committee, duly endorsed by the PS Revenues and Land and the DG GPD.
11 May 2011	A GPD Legal Officer enquired with the Assistant Director Enforcement GPD as to what action had been taken as a result of the court ruling regarding the foreshore, following queries raised by the Private Secretary to the PS Revenues and Land.
23 May 2011	The composition of the Arbitration Committee was determined following agreement by both parties.
10 October 2011	Having failed to reach a compromise, the Chair Arbitration Committee established the value of 83 Spinola Road as €550,000 in a report submitted to the GPD Tender Committee on 11 November 2011. The valuation was based on property drawing JO_20_2010_A, which essentially featured receding floors in the upper levels.
29 November 2011	The DG GPD referred the €550,000 valuation arrived at by the Chair Arbitration Committee for ministerial authorisation. Two options were proposed, namely: (1) the sale of the entire site through a call for tenders, granting Eighty Two Co. Ltd the right of first refusal at a minimum value of €525,000; or (2) the grant of a revisable perpetual emphyteusis through a call for tenders at the minimum value of €15,700 per annum, redeemable on the fifteenth year and resulting in revenue to Government of €549,500, as well as the revision due on the fifteenth year. The DG GPD recommended the second option, which was also favoured by the Company.
29 November 2011	In response to the query raised by the GPD Legal Officer on 11 May 2011, the Assistant Director Enforcement GPD noted that, on instructions of the CoL, the file was to be reviewed in six months time.
18 December 2011	The Minister MFEI approved the second option as proposed by the DG GPD. The PS Revenues and Land had endorsed resort to the second option on 30 November 2011.
4 January 2012	The GPD Tender Committee informed Eighty Two Co. Ltd that the Department had received ministerial authorisation for the grant of 83 Spinola Road on perpetual emphyteusis. Specified was the minimum value of €15,700 payable per annum and the possibility of redemption on the fifteenth year after revision as per the index of inflation from the date of contract.
4 January 2012	Eighty Two Co. Ltd objected to that proposed by the GPD, maintaining that the procedure through the re-issuance of a tender was inconsistent with that previously agreed and argued for an outright sale of the property.
17 January 2012	The DG GPD informed Eighty Two Co. Ltd that the letter of acceptance issued following the original tender had specified that the contract was to be signed by 15 September 2010 and failure to conclude the contract by this date would result in the Company's forfeiture to any rights to the tender.
19 February 2012	Eighty Two Co. Ltd expressed reservations on the value of the site and indicated that the matter was to be referred to the Arbitration Committee.

27 February 2012	Following ministerial guidance intended to resolve the impasse, the DG GPD sought the authorisation of the Minister MFCC (the former PS Revenues and Land) for the outright sale of the property. The DG GPD made reference to the authorisation originally granted by the Minister MFEI and the PS Revenues and Land for the grant of the site on a perpetual emphyteusis. Notwithstanding this, the DG GPD indicated that in order to avoid a new call for tenders, the site was to be offered through an outright sale. Moreover, the DG GPD noted that an outright sale could prejudice the Department's position considering its previous offer and deadline for acceptance. The Permanent Secretary MFCC was copied.
6 March 2012	The Minister MFCC granted authorisation for the outright sale of 83 Spinola Road. The Permanent Secretary MFCC endorsed the minute by the DG GPD on 29 February 2012. Resort to the outright sale had a direct and significant impact on revenue to Government. Whereas the option of perpetual emphyteusis would have generated a minimum revenue of €550,000, the outright sale secured €35 in revenue to Government, with the remaining balance of approximately €525,000 transferred to the Foundation for Church Schools.
29 March 2012	Eighty Two Co. Ltd indicated its acceptance of Government's offer for the sale of 83 Spinola Road on condition that payment was effected over a ten-year period. In subsequent correspondence exchanged, the DG GPD indicated that equal payments were to be effected over a five-year period, with the first payment to be made on the signing of the contract. Interest of five per cent was to be charged on the outstanding balance.
13 April 2012	The contract of sale of 83 Spinola Road was signed by the CoL on behalf of Government and Eighty Two Co. Ltd. The value of the contract was of €525,000, of which the Company paid €105,000 on the date of signing. The balance of €420,000 was to be paid over five years, with annual payments of not less than €105,000. On the remaining balance of €420,000 interest of eight per cent was due, which interest was to be reduced to five per cent should the Company effect punctual payments.
21 May 2012	The Assistant Director Enforcement GPD requested the advice of the CoL in light of previous instructions to put the issue on hold, given that he was being pressed to take action.
28 May 2012	The CoL informed the Assistant Director Enforcement GPD that the matter had been settled as the occupied site (83 Spinola Road and the foreshore) had been sold through tender.
11 July 2013	Eighty Two Co. Ltd effected payment of €126,000, corresponding to the second instalment and interest at five per cent. Interest was charged at five per cent despite the fact that payment was overdue and therefore subject to an interest rate of eight per cent.
1 July 2014	Eighty Two Co. Ltd effected payment of €105,000, corresponding to the third instalment. No interest was paid.

30 April 2017	As at the date of the last verification, Eighty Two Co. Ltd had an outstanding balance of €308,885 despite the fact that all payments should have been settled by this date. The €308,885 due comprised the fourth and fifth instalments, equivalent to €105,000 each, and the difference in the interest rate charged on the second instalment and interest accruing on the third, fourth and fifth instalments.
---------------	---

