– ART. 19 REGULATION (EC) NO. 861/2007: PROCEDURE TO BE GOVERNED BY THE PROCEDURAL LAW OF THE MEMBER STATE IN WHICH THE PROCEDURE IS CONDUCTED –
– ART. 7(1) AND ART. 9(1) CHAPTER 380 LAWS OF MALTA: DECISION ACCORDING TO EQUITY –
– EQUITY NOT TO OVERSHADOW BASIC PROCEDURAL NORMS AND/OR RULES OF EVIDENCE –
– ART. 562 CHAPTER 12 LAWS OF MALTA: "ONUS PROBANDI INCUMBIT EI QUI DICIT NON EI QUI NEGAT" –
– BURDEN OF PROOF: PREPONDERANCE OF THE EVIDENCE & BALANCE OF PROBABILITIES –
– "QUOD NON EST IN ACTIS NON EST IN MUNDO"& "NON REFERT QUID NOTUM SIT JUDICI SI NOTUM NON SIT IN FORMA JUDICII" –
– MALTESE JUDICIAL SYSTEM: ADVERSARIAL RATHER THAN INQUISITORIAL –
– CLAIMANT FAILED TO PROVE HIS ALLEGATIONS –

SMALL CLAIMS TRIBUNAL
(EUROPEAN SMALL CLAIMS PROCEDURE)

ADJUDICATOR
ADV. DR. KEVIN CAMILLERI XUEREB

Sitting of Tuesday, 28th of November, 2017

Claim no. **5 / 2017**

BAUERLE JOERG

VERSUS

CO-GAMING LIMITED

The Tribunal,

Having seen the Claim Form ('Form A') filed by the claimant on the 8th May, 2017 (*fol*. 1) whereby, in line with Regulation (EC) no. 861/2007, the same requested the Tribunal to condemn defendant company to pay and reimburse him the sum of one thousand, three hundred and forty eight Pound Sterling GBP (£1,348.00)[1] (*fol*. 4) for the reasons explained under Section 8.1 of the claim form (*fol*. 5). The said amount consist of £648.00 as "amount of principal" (*vide* Section 7.1.1 of the claim form), £400.00 as "Administration" (*vide* Section 7.2 of the claim form) and £300.00 as "legal advice" (*vide* Section 7.2 of the claim form). Moreover, claimant requested statutory

[1] Equivalent to *circa* €1,472.00c.

interest as per Section 7.4 of claim form running from the 28th of November, 2016 as per Section 7.4.2 of the claim form (*fol*. 5).

Having seen that the defendant company, was duly notified on the 14th of June, 2017 (*a tergo* of *fol*. 10) and the same filed its Answer Form ('Form C') on the 12th of July, 2017 in terms of Article 5(3) and 5(6) of Regulation (EC) no. 861/2007 (*fol*. 16), whereby it resisted claimant's allegations and refuted claimant's claim to be reimbursed the mentioned amount as described under Section 2.3 of 'Form C' (*fol*. 17) where there is reference to the documentation attached to 'Form C' (see *foll*. 19–20).

Both parties to these proceedings did not demand an oral hearing (see Section 8.3 of 'Form A' at *fol*. 6 and Section 3 of 'Form C' at *fol*. 17). Therefore, the Tribunal is proceeding to deliver its present decision upon the documentary evidence submitted by the litigants.

The Tribunal, took cognizance of its decree dated the 6th of September, 2017 (*foll*. 11–12) wherein there was erroneously indicated that although the defendant company was duly notified on the 14th of June, 2017 the same "*did not file any reply within the time limits established under Article 5(3) of EC Regulation no. 861/2007*." In actual fact, as above already indicated, the defendant company had filed its Answer Form ('Form C') on the 12th of July, 2017. This error was due to the fact that when the said decree was issued, the present acts of the proceedings did not contain the defendant's company's Answer Form ('Form C') but was inserted therein after the said decree was published.