3.2 Analysis of the Disposal of 83 Spinola Road, St Julian's

- 3.2.1** In 1998, E.G. Property Holdings Ltd acquired the remaining period of the temporary emphyteusis of 83 Spinola Road, at the time, understood to be 47 years from an original term of 150 years. This understanding was in fact incorrect, as the temporary emphyteusis had already expired in 1996. Notwithstanding this, when the Company sought recognition as the new emphyteuta in January 2002, the Joint Office endorsed the transfer against payment of the laudemium and the outstanding ground rent. In the interim, the Company had initiated development works on the site, which formed part of a larger development at 80 to 83 Spinola Road, consisting of a residential complex with underlying garages and commercial premises. In February 2003, following verification carried out by the Joint Office, the Company was informed that it held no legal title to 83 Spinola Road.
- 3.2.2** In addition, concerns arose regarding the extent of the development, largely fuelled by public concerns that the site encroached on the foreshore at Spinola Bay. To this effect, the GPD initiated legal action against E.G. Property Holdings Ltd in early 2003. The Court ruled in favour of Government in November 2006, declaring the site in question as government land and ordering the Company to restore the site to its original state. The ruling was confirmed on appeal in March 2009.
- 3.2.3** Despite the court ruling, the GPD sought to dispose of 83 Spinola Road, now including the part of the foreshore illegally occupied. A tender for the disposal of the site was issued by the GPD in May 2010. No minimum acceptable offer was stipulated in the tender; however, the GPD established the value of the site at €950,000. By the closing date, Eighty Two Co. Ltd (previously E.G. Property Holdings Ltd) submitted the only offer of €192,225. The GPD accepted this offer subject to its revision to €950,000. The Company objected, leading the parties to resolve the matter through arbitration. The appointed Chair Arbitration Committee determined the value of the site as €550,000. A contract of sale was entered into on 13 April 2012, whereby the Company acquired 83 Spinola Road for the consideration of €525,000, payable over a five-year period.

The Expired Emphyteusis

- 3.2.4 It is pertinent to note that the source of the error regarding the term of the temporary emphyteusis of 83 Spinola Road predated the acquisition by E.G. Property Holdings Ltd, as this was traced back to a deed of inheritance entered into in 1975. This error was subsequently perpetuated in the deeds of transfer entered into in 1981, 1986 and 1998, at which point the Company acquired the property from third parties. It was in this context that the Company argued that its actions were in good faith, a point duly acknowledged and deemed valid by the NAO.
- 3.2.5 In recognising the Company as the new emphyteuta, the Joint Office perpetuated the error cited in the previous deeds of transfer and conditioned the Company in confirming an incorrect understanding of ownership. When the Company was recognised as the new emphyteuta in January 2002, works on the site had already commenced, with documentation reviewed by the NAO indicating that residents were informed by the Company of the initiation of works as early as May 2001. This understanding was eventually challenged in February 2003, when E.G. Property Holdings Ltd was informed by the GPD that the Company did not hold a valid title to the property; however, at that stage, construction works on the site were almost complete.
- 3.2.6 Although it may be argued that the GPD had a legal right to reclaim the property, since ownership had reverted to Government when the temporary emphyteusis expired in 1996, the matter was rendered less straightforward when one considers the extent of development carried out on the site until the error was detected. Given the fact that the development was nearing completion and formed part of a larger complex, the options available to the GPD were limited, with the Department effectively conditioned to transact the property with the Company. The NAO understood the Department's intention to dispose of the property in its developed state as a practical opportunity for Government to maximise revenue. The acceptance of the laudemium by the Joint Office also influenced the GPD, with the Department assuming an element of responsibility for the ensuing circumstances and hence inclined to dispose of the site to the Company. Nonetheless, in this Office's opinion, this did not imply that the GPD was to enter into negotiations regarding the value of the site. In this Office's understanding, while an obligation to transact with the Company may have existed, any obligation to negotiate on the value of the site certainly did not. To this end, the GPD was to ensure that the terms of the transaction fairly represented the value of the site.

The Contested Ownership of the Foreshore

- 3.2.7 The matter of the expired emphyteusis and efforts at resolution were put on hold pending the outcome of judicial proceedings initiated by the GPD regarding the encroachment of part of the development on the foreshore. The contested site consisted of the rear segment of the development, extending from 80 to 83 Spinola Road and overlooking Spinola Bay.

While E.G. Property Holdings Ltd claimed ownership of the site, the GPD contended that this was Government-owned and demesial property. The Court ruled in favour of Government in November 2006, which ruling was confirmed on appeal in March 2009. The Court declared the site as government land, demesial property and illegally occupied by E.G. Property Holdings Ltd, and ordered the Company to restore the site to its original state prior to its occupation. Subsequently, the GPD did not enforce the Court's ruling, exercising its discretion as owner of the site. In this Office's opinion, this action was intrinsically tied to the understanding imparted by the classification of this site as demesial property. This understanding determined whether the GPD was constrained to enforce that decided by the Court or whether it was within the Department's right to seek alternative means to resolve the matter.

- 3.2.8 It was in this context that the NAO noted the somewhat disparate views of the GPD and the Attorney General as to whether the foreshore, considered demesial property, was actually extra commercium. In exchanges preceding the court ruling, the GPD maintained that the foreshore was non-transferable, while the Attorney General disagreed with this reasoning, arguing that demesial property can be alienated. Given the fundamental differences and the significant implications that emanate from this distinction, the NAO sought legal advice regarding whether Government could validly and legitimately dispose of such property. According to the legal advice obtained, at the time when the case was being contested, the foreshore was not specifically dealt with in Maltese law and the consideration of foreshore as demesial property emanated from Roman law. While it was certain that the foreshore constituted public property, its classification as extra commercium was unclear. Based on the legal advice obtained, the NAO established that there was no prohibition against the transfer of the rights on the foreshore and the granting of concessions by Government to third parties, and therefore was of the opinion that the foreshore was not extra commercium.
- 3.2.9 Notwithstanding this, the NAO maintains reservations regarding the sagacity of such action, for the benefit of retention of the foreshore as a publicly accessible space outweighed the revenue that was generated through its disposal. In this case, the judiciousness, or otherwise, to dispose of the foreshore was compounded by the fact that the occupation of the foreshore by the Company was deemed illegal by the Court. In this Office's opinion, the regularisation by Government of the illegal occupation of public land, through disposal, imparts an element of condoning that remains questionable. This concern was heightened by that stated by the GPD officials involved, who indicated that in cases of development that encroached on public land yet were MEPA-compliant, the Department favoured sanctioning the development through disposal rather than enforcement. According to the GPD, these cases were not uncommon.
- 3.2.10 The NAO acknowledges the argument put forward by various GPD officials that, following land reclamation, it was unclear as to whether the site of the illegal encroachment still constituted foreshore. If one were to accept this reasoning, then the argument that the

foreshore was not to be disposed of on grounds that it should be enjoyed by the public does not hold. This argument was strengthened by the fact that other properties, extending to the building line of this development, existed further along the foreshore.