Moreover, in the mentioned decree of the 6th of September, 2017 (*foll*. 11–12) the Tribunal had ordered the claimant to "*submit a sworn declaration or affidavits (in the English language) whereby a reasonably detailed description and explaining of the factual events behind claimant's claim*" and also to "*submit any documentary evidence in support of the claim and in support of the amount claimed in these proceedings*." The reason behind that order was, as stated in the decree, because "*the claimant's details of the claim are scant and very scarce (vide section 8 of the Claim Form) and that the claimant submitted no documentary evidence in support of his claim and has not submitted any evidence in support of the monetary claim in the total amount of £1,348 (equivalent to circa €1,472)*." The Tribunal had conceded a time-limit of thirty (30) days for the claimant to comply with such directives.

The said decree was notified to the claimant on the 2nd of October, 2017 *via* email by the Tribunal's deputy registrar (*fol*. 26). The claimant, by virtue of an email dated 22nd of October, 2017, addressed to the deputy registrar, replied thus: "*In terms of evidence for the claim I am afraid that only the Defendant has got those records as evidence. I can not provide this as they closed my account with them as soon as I reported the fraudulent activities. I will however forward an email that they have sent me that gave an overview of the transactions.*" (*fol*. 27) By virtue of a separate email, also dated 22nd of October, 2017, also addressed to the deputy registrar, claimant forwarded an email sent to him by the defendant company on the 13th of January, 2017 (*fol*. 28). In this last email (i.e., of 13th of January, 2017) there is explained the reason – according to the defendant company – why the claimant's player account funds were removed therefrom.

The Tribunal must note that this last email is not the evidence it requested from the claimant, namely "*a sworn declaration or affidavits (in the English language) whereby a reasonably detailed description and explaining of the factual events behind claimant's claim*." As above stated, such email is merely a reply provided by the defendant company to the claimant explaining the reason why the funds disappeared from the claimant's player account. Therefore, the Tribunal has at its disposal solely the concise description offered by the claimant under Section 8.1 of his claim form (*fol*. 5) which states: "*Go-Gaming Ltd has transferred funds from my account to a foreign account that is in no way linked to mine*." The Tribunal also took cognisance of the claimant's Account History (see *foll*. 30–31) which was attached to the claimant's email dated 22nd October, 2017 (*fol*. 28).

In connection with such a brief explanation of the factual aspect of the claimant's allegation, the Tribunal has also examined the documentation produced by the defendant company, which is attached with its Answer Form ('Form C') (*foll*. 19–20).

Again, the said documentation consists of a few emails exchanged by the claimant and the defendant company, wherein the former demands an explanation on the matter from the latter (see *fol*. 19) and the defendant company replying in detail that the matter was duly reported to the investigative authorities (i.e., 'Skrill/Moneybookers'), that claimant ought to report the matter to the Police and that in the defendant company's view, "*your details have been breached which means the hacker might have access to more accounts, other than the one you have with us. The hack is not a system breach on our end or any type of system failure, your login details have been compromised via a breach on your end*" (*fol*. 20).

After having considered all the acts of the proceedings, the Tribunal considers as follows:

The present case is one wherein the claimant, having an account with the defendant company for on-line gaming purposes, had the relative funds therein contained transferred to some other unknown foreign account, in no manner connected with the claimant. The claimant is alleging that this system failure or hack of the relative account was due to the defendant's company's fault, thus alleging that "*Go-Gaming Ltd has transferred funds from my account to a foreign account that is in no way linked to mine*." He is thus requesting to be reimbursed the amount of £648.00 (along with other sums) which was, according to the same, illicitly taken from his player's account and transferred to an unknown foreign account.

On the other hand, the defendant company is stating that its gaming systems were in no manner compromised by any hacking activity and that the same did not experienced any system failure. It repeatedly stated (see *fol*. 20 and *foll*. 28–29) that it was claimant's account which was hacked and this may be due to the hacker being privy to the claimant's account details and/or relative passwords. In this regard, the defendant company, in its 13th of January, 2017 email, stated thus: "*As I understand, the nature of your complaint is regarding an unauthorized breach of your account, which followed your balance being removed from your player account. Along with the security department, we checked your account and did notice that your balance had been spent on the Starburst slot machine and later withdrawn* ..." (*fol*. 28). Again, in another email the defendant company replied to the claimant's complaints by stating that "*your details have been breached which means the hacker might have access to more accounts, other than the one you have with us. The hack is not a system breach on our end or any type of system failure, your login details have been compromised via a breach on your end*" (*fol*. 20).

Thus, the Tribunal is faced with these two diametrically opposed versions. The claimant is alleging that the illicit transfer of the funds was due to the defendant company's failures (and thus claiming reimbursement) and the defendant company resisting such allegation by stating that it was claimant's account which was directly hacked giving rise to the illicit fund transfer.

Before delving into the merits of the case, the following few observations need to be listed and highlighted.

In line with Art. 19 of Regulation (EC) no. 861/2007, "*Subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted*." This signifies that the procedural rules and principles applicable to this case are those found under Maltese domestic law since Malta is "*the Member State in which the procedure is conducted*."

This Tribunal is principally regulated by its own special Statutory Act, being the "Small Claims Tribunal Act" (Chapter 380 of the Laws of Malta) wherein there is explicitly provided, *inter alia*, under Art. 7(1) that, "*The Tribunal shall determine any claim or counter-claim before it principally in accordance with equity*." Furthermore, under Art. 9(1) thereof, as to the procedural conduct of the cases, there is asserted that the adjudicator "*shall regulate the proceedings before a Tribunal as he thinks fit in accordance with the rules of natural justice*." These two provisions appear to give very wide discretionary powers to the Tribunal and its Adjudicator.

However, numerous decisions of the Maltese Courts have firmly established, and on several occasions reiterated, that such provisions, although bestowing a certain degree of discretion, cannot transcend or eclipse basic fundamental procedural norms.[2] This is because "æquitas legem sequitur" (equity follows the law) and "æquitas nunquam contravenit legem" (equity cannot go contrary to law). Thus, even though this Tribunal is vested with the power and authority to decide the merits of the cases that come before it in accordance with the principles of equity, the Tribunal cannot ignore or discard necessary and core procedural rules of evidence.[3]

Therefore, fundamental procedural rules such as "onus probandi incumbit ei qui dicit non ei qui negat" (the burden of the proof lies upon him who affirms, not him who denies) and "actore non probante reus absolvitur" (when the plaintiff does not prove his case, the defendant is absolved) cannot be overlooked by this Tribunal and be replaced by any flexible rule of equity. Turning a blind-eye to such procedural

[2] Among several others, one is referred to the judgments *in re* **Emanuel Borg et v. Anna Clews et** (Court of Appeal, 27th February, 2009); **Maltacom plc v. Silvan Industries Limited et** (Court of Appeal, 28th November, 2007); **Martin Paul Vella et v. Chris Micallef** (Court of Appeal, 6th October, 2010); **George Muscat noe v. Anton Zammit et** (Court of Appeal, 21st February, 2017); **Middlesea Insurance plc v. Waldorf Auto Services Co Ltd et** (Court of Appeal, 17th November, 2017); and **A.l.M. Enterprises Limited v. U.C.I.M. Co Ltd et** (Court of Appeal, 17th November, 2017).

[3] In the case *in re* **Negte. Francesco Saverio Caruana v. Onor. Negte. Emmanuel Scicluna nomine** (Court of Commercial Appel, 16th February, 1876 – Vol.VII, 522) it was stated thus: "*la discrezione, però, non puo tradursi in arbitrio; anzi al contrario nel fare uso della discrezione accordata è mestiere che risulti essere giusta, e fatta con discernimento e giudiziosamente secondo l'esigenza del caso e lo spirito della legge. Di fatti la discrezione secondo i dottori non è che 'discernere per legem quid sit justum'.*"

requirements will not fare well with the basic principles of procedural justice expected to be embraced, administered and advocated by this Tribunal.

The latter two legal Latin maxims (i.e., "onus probandi incumbit ei qui dicit non ei qui negat" and "actore non probante reus absolvitur") are enshrined within Art. 562 of the Maltese "Code of Organisation and Civil Procedure" (Chapter 12 of the Laws of Malta). The "Code of Organisation and Civil Procedure is that piece of domestic legislation that lays down the procedural norms, rules of evidence, legal mechanisms, juridical tenets and legal principles that local Courts and Tribunals must religiously observe as imperative evidentiary beacons in deciding civil cases. As a natural corollary, the said provision (Art. 562) is one which must also be followed and adhered to by this Tribunal notwithstanding the above-cited provisions of Chapter 380 of the Laws of Malta.