- 3.2.11 Having established that it was possible for the GPD to dispose of the site despite the court ruling, whether this was a prudent course of action or otherwise remains debatable. However, the court ruling certainly strengthened Government's position when disposing of the site, for it determined that the site was illegally occupied. In contrast with the element of responsibility borne by Government with respect to the expired emphyteusis, in this case Government was in no way at fault and therefore had no obligation to dispose of the site to the Company, less so to engage in negotiations. In this Office's opinion, the GPD was to ensure that disposal, were this to be pursued, was to maximise revenue to Government through a fair valuation of the site.
- 3.2.12 Although at the time of this disposal there were no specific legal provisions regarding the disposal of the foreshore, this is now regulated by the Civil Code (Amendment No. 3) Act (Act XXV of 2016). The Act specifically allows Government to, in appropriate circumstances, transfer parts of the foreshore in accordance with the structures introduced therein.
- 3.2.13 Of concern to the NAO were the inconsistencies noted in terms of whether key GPD officials were informed of the court ruling. Conflicting versions of events were provided by the DGs GPD, who maintained no knowledge or recollection of the case, and the CoL, who stated that he had informed them of the outcome of judicial proceedings. The GPD files reviewed by the NAO substantiated that stated by the DGs GPD, as this Office was unable to trace documentation where the ruling was referred to the DGs. It must be noted that matters relating to the court case regarding the foreshore were filed separately to matters relating to the expired emphyteusis and the tender process for the disposal of the entire site, which included the foreshore. Therefore, in this Office's opinion, arguments brought forward by the DGs GPD, that they were unaware of court proceedings, were plausible. Also of concern to the NAO was that the Minister MFEI and the PS Revenues and Land were not informed of developments relating to the judicial proceedings. This was corroborated by the DGs GPD and the CoL. This omission assumes relevance when one considers the manner in which the case unfolded, with Government disposing of the entire site through tender without reference to this fundamentally important issue.
- 3.2.14 An element of contradiction regarding the fact that the PS Revenues and Land was unaware of the court ruling emerged in correspondence submitted by the Private Secretary to the PS Revenues and Land to the Legal Officer GPD in May 2011, that is, well after the Court of Appeal ruling in March 2009. Although the Private Secretary enquired with the GPD whether the Department had enforced the court ruling, the NAO could not establish whether the Private Secretary had informed the PS Revenues and Land of this exchange. Attempts at establishing the context to this exchange proved futile hence rendering it impossible for this Office to determine the extent of involvement of the Secretariat of the PS Revenues and Land.

3.2.15 The NAO's attention was drawn to a minute by the Assistant Director Enforcement GPD to the CoL in May 2012, wherein he indicated that he was being pressed to take action, presumably enforcement action in terms of the court sentence. This Office sought further details regarding the pressure exerted, yet the Assistant Director Enforcement GPD and the CoL failed to provide any information. It must be noted that the CoL had earlier issued instructions to the Assistant Director Enforcement GPD to put the matter on hold. Enforcement action was not pursued and the site was eventually disposed of through tender. These exchanges between the CoL and the Assistant Director Enforcement GPD assume relevance as they represent the only instance when the existence of the court ruling is acknowledged simultaneous to the disposal of the site through tender. Although the property disposed of comprised the site subject to the expired emphyteusis and the adjacent foreshore, during the tender process all references to the site were limited to the expired emphyteusis, with no indication of the illegal encroachment on the foreshore and the ensuing court case.

Resort to Tender

3.2.16 Following the court ruling in March 2009, the next significant development recorded by the GPD was its decision to dispose of 83 Spinola Road through tender. Although instructions to this effect were noted in the relevant GPD file by the CoL in a minute addressed to the Director Joint Office, the rationale and decision-making process that led the Department to this course of action remained obscure. The NAO established that the decision to dispose of the site was taken following a meeting held with E.G. Property Holdings Ltd; however, no record of this meeting was retained by the GPD, rendering it impossible for this Office to consider that discussed and establish the specific involvement of GPD officials. Despite that stated by the CoL, that the DG GPD had issued instructions to initiate the tender process, information obtained by the NAO supported the understanding that the process was effectively driven by the CoL.

3.2.17 Of concern to the NAO were the dimensions of the site indicated in the property drawing, which not only corresponded to 83 Spinola Road but incorporated the foreshore adjacent to properties 80 to 83 Spinola Road. The gravity of the matter arises from the fact that it remained entirely unclear to the NAO who instructed and authorised the assimilation of the foreshore with 83 Spinola Road. The Office traced no documentation specifically authorising the incorporation of the foreshore as part of 83 Spinola Road, which assimilation significantly altered the dimensions of the site, increasing its footprint from 68 square metres to 165 square metres. Although the NAO sought the views of the GPD officials involved, the Office maintains serious reservations in this respect, deeming the explanations provided incomplete and implausible, since the changes in the dimensions of the site were extensive and far from obvious, certainly requiring due authorisation, which was conspicuously lacking. The NAO took particular exception to that stated by the CoL, who affirmed that the decision to sell both sites did not follow discussions held by the GPD or consultation with the Minister MFEI or the PS Revenues and Land, but termed

this course of action as the obvious resolution to the situation. Given the GPD's failure to document key decisions and developments leading to the assimilation of the foreshore with 83 Spinola Road, the NAO contends that the matter remained anything but obvious.