Art. 562 states that, "*Saving any other provision of the law, the burden of proving a fact shall, in all cases, rest on the party alleging it*." This provision must per force be read in line with Art. 558 of the mentioned Code which states that "*All evidence must be relevant to the matter in issue between the parties*" and Art. 559 of the said Code which holds that, "*In all cases the court shall require the best evidence that the party may be able to produce*." In other words, the party who alleges a fact must produce tangible evidence in support of such allegation (Art. 562) and such evidence must be relevant to the case (Art. 558) and the best evidence the party can produce (Art. 559). Even though Art. 9(2)(b) of Chapter 380 stipulates that an adjudicator "*shall not be bound by the rules of best*" a certain minimum standard with respect to the nature of the evidence must be met by the party alleging a fact-in-issue, so much so that the cited provision continues to provide and qualify that the adjudicator must be "*satisfied that the evidence before him is sufficiently reliable for him to reach a conclusion on the case before him*."[4]

Inherent in the last observation made in the preceding paragraph, there is the question of the burden of proof or, as is it is legally known, the "onus probandi". This *onus* is the duty of a party during proceedings (in this case the claimant) to produce the evidence that will substantiate the claims it has made against the opposite party (in this case the defendant company). That burden (*onus*) is shifted from one party to the other solely when a party initially burdened with the same

[4] This is why in a relatively recent judgment, delivered by the Court of Appeal (inferior jurisdiction) on the 21st of February, 2017 in re **George Muscat noe v. Anton Zammit et** there was affirmed as follows: "*Statements generici m'humiex provi sufficjenti, u l-ekwità ma tistax taghmel tajjeb ghan-nuqqas ta' provi*."

manages to substantially prove its allegations. In that case, the burden of proof switches (or shifts) to the other side who must counter produce evidence to rebut the evidence submitted by its adversary (i.e., "reus in excipiendo fit actor"). Thus, fulfilling the burden of proof effectively attracts the benefit of assumption, passing the burden of proof off onto the opposing party.

The present proceedings are of a civil nature and thus the *onus* on the claimant is not that he must prove his allegations against the defendant company beyond reasonable doubt. That *onus* is demanded in proceedings of a criminal nature by the prosecuting party. Here, the relative standard is that the claimant must prove his claim on 'preponderance of the evidence', also known as 'balance of probabilities'. This standard is met if the proposition is more likely to be true rather than not true. The standard is satisfied if there is greater chance that the proposition submitted by a party (and backed-up by sound evidence) is true rather than false. Lord Denning J., in the case of «**Miller v. Minister of Pensions**» ([1947] 2 All ER 372), described it simply as "*more probable than not*."[5] Also interesting is the *dicta* by Lord Hoffman J. in «**Re B**» ([2008] UKHL 35) wherein there is stated: "*If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.*"[6]

[5] The complete citation by Lord Denning J. reads thus: "*If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not*."

[6] The Tribunal observes that Maltese procedural norms (as enshrined in Chapter 12 of the Laws of Malta) were modelled, in their majority, upon Anglo-Saxon procedural principles and norms, which were adopted by the Maltese legislator (and applied by Maltese Courts and Tribunals) during the English dominion of the Maltese islands. In this regard, in his monograph entitled "Storia della Legislazione in Malta", the Maltese jurist **Paolo De Bono** (Malta, 1897) describes that under British rule, "*Varie altre leggi parziali, riguardanti l'organizzazione, il procedimento, le prove giudiziarie, furono pubblicate sino al 1850. Nel quale anno la commissione legislativa nominata il 7 agosto 1848 presentò il progetto del codice di leggi organiche e di procedura civile*." (p.320) and that, "*Il diritto probatorio è in gran parte modellato sul sistema inglese, giá introdotto nell'isola sin dall'anno 1825. Ma i singoli provvedimenti sono alcune volte superiori a quelli delle leggi inglesi medesime*." (p.322). In a footnote to this latter comment, this jurist asserts, *inter alia*, that, "*Ma lo studio delle opera de' giuristi inglesi è in questo ramo indispensabile. Ai giovani raccomando specialmente la lettura del BEST, 'The principles of the law of evidence' 8th edizione curata dal LELY (Londra 1893). È un'opera che tratta metodicamente la materia, esponendo i canoni fondamentali del diritto probatorio inglese, tracciandone le sorgenti, e mostrandone il nesso*." (pp.322–323). As a tangible example of episodes where domestic Courts have resorted to English doctrine on the Law of Evidence reference is made to **Lawrence Sive Lorry Sant v. In-Nutar Guze' Abela** (First Hall of the Civil Court, 27th April, 1993) and **Michael Agus v. Rita Caruana** (First Hall of the Civil Court, 10th March, 2011), among numerous others.

From the Tribunal's vantage point, it is rather like a pair of scales – to win the case one needs to tip them a little bit past level. Therefore, if a judge reaches the conclusion that it is fifty per cent (50%) likely that the claimant is in the right, the claimant will have his case rejected or dismissed. On the other hands, if the judge reaches the conclusion that it is fifty one per cent (51%), or more, likely that the claimant is in the right, then the claimant will win the case.

In the present case, it is the claimant who is 'burdened' to prove his allegations against the defendant company. Only when this burden is discharged, the *onus* passes onto the defendant company to show, through evidence, otherwise.

Moreover, it must be also underlined that the person who is ultimately to decide any issue of a factual nature must, necessarily, base his reasoning, findings and eventual decision, on the evidence formally produced before him and not by means of any ulterior investigations conducted *motu proprio* or *ex officio* (i.e., of his/her own initiative). This is all implicitly enshrined in our domestic legal system in the Latin maxims[7] of "quod non est in actis non est in mundo" (what is not kept in records of the case does not exist), "secundum acta et probata non secundum privatam scientiam" (according to the evidence and not according to private knowledge of the deciding authority) and "non refert quid notum sit judici si notum non sit in forma judicii" (it matters not what is known to the judge, if it be not known in a judicial form or manner).[8]

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[7] Reference to Latin maxims and principles derived from Roman Law are pertinent since, as asserted *in re* **Dr. Giovanni Messina ed altri v. Com. Giuseppe Galea ed altri** (First Hall of the Civil Court, 5th January, 1881 – Decision Nº 122 in *Kollez*. Vol. IX–308), Roman Law was, and still is, the "ius comune" (common law) of Malta and "*nei casi non proveduti dalle nostre leggi, dobbiamo ricorrere alle leggi Romane*". As an example where Maltese Courts or Tribunals made reference to and application of Roman maxims and tenets one is invited to see, *inter alia*, **Vincent Curmi noe v. Onor. Prim'Ministru et noe et** (Constitutional Court, 1st February, 2008); **John Patrick Hayman et v. Edmond Espedito Mugliett et** (Court of Appeal, 26th June, 2009); **Anthony Caruana & Sons Limited v. Christopher Caruana** (Court of Appeal, 28th February, 2014); **Coleiro Brothers Limited v. Karmenu Sciberras et** (First Hall of the Civil Court, 13th February, 2014); and **Sebastian Vella et v. Charles Curmi** (Court of Appeal, 28th February, 2014).

[8] Reference is made to the domestic decisions, among several, *in re* **Carmelo Zammit v. Kummissjoni ghall-Kontroll ta' l-Izvilupp** (Commercial Appeal, 10th of April, 1995); **F. Advertising Limited v. Simon Attard et** (Court of Appeal, 21st of May, 2010); and **Michael Debono et v. Joseph Zammit et** (First Hall, Civil Court, 30th of June, 2010). Moreover, the Italian author **Aurelio Scardaccione** ("Le Prove", UTET 1965; §3, p.8) asserts that, "*il giudice nella formazione o preparazione del materiale, che a lui occorre per pervenire alla decisione della controversia, sceglie i fatti su cui giudicare e, nell'operare tale scelta, si avvale solo dell'attività probatoria svolta dalle parti nell'ambito del processo*." Another Italian author, **Carlo Lessona** ("Trattato Delle Prove in Materia Civile", UTET 1927; Vol.I, §45, p.59), states that, "*la scienza personale del giudice, da lui già posseduta od acquistata stragiudizialmente intorno ai fatti sui quali si controverte non è legittima fonte di prova, perchè la legge non la contempla; perchè anzi, pel sistema della legge, il giudice non conosce i fatti se non quali glie li presentano le parti*."