- 3.2.18 Despite the endorsement of the Director Joint Office of the property drawing depicting an assimilated site, the Director Joint Office maintained that this was to be construed as recognition that the site was to be disposed of. The NAO contends that the Director Joint Office could not unilaterally authorise the transfer of Government-owned land as his remit was limited to Joint Office property.
- 3.2.19 The GPD officials involved in the drawing up of plans maintained that they had not received instructions to incorporate the foreshore with 83 Spinola Road and simply based the plans drawn on those submitted by E.G. Property Holdings Ltd. The GPD officials maintained that this was the procedure adopted by the Department, mainly due to a lack of resources. In this Office's opinion, this reliance on third-party plans without a system whereby any divergences from the original GPD plans are highlighted and referred for endorsement, presents a control risk.
- 3.2.20 Based on information made available, the NAO established that the Minister MFEI and the PS Revenues and Land were not involved in the meeting held between the GPD and E.G. Property Holdings Ltd that led to the decision to dispose of the site through tender. Similarly, the Minister MFEI and the PS Revenues and Land maintained that they had not been informed of or involved in authorising the assimilation of the foreshore with 83 Spinola Road. Ministerial authorisation was in fact sought once the adjudication of the tender was completed, in line with the ministerial direction MFEI 001/08. Nevertheless, the Minister MFEI indicated agreement with the course of action pursued by the GPD, in that Government generally opted for the sanctioning of irregular developments on public land provided that such developments were covered by relevant planning permits, rather than demolition. However, the Minister MFEI contended that, given the particular nature of this disposal, the GPD should have informed him of the intended action prior to the call for tenders. The NAO is of the opinion that the particular nature of this case certainly warranted consultation between the GPD and the Minister MFEI as well as the PS Revenues and Land. The GPD's failure to inform and involve the Minister MFEI and the PS Revenues and Land in key decisions relating to the disposal of the site detracted from the process of governance and fell short of the required transparency.
- 3.2.21 Following the drafting of the property drawing, the Director Joint Office submitted a tender proposal form to the CoL, through the DG GPD. No reference was made to the illegal encroachment on public land, the ensuing court ruling and the GPD's decision to dispose of the site rather than enforce that determined by the Court, that is, render the land pristine. Instead, the tender proposal solely presented details relating to the expired emphyteusis of 83 Spinola Road. However, evident in terms of the footprint cited and the referred plans was the fact that the property now incorporated both sites. From this point

onwards, reference to 83 Spinola Road implied the assimilated sites. The Director Joint Office maintained that, in line with his remit, he had limited the information presented in the tender proposal form to the part of the site that was Joint Office property. On the other hand, the DG GPD indicated that he was unaware that the proposal did not include details regarding the foreshore. While the assertions of the DG GPD and the Director Joint Office render debatable their awareness of and/or consent to the subtle inclusion of the foreshore in the tender proposal, the NAO maintains that such doubt cannot be extended to the CoL, who was directly involved in the representation of the Department in court proceedings that had come to a conclusion a year earlier. The gravity of the matter emerges more clearly when one considers that this omission of fundamentally important information relating to the disposal misled the GCC, the PS Revenues and Land and the Minister MFEI, whose authorisation was sought and obtained without their full knowledge of the facts. Of particular concern to the NAO were statements made by the CoL, who maintained that given the GPD's intention to dispose of the site by tender, then there was no need to provide details allowing for a comprehensive representation of the case. This Office strongly disagrees with that stated by the CoL, deeming the tender proposal drawn up by the Director Joint Office and endorsed by the CoL as misleading, failing to provide a full account of the property to be disposed of.

- 3.2.22** The GPD's decision to dispose of the foreshore and the expired emphyteusis through one tender resulted in the Department forfeiting an element of bargaining power in negotiations regarding the value of the now assimilated 83 Spinola Road. In the NAO's opinion, while the party that was to bear responsibility for the expired emphyteusis remained a point of contention, with Government and E.G. Property Holdings Ltd presenting valid arguments, the same could not be said of the foreshore. The party at fault with respect to the foreshore was certainly the Company, as in fact confirmed on appeal by the Court. In the NAO's understanding, Government's negotiating position on the foreshore, which accounted for a substantial portion of the assimilated site, was compromised when disposing of this area with that of the expired emphyteusis through a single tender.
- 3.2.23** Although there existed no grounds for granting E.G. Property Holdings Ltd a right of first refusal with respect to the part of the site constructed on the foreshore, an element of doubt persists as to whether it was reasonable and economically advantageous for Government to distinguish between the two parts of the site and therefore dispose of each separately. Given the circumstances and the dimensions of the site, it was reasonable for Government to consider the Company as the party most willing to submit the most financially advantageous offer in view of its vested interest in the entire development.
- 3.2.24** Following the endorsement of the tender proposal by the CoL and the DG GPD, the Department published a call for tenders for the disposal of 83 Spinola Road in May 2010 and included details of the bid bond required, specified a right of first refusal yet made no reference to a minimum acceptable offer. The GPD had established the value of the site as €950,000. The Company, now Eighty Two Co. Ltd, submitted the only offer of €192,225.

The CoL recommended that the tender be awarded to the Company subject to revision of the offer to match the GPD's valuation, which proposal was endorsed by the GCC and the Minister MFEI. It was in this context that the Minister MFEI reiterated that reference to all pertinent facts should have been made prior to the issue of the tender and failure to do so at that early stage conditioned subsequent actions. This contrasted with that stated by the CoL, who asserted that there existed no obligation to inform the Minister MFEI or the PS Revenues and Land of the full details of the case. The NAO maintains serious reservations in this respect, deeming it imperative and essential that a comprehensive account of facts is provided when ministerial authorisation is sought. In this Office's understanding, the CoL's failure and reluctance to draw the attention of the Minister MFEI and the PS Revenues and Land to all facts of the case remains entirely unclear and casts doubt on the integrity of the process.

- 3.2.25 Eighty Two Co. Ltd was informed of the acceptance of its offer, subject to this revision, and was to enter into the contract of sale on 15 September 2010. Failure to comply would result in the Company forfeiting any rights to the tender. Notwithstanding this, the Company objected to the conditions set by the GPD, which objection ultimately led to recourse to arbitration.