The above tenets are directly and intimately linked to the fact that Maltese Law embraces a predominantly adversarial rather than an inquisitorial procedural system. This is a system where the parties advocate their own case, or positions, before an impartial and equidistant person (a judge, a magistrate, an adjudicator, *etc*.), who attempts to determine the truth and pass judgment accordingly on the evidence submitted exclusively by the contending parties.[9] In contrast, under the inquisitorial system, the judge investigates the case and takes an active role in the proceedings and in the gathering of evidence.

Under Maltese law, as embraced by domestic case-law, it is a known tenet that a party in civil proceedings is not expected to be guided by the Court or Tribunal regarding the quantity or quality of the evidence to be exhibited. That is purely up to the party submitting the relative evidence. The Court or Tribunal is only permitted to decide on the evidence it has before it and is not allowed to raise any awareness of either of the parties with respect to any possible *lacunæ* or potential inadequacies in the evidence submitted.[10] Lord Thomson LJ-C, in «**Thomson v. Corporation of Glasgow**» (1962 SC [HL] 36 at 52), stated that, "*It is on the basis of two carefully selected versions that the Judge is finally called upon to adjudicate . . . He is at the mercy of contending sides whose whole object is not to discover truth but to get his judgment. That judgment must be based only on what he is allowed to hear. He may suspect that witnesses who know the "truth" have never left the witness-room for the witness-box because neither side dares risk them, but the most that he can do is to comment on their absence*." (*cfr*. **Heydon J. D.**, "Cross on Evidence", 8th Australian Edition, LexisNexis Butterworths

[9] **Marvin E. Frankel** ("Partisan Justice", Hill & Wang, 1978 edition; p. 43) states that: "*The adversary lawyers are strong, active, creative; the adjudicators are passive, receptive. The parties are equipped and knowledgeable; the decision-makers work with what they are given … the evidence not produced by counsel is not produced. Its existence is unknown to the court. The 'facts' will be reconstructed from the materials the parties supply, and no others.*"

[10] This is so because, "*nel processo civile vige il così detto principio dispositivo in conseguenza del quale il giudice decide esclusivamente in base alle prove fornite in giudizio dalle parti*." (*cfr*. **Francesco Gazzoni**, "Manuale di Diritto Privato", XI ed., 2004; p.102). Therefore, "*le parti sono, e devono essere, su di un piede di parità i protagonisti e gli artefici del processo poiché loro è la res de qua agitur, e su di loro, infine, ricadranno gli effetti del giudizio*" (*cfr*. **Girolamo Monteleone**, "Manuale di Diritto Processuale Civile", CEDAM 2007; Vol. I, p.20). "*È, dunque, infedele alla legge quel giudice che, anche in buona fede, si sovrappone alle parti assumendo di fatto la veste di contraddittore, che non gli compete; quel giudice che strumentalizza le parti ed il processo per un fine ad esso esterno, qualunque esso sia (politico, ideologico, economico, di sentimento, persecutorio, ecc. ecc.); quel giudice che finge di vivere il contraddittorio ed il processo, ma giunge in realtà con la soluzione precostituita in tasca*." (*ibid*., p.31). Additionally the same author holds that, "*Il giudice, come ben sapiamo, è un terzo che non sa nulla (e nulla deve sapere) dei fatti controversi; nel nostro ordinamento assume anche la veste del pubblico impiegato, cioè di burocrate, per cui egli in linea di principio, oltre ad ignorare i fatti, si limita a svolgere il suo lavoro senza particolari entusiasmi per le vicende riguardanti le parti. In queste condizioni è quanto meno azzardato pensare che il giudice possa con esito proficuo sostituirsi nell'acquisizione delle fonti di prova alle parti, che invece conoscono assai bene i propri affari, sanno come e dove cercare le prove, e rischiano in prima persona.*" (*ibid*., p.269).

Australia, 2010, §17135, p.531). Therefore, as put by Lord Denning in «**Jones v. National Coal Board**» ([1957] 2 QB 553) – wherein he characterised the adversarial system – if the person who is to decide the matter takes an active part in the proceedings while the evidence is being gathered, "*he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well*."[11]

In other words, the present Tribunal – as with all judicial or quasi-judicial bodies in Malta – is only permitted to reach its decision entirely and solely upon the evidence produced by the parties.[12] At no stage of the proceedings was this Tribunal allowed to guide (or advice) any party thereto in regard to the quantity and/or quality of the evidence it was putting forward for eventual scrutiny, saving any elucidation thereof as permitted and prescribed by Art. 7(1)(a) of Regulation (EC) no. 861/2007 (*vide* Tribunal's decree dated 6th of September, 2017 at *fol*. 11).

Having explained the above applicable principles, the Tribunal observes as follows:

The Tribunal must admit that the claimant did not manage to produce sufficient evidence in support of his claim. Unfortunately, all that the claimant managed to make clear in these proceedings – albeit in very generic terms – were his allegations. But mere allegations amount to nothing if not properly accompanied by relevant

[11] The full citation is the following: «*In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries ... And Lord Greene M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations. If a judge, said Lord Greene, should himself conduct the examination of witnesses, "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict ... The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal"*.» Other cases which followed this *dicta* are, *inter alia*, **Barry Victor Randall v. The Queen (Cayman Islands)** [2002; UKPC 19 (16 April 2002)] and **Peter Michel v. The Queen** [2009; UKPC 41]. Also interesting is the following literature on the subject of judicial intervention: "**Judges Ought To Be Active Referees And Not Mere Spectators**" by David Hope (September, 2012); "**Partisan Justice: A Brief Revisit**" by Marvin Frankel ('Litigation Journal' 1989; Vol. 15, No. 4); and "**The role of the judge in the court-room: the common law and civil law compared**" by Hein Kötz ('South African Law Journal' 1987; Vol. 35). See also the LLD thesis entitled "The Maltese Judge: A Neutral Referee of an Inquisitor in the Production of Civil Testimony?" by Maria De Martino (Faculty of Laws – University of Malta, May, 2014).

[12] The Italian authors **Antonio Carratta** and **Michele Taruffo** ("Poteri Del Giudice", Zanichelli ed., 2011; p.478) write thus: "*il giudice è infatti vincolato a decidere* secundum probata, *non* secundum conscientiam, *e quindi non poteva* supplere de facto, *potendo utilizzare solo le informazioni che avesse acquistato* uti iudex, *ossia nell'ambito del processo.*"

evidence supporting the same.[13] There is no objective and relevant evidence exhibited in the acts of the proceedings which goes to show, in an objective manner, the defendant company's failures as the claimant is attributing to the same. The History Account produced by the claimant (*foll*. 30–31) solely shows a list of transactions into and out of claimant's account but it narrates nothing further than that.

Claimant's claim leaves many aspects unresolved and unanswered. According to him it was the defendant company's fault that led to his account's funds to be illegally transmitted to another unknown account. However, the claimant fails to prove why it is the defendant company who is to answer for such an episode. Although the claimant, under Section 8.2.1 of his claim form ('Form A'), indicated that "*Full email trail can be provided by myself or Go-gaming*" (fol. 5), he only managed to submit an email issued by the defendant company dated 13th of January, 2017 (*fol*. 28–29). No email thread was submitted by the claimant as he indicated.

The Tribunal understands that these hacks are not always a result of the players not protecting their passwords and/or account details. However, it was up to the claimant to show that he did everything reasonably possible to make his account secure against any tempering therewith and protected against any hacking activity. The query still subsists whether the claimant's player account was breached by any hacker on his end. In this regard reference is made to defendant company's assertion in its email of 13th January, 2017 that "*As much as we try to protect our players, I am afraid that it is a player's responsibility to keep their details safe and secure*" (*fol*. 29).