Recourse to Arbitration

- 3.2.26 Referral by the CoL of the objections raised by Eighty Two Co. Ltd to the GPD Tender Committee drew this Office's attention. In this Office's opinion, the assertion that the facts of the case were as presented by the Company effectively misled the GPD Tender Committee, for the Company made no reference to the illegal encroachment on public land but limited its account to the expired emphyteusis. Although the DG GPD chaired the GPD Tender Committee, he maintained that he had no knowledge of the court case as this was not brought up during any Committee meetings and therefore the deliberations of the Committee were solely based on that referred to by the CoL.
- 3.2.27 In view of the failure to reach an agreement, Eighty Two Co. Ltd proposed resort to arbitration through the nomination of an ad hoc committee of three persons. The GPD Tender Committee considered referral to the Malta Arbitration Centre; however, ultimately opted for that proposed by the Company. Resort to informal arbitration as opposed to that undertaken through the Malta Arbitration Centre was understood by the NAO as an attempt by the parties to retain control over the process. Referral to arbitration was endorsed by the Minister MFEI, the PS Revenues and Land and the DG GPD; however, it must be noted that the said endorsement was based on information solely relating to the expired emphyteusis. In the NAO's understanding, this endorsement of referral to arbitration represented the inevitable course that was to lead to negotiation on the value that was to be assigned to the property. Whether this course of action would have been pursued had the Minister MFEI, PS Revenues and Land and the DG GPD been aware of the court ruling remains a moot point; however, the NAO is of the opinion that this was critical

information not brought to the attention of those involved in decisions taken. It is in this context that the Office's gravest concerns are drawn to the failure of the CoL to present all the facts of the case when referring the matter to the GPD Tender Committee. This omission misled all subsequent decisions in the process, including ministerial endorsement.

- 3.2.28 The Arbitration Committee was chaired by the Adviser to the PS Revenues and Land, who was proposed by the GPD and endorsed by the Company. One of the members was nominated by the GPD and the other by the Company. Given that the members were each representing the specific interests of the involved parties and failed to reach any form of compromise regarding a revised value, the establishment of the value rested with the Chair. The arbitration report, dated October 2011, determined the freehold value of the property as €550,000. While the Chair Arbitration Committee criticised the valuations by the Company Architect and the GPD Consultant Architect, members of the Committee, the NAO noted that the established value was effectively the mid-point between the €950,000 originally established by the Department and the €192,225 offer submitted by the Company. The Chair Arbitration Committee contended that the rate of €633 per square metre was similar to that applied by the GPD Consultant Architect, yet the valuation of €550,000 resulted from the consideration of receding floor areas at the upper levels.
- 3.2.29 The Chair Arbitration Committee applied a 20 per cent deduction to the initial rate of €633 per square metre to account for the GPD's acceptance of the laudemium, resulting in a rate of €500 per square metre. The NAO noted that this reduction was incorrectly applied to the entire site, when in fact this should have been limited to the site of the expired emphyteusis. This resulted in an unnecessary reduction of €70,000; however, this Office is of the opinion that the Chair Arbitration Committee was misled by the fact that he was unaware of the matter of the foreshore.
- 3.2.30 Although the arbitration report was dated 10 October 2011, it was submitted to the GPD on 11 November 2011. Eighty Two Co. Ltd alleged that the delay in the presentation of the arbitration report was due to the disagreement of the GPD with the conclusions reached. Correspondence reviewed by this Office contradicted these allegations. Notwithstanding this, the NAO was unable to explain the time lapse between the conclusion of the report and its submission.
- 3.2.31 The valuation determined by the Chair Arbitration Committee was referred to the Minister MFEI by the DG GPD through the PS Revenues and Land. The DG GPD presented two options, that is, an outright sale or a perpetual emphyteusis, indicating preference for the latter option as this would maximise revenue to Government. While the perpetual emphyteusis would secure a minimum of €549,500 over a period of time, the outright sale would result in revenue to Government of €35, with the remaining balance of €525,000 payable to the Archdiocese as Foundation for Church Schools bonds. In line with that recommended by the DG GPD, the Minister MFEI and the PS Revenues and Land endorsed the perpetual emphyteusis option in December 2011.

- 3.2.32** Disposal through a perpetual emphyteusis was not pursued following objections raised by Eighty Two Co. Ltd in January 2012 with regard to the issuance of a new call for tenders. The Company contended that the tender was still valid given that it had submitted the only offer, the bid had never been rejected and the bid bond was renewed at the GPD's request. In this context, the Company expressed its willingness to transact the property through an outright sale. Despite objections raised by the DG GPD, wherein he maintained that the Department was to issue a new call for tenders for disposal of the site on perpetual emphyteusis, in February 2012, the DG GPD sought the authorisation of the Minister MFCC for the outright sale of the property. This development followed at least one meeting held between the Company and the GPD, for which the Permanent Secretary MFCC, the Head of Secretariat MFCC and the Chair Arbitration Committee were also present.
- 3.2.33** In the NAO's opinion, the validity of the tender for the disposal of 83 Spinola Road issued in May 2010 remained subject to debate. Although the renewal of the bid bond supported the tender's validity, the Company's failure to abide by the conditions stipulated in the letter of acceptance rendered this dubious. Furthermore, the tender clearly stipulated that, in case of disagreement, referral was to be made to the Malta Arbitration Centre. This provision was not adhered to in the subsequent negotiations undertaken, hence rendering questionable the enduring validity of the tender. In view of the persistent doubts regarding the validity or otherwise of the tender, largely emanating from the non-adherence to the conditions stipulated in the letter of acceptance, it is this Office's understanding that Government retained the right to reissue the tender for the disposal of the site specifying its preferred method of transfer. Government's failure to persist in transacting the property through a perpetual emphyteusis resulted in revenue of €35 instead of €549,500 and a revision to ground rent as per the index of inflation on the fifteenth year. In effect, given that the site was acquired by Government through the Church-State Agreement, then it was inevitable that Government would have only secured revenue through perpetual emphyteusis and therefore the tender of May 2010 should have been issued accordingly.
- 3.2.34** The authorisation of the Minister MFCC for the outright sale of 83 Spinola Road was granted in March 2012. The Minister MFCC indicated that he was unaware that the change from perpetual emphyteusis to outright sale would have reduced Government revenue so severely and asserted that the DG GPD should have alerted him to the exact financial implications of the two options. Although the NAO acknowledges that the DG GPD did not clearly specify the extent of revenue to be registered by Government through the sale of the property, this Office maintains that the Minister MFCC had an obligation to know that the disposal of property through outright sale acquired by Government through the Church-State Agreement would invariably result in a negligible revenue to Government. The NAO considers the failure by the Minister MFCC to question the implications of the change in the method of disposal as a shortcoming in terms of ministerial oversight.

The Contract of Sale

- 3.2.35** The contract of sale was signed on 13 April 2012, whereby Eighty Two Co. Ltd acquired 83 Spinola Road for €525,000, payable over five years. Although the contract of sale stipulated that the property was sold for €525,000, it must be noted that the residual revenue to Government was €35. The deduction of the revenue to Government from the proceeds of the sale resulted in a balance of €524,965, which balance was transferred as bonds issued to the Foundation for Church Schools in 2013. The NAO is of the opinion that the GPD failed to secure the revenue that was in fact due to Government as the site disposed of was not entirely Joint Office property. The portion of the site previously referred to as the foreshore was Government-owned land that was not subject to the Church-State Agreement. Hence, this Office considers the amount transferred as bonds issued to the Foundation for Church Schools as erroneous, for the income earned from the disposal of the site should have been apportioned according to ownership.
- 3.2.36** Despite the fact that the contract stipulated payment of the full amount over a five-year period, that is, up to April 2017, as at that date, the amount due by Eighty Two Co. Ltd, including interest, was of €308,885. The NAO noted that interest charged by the GPD for late payments was erroneously set at five per cent instead of the eight per cent specified in the contract of sale. Moreover, the GPD failed to levy compound interest as stipulated in the contract. Efforts at recovering amounts due by the Company were deemed insufficient by this Office.

NAO Valuation of 83 Spinola Road

- 3.2.37** As part of its review and in view of the considerable difference in valuations assigned to 83 Spinola Road, the NAO commissioned an independent valuation of the site. The GPD initially estimated the site at €950,000, while Eighty Two Co. Ltd submitted an offer of €192,225. Following arbitration, the Chair Arbitration Committee determined the value of the site and structure as €550,000. In its analysis, the NAO sought to determine the value of the site utilising the same parameters employed by the Arbitration Committee, that is, valuation as at 2011, taking into account the site and structure. The freehold value of the site and structure determined by the NAO was of €2,350,000. When one compares this valuation with the transacted amount, that is, €525,000, the resulting variance is substantial, rendering evident Government's failure to obtain the true and fair compensation that was due. While it is acknowledged that the valuation of property remains a subjective process, this Office is of the understanding that subjectivity does not explain the extent of the difference noted. In this case, the rate per square metre applied by the GPD was that of €633, while those determined by the NAO ranged from €1,125 to €4,050 per square metre, depending on floor level and use.

3.2.38 Were it to be argued that Eighty Two Co. Ltd was being unfairly charged by Government for the cost of development that the Company had incurred and therefore the site was to be valued solely in terms of its potential, then revenue secured by Government also fell short of the NAO's valuation under such a scenario. Without delving into the merits of whether sale in this manner was legally tenable or otherwise, the NAO established the value of the site's potential as €1,500,000. Even if the site were to be valued in this sense, then the transacted amount secured by the GPD would still be significantly less than the site's value for potential development.

3.3 Conclusions

3.3.1 Although the NAO noted various shortcomings in the process leading to the disposal of 83 Spinola Road, this Office acknowledges the complexity and particular nature of the case. The source of complications that arose may partly be traced back to a notarial error, perpetuated in various deeds of transfer of the property, dating back to 1975. The GPD and E.G. Property Holdings Ltd, later Eighty Two Co. Ltd, were not involved in the deed when the error was first made; however, the Company was party to a deed of transfer in 1998, when it acquired the temporary emphyteusis of the property. The Company's acquisition occurred at a point when the emphyteusis had already expired. The GPD, when notified of the transfer, initially failed to detect this anomaly and accepted the laudemium payment. In essence, the NAO's review focused on efforts undertaken by the GPD and the Company at resolving this anomalous situation relating to the expired emphyteusis. However, compounding matters was the fact that the Company extended its development of 83 Spinola Road on public land over which it had no title.

3.3.2 In view of the request for investigation mandated by the PAC, the NAO sought to ascertain whether the principles of good governance, value for money, transparency and accountability were respected, and whether any political pressure was exerted with respect to Government's disposal of 83 Spinola Road.

Good Governance

3.3.3 The NAO noted the lack of documentation particularly evident at key stages of the process. This critical shortcoming hindered the Office from establishing a comprehensive understanding of the GPD's consideration of the case and detracted from the expected standards of good governance. The NAO was unable to determine how the decision to dispose of the property after the court ruling in Government's favour was arrived at. Similar concerns emerge with regard to the decision to assimilate the foreshore with the site of the expired emphyteusis and dispose of the entire site through one tender. This Office established that the assimilation of the two sites was discussed during a meeting held with E.G. Property Holdings Ltd; however, the lack of documentation rendered the NAO unable to determine who was involved, that discussed and how this decision was taken. Other key meetings for which no documentation was retained included those where

the option of transfer through perpetual emphyteusis, as opposed to outright sale, was discussed and eventually discarded. The conspicuous gaps in documentation at the critical stages of the process shroud the decision-making process, rendering it impossible for the NAO to determine the precise facts and role of all involved as is expected in terms of good governance.

- 3.3.4** Given the lack of documentation, the NAO was constrained to rely on that stated during meetings held. This invariably resulted in conflicting accounts of events, with the NAO unable to establish a veritable and comprehensive understanding of facts. Aside from concerns in terms of the governance of the process, this shortcoming raises issues of transparency and accountability.
- 3.3.5** The NAO is of the opinion that, prior to the issue of the tender for the disposal of the site, the matter should have been referred to the Minister MFEI and the PS Revenues and Land. While this Office acknowledges that the ministerial direction MFEI 001/08 stipulated that referral for ministerial authorisation was to be made after the endorsement of award by the GCC, the NAO considered that the particular nature of this case warranted earlier referral. In fact, this Office is of the opinion that the decision to dispose of the property, rather than enforce the demolition of the site as determined by the Court, required ministerial consultation that should have been adequately documented. The GPD's failure to inform and involve the Minister MFEI and the PS Revenues and Land in key decisions relating to the disposal of the site detracted from the process of good governance and fell short of the required standards of transparency.
- 3.3.6** Although the NAO acknowledges the considerable work involved in verifying the title of ownership of 83 Spinola Road and the complexity of this endeavour, the processing of such verifications may warrant review. The erroneous initial recognition of E.G. Property Holdings Ltd as the new emphyteuta provided the Company with a foothold in claims made over its ownership of the property that the GPD could not entirely dismiss. This might not have changed the outcome of the case, yet would have strengthened Government's position in the setting of terms of such transfer.
- 3.3.7** Another procedure-related shortcoming identified by the NAO was the GPD's reliance on site plans submitted by third parties, which served as the basis for the disposal of the site, without any verification. Furthermore, rendered evident in this case was the GPD's lack of a system whereby changes to site plans are adequately highlighted and referred for authorisation, which exposes the GPD to unnecessary risk.
- 3.3.8** Finally, the NAO notes that despite that the amount due should have been settled by April 2017, as at that date, the amount of €309,000 was still outstanding. The NAO noted that the GPD failed to apply the higher rate of interest that should have been charged in case of late settlement, despite delays in the payment of amounts due. Moreover, efforts by the GPD to collect outstanding amounts were minimal.

Value for Money

- 3.3.9 In determining whether the disposal of 83 Spinola Road constituted value for money, it is imperative to first establish the context within which such a decision was taken and therefore determine whether other options presented more advantageous outcomes to Government. By the time Government established that the temporary emphyteusis of 83 Spinola Road had in fact expired and that the foreshore had been illegally occupied by E.G. Property Holdings Ltd, the Company had practically completed the development of the sites as part of a larger complex. In the NAO's opinion, the delay in establishing these facts could not be attributed to Government or the GPD, as the searches required to establish title of 83 Spinola Road were complex and laborious, and the determination of judicial action was certainly not within their control. Therefore, the GPD had limited options when determining if and how to dispose of the property. Given the particular circumstances of the site, it was reasonable for Government to consider the Company as the party most willing to submit the most financially advantageous offer in view of its vested interest in the entire development.
- 3.3.10 However, it was Government's and the GPD's obligation to ensure that revenue from the disposal of this site was maximised, which aspect of the value for money consideration was within their direct control. When one considers that the site was transferred to Eighty Two Co. Ltd for €525,000 against the NAO's valuation of €2,400,000, then value for money was certainly not ascertained. Even if one were to take into consideration the fact that the Company bore construction costs and value the site in terms of its potential, the discrepancy between the NAO valuation under this scenario, that is, €1,500,000 and the sale price remains a significant concern. In establishing the value of the property and in agreeing to enter into negotiations with the Company, the GPD failed to safeguard Government's interests and certainly did not secure revenue that fairly represented the value of the site.
- 3.3.11 Compounding the GPD's failure to ensure value for money was the erroneous consideration of the entire site, including the foreshore, as Joint Office property. The footprint of the foreshore constituted the larger part of the site and therefore, revenue generated from the disposal of the property should have been apportioned accordingly to Government and the Archdiocese. In effect, having considered the entire site as Joint Office property, Government secured €35 of the €525,000 transaction, with the remaining balance transferred to the Archdiocese as Foundation for Church School bonds. This outcome could have readily been averted had Government disposed of the site through a perpetual emphyteusis, which would have ascertained that all revenue registered from the disposal of the site be retained by Government. Notwithstanding the fact that the DG GPD had highlighted the benefit to Government of resort to disposal through perpetual emphyteusis, this proposed course of action was discarded in favour of outright sale following objections raised by the Company. The involvement of the Minister MFCC, the Permanent Secretary MFCC and the Head of Secretariat MFCC remained unclear to this Office, particularly due to the lack of documentation retained in this respect. Although the Minister MFCC maintained that the

DG GPD failed to clearly specify the implications on Government revenue of an outright sale, the NAO has reservations in this respect. Even if this were the case, the NAO is of the opinion that the Minister MFCC should have been aware of this critically important fact, an invariable outcome in the disposal through outright sale of property transferred to Government by way of the Church-State Agreement.

3.3.12 In sum, the NAO is of the opinion that value for money was not ascertained in this transaction. Responsibility for shortcomings relating to Government's failure to ascertain value for money rests, to varying degrees, with the GPD officials involved, the architects engaged by the GPD and the Minister MFCC. The DGs GPD assume oversight of all of the Department's functions, and hence shoulder an element of responsibility in this respect. More central was the role of the CoL, whose involvement was critical in the Department's recourse to arbitration. The CoL provided partial information of the facts of the case that misled subsequent considerations by the GPD Tender Committee, the Arbitration Committee, the PS Revenues and Land and the Minister MFEI. The direct implication of arbitration was the unnecessary weakening of Government's position and it is in this context that the CoL bears responsibility in this regard. This weakening was compounded by valuations that effectively understated the true value of the property. Finally, the NAO finds the approval of the Minister MFCC for resort to the outright sale of the property, rather than disposal of the site through perpetual emphyteusis, as injudicious.

Transparency

3.3.13 In its review of the documentation retained by the GPD, the NAO noted the persistent failure of the CoL to indicate developments relating to the foreshore and the court ruling in favour of Government, despite his evident awareness of the case given that he was directly involved in judicial proceedings. This was rendered evident in various instances, particularly at key junctures, leading to the disposal of 83 Spinola Road. This Office noted such omission in the CoL's endorsement of the tender proposal form referred by the Director Joint Office wherein no reference was made to the foreshore despite its inclusion for disposal. Again, no reference to the foreshore was made in the recommendation by the CoL for the award of the tender to Eighty Two Co. Ltd addressed to the DG DoC, through the PS Revenues and Land and the DG GPD, with reference solely made to details relating to the expired emphyteusis. When referring objections raised by Eighty Two Co. Ltd to the award of tender and the request for a reconsideration of the valuation of 83 Spinola Road to the GPD Tender Committee, the CoL confirmed the account of events as presented in the correspondence submitted by the Company, when in fact the Company made no reference to the matter of the foreshore. The NAO considers this as serious negligence on the part of the CoL and also casts significant doubt on the integrity of the process. Although the CoL maintained that he had verbally informed the DGs GPD of the judicial action regarding the foreshore, the DGs maintained that they were not aware of this. Given the centrality of the matter, the NAO nonetheless maintains that such information was not to be conveyed verbally.

- 3.3.14 A total lack of transparency was also evident in the process that led to significant changes in the footprint of the site that was disposed of. Despite clarifications sought, the NAO was unable to establish who authorised the assimilation of the foreshore with 83 Spinola Road. Although the Director Joint Office endorsed the revised plans, the assimilation of government-owned land with Joint Office property was not within his remit. Contentions that the plan of the site prepared by the GPD was based on drawings submitted by the Company, which included the foreshore, were deemed unconvincing by the NAO. The decision to dispose of the foreshore with the site of the expired emphyteusis should have been comprehensively documented, with all requisite authorisations clearly sought and recorded on file. Instead, despite the fact that this was a critical development, the assimilation of the sites only becomes apparent in a highly inconspicuous manner, from the change in footprint in the site plans prepared, again drawing this Office's concerns to the integrity of the process.
- 3.3.15 Another key development was the decision to dispose of the site through outright sale rather than a perpetual emphyteusis. Despite the significant implications in terms of revenue to Government, the process that led to the change in the method of disposal was not documented, rendering it impossible to identify who was responsible and the rationale for the change from a perpetual emphyteusis to outright sale. As indicated, the role of the Minister MFCC, the Permanent Secretary MFCC and the Head of Secretariat MFCC remained unclear, raising this Office's concerns regarding the transparency in Government's resort to outright sale.
- 3.3.16 Another contributing factor to the lack of transparency was the filing of documentation by the GPD, with two separate files retained. While the documentation on the matter relating to the expired emphyteusis and the subsequent tender process for the site comprising the foreshore was retained in a Joint Office file, documentation relating to the court case regarding the foreshore was filed under separate cover in a GPD file, with no reference to both issues made in any of the files. Although the NAO acknowledges that no reference to the expired emphyteusis was necessary in the court case file, reference to the court ruling was certainly required in the Joint Office file once the decision to assimilate and dispose of the two sites was taken. Documentation of the tender process was exclusively retained in the Joint Office file, which made no reference to the matter of the foreshore. Therefore, unless informed through other means, officials involved in the tender process would not have been aware of the court case, even if a review of the entire Joint Office file was undertaken.

Accountability

- 3.3.17 The limited documentation retained by the GPD of key developments and the conflicting accounts of events rendered the NAO at times unable to determine the precise involvement of the Government officials. Shortcomings in this respect impeded the Office from establishing who was responsible for key decisions that led to the disposal through outright

sale of 83 Spinola Road. Gaps in accountability were most evident in the decision to dispose of the foreshore, declared by the Court as illegally occupied by E.G. Property Holdings Ltd, through its assimilation to 83 Spinola Road. The Office was also unable to ascertain on what grounds resort to informal arbitration was agreed to when the tender for the sale of the site specifically made reference to arbitration through the Malta Arbitration Centre in case of any dispute or claim arising therefrom. The discussions that led to the decision to dispose of 83 Spinola Road through an outright sale from that previously agreed to, that is perpetual emphyteusis, were not documented. Despite reference to meetings held involving officials of the MFCC, the GPD and the Company, no minutes of that discussed were retained. The NAO maintains that these were key decisions in the disposal of 83 Spinola Road, which were obscured because of a lack of documentation.

3.3.18 In its consideration of decisions taken by the various officials involved at one stage or another of the process leading to the disposal of the site, the NAO noted instances where incomplete information was provided as the basis for deliberation. In such cases, the responsibility borne by officials involved in decisions taken is somewhat mitigated by their partial understanding of facts, which understanding may have conditioned the pursued course of action. The NAO is of the opinion that the burden of accountability rests with those officials who, although aware of all the facts of the case, failed to draw attention to them despite that it was their responsibility to do so. Reference in this respect is made to the CoL and to others who were possibly aware of more than that rendered evident in documentation reviewed and submissions made.

Political Pressure

3.3.19 The NAO did not find direct evidence of political pressure exerted in the process reviewed. Notwithstanding this, the involvement of the Minister MFCC and the Head of Secretariat MFCC in the latter stages of the process of disposal drew the Office's attention. It was not possible for the NAO to precisely establish the developments that took place prior to the minute submitted by the DG GPD, wherein he advocated disposal through outright sale, when he had previously recommended that disposal was to be effected through perpetual emphyteusis. This Office's limited understanding was conditioned by the absence of any documentation retained with respect to this key stage of the process. In the NAO's opinion, the context of this change from perpetual emphyteusis to sale indicated an element of ministerial involvement, for it was after a meeting held with the Minister MFCC, Head of Secretariat MFCC and the Permanent Secretary MFCC that the DG GPD recommended disposal through outright sale.

2016-2017 (to date) Reports issued by NAO

NAO Work and Activities Report

March 2017 Work and Activities of the National Audit Office 2016

NAO Audit Reports

July 2016 An Investigation of the 2015 Local Councils' Capital Projects Fund

July 2016 An Investigation of Local Councils Funding Schemes launched between 2008 and 2013

September 2016 Performance Audit: Service Agreements between Government and Richmond Foundation Malta

October 2016 Performance Audit: Agreements between Government and YMCA Valletta

November 2016 Performance Audit: Managing and Monitoring the State Schools' Transport Services

December 2016 Annual Audit Report of the Auditor General - Public Accounts 2015

December 2016 Annual Audit Report of the Auditor General - Local Government 2015

December 2016 An Investigation of Property Transfers between 2006 and 2013: The Transfer of Land at Ta' L-Istabal, Qormi

December 2016 An Investigation of Property Transfer between 2006 and 2013: The Acquisition of 233, 236, and 237 Republic Street, Valletta

January 2017 Contribution of the Structural Funds to the Europe 2020 Strategy in the Areas of Employment and Education

February 2017 Information Technology Audit: Cyber Security across Government Entities

May 2017 Performance Audit: Protecting Consumers through the Market Surveillance Directorate's Monitoring Role

June 2017 Performance Audit: Procuring the State Schools' Transport Service