The Tribunal also understands that gaming companies have their own measures in place to protect their data and they invest in securing their on-line systems against any hacking activities or attacks. In fact the defendant company, in its email of 13th January, 2017, stated thus: "*As an online casino provider, we treat our customers network safety as a priority. We advise our customers to change their passwords on a regular basis, to reduce the possibility of hacking the account to the very minimum. Our systems are secure and in line with the regulations set by our Licensers and updated regularly to keep in line with those requirements. All of this information can be found in our terms and conditions*" (*fol*. 28). Nevertheless, it was not up to the defendant company to prove such an

[13] As underlined *in re* **Ignatius Busuttil v. Water Services Corporation** (Court of Appeal, 12th January, 2005), "*tribunal b'funzjonijiet gudizzjarji ma jistax, b'ebda logika u sens ta' gustizzja, jikkampa l-gudizzju tieghu fuq asserzjonijiet gratuwiti, kongetturi bla bazi, jew semplici fehmiet meta dawn ma jsibu l-ebda riskontru fil-konkret tal-provi*."

issue since the allegation in this case was raised by the claimant.[14] Therefore it was up to the claimant to show that the defendant company was at fault for the alleged pecuniary loss he sustained and/or that the breach into his account derived from a breach in the defendant company's online system and not his own, adversely affecting his funds.

In the light of the above, the Tribunal cannot accede to claimant's request and thus cannot condemn the defendant company to pay him the amount of one thousand, three hundred and forty eight Pound Sterling GBP (£1,348.00c) since the claimant's allegations were not sufficiently proven and the *onus probandi* incumbent upon the same was not properly discharged. In other words, the claimant did not manage to tilt the 'pair of scales' which were described here-above and, therefore, there kicks in the principle above mentioned of "actore non probante reus absolvitur".[15]

Decision

In the light of the above considerations, the Tribunal is not satisfied that the claim put forward by the claimant meets the requirements at Law and therefore decides to dismiss the claimant's claim since it was not sufficiently proven.

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[14] Reference is made to the decision *in re* **Anthony Azzopardi et v. Anthony Micallef** (First Hall of the Civil Court, 5th May, 2016): "*il-fatt li l-parti mħarrka ma tressaqx provi tajba jew ma tressaq provi xejn kontra l-pretensjonijiet tal-parti attriċi, ma jeħlisx lil din milli tipprova kif imiss l-allegazzjonijiet u l-pretensjonijiet tagħha; Illi huwa għalhekk li l-liġi torbot lill-parti f'kawża li tipprova dak li tallega u li tagħmel dan billi tressaq l-aħjar prova*." The same philosophy is contained *in re* **Philip Grima v. Chris Grech** (First Hall of the Civil Coutt, 28 ta' Jannar, 2010) u cioè li, "*Dwar l-enfasi li saret fin-nota tar-rikorrent li l-intimat ma kienx qed jikkontesta l-fatti avvanzati fir-rikors tieghu, din il-Qorti tghid li l-piz tal-prova li ghandu l-intimat biex isostni d-difiza tieghu tinsorgi ladarba ir-rikorrent min-naha tieghu ikun gab il-prova ta' fatt jew fatti li jsostnu t-talba tieghu. Dan ghaliex l-insufficjenza jew in-nuqqas ta' prova tac-cirkostanzi dedotti mill-intimat biex jikkumbatti l-pretensjoni tar-rikorrent ma tiddispensax lir-rikorrent mill-oneru li adegwatament u skond il-ligi jipprova l-legittimità u l-fondatezza tal-mertu tal-pretensjoni tieghu li dwarha qed jitlob rimedju mill-Qorti*." The same reasoning was embraced *in re* **Emanuel Ellul et v. Anthony Busuttil** (Court of Appeal, 7th May, 2010): "*huwa valevoli bosta li jigi sottolinejat illi l-piz probatorju tal-konvenut in sostenn ta' l-eccezzjoni tieghu tinsorgi fih meta l-attur minn naha tieghu jkun gab prova tal-fatti li jsostnu l-bazi tat-talba tieghu. Dan huwa hekk ghaliex l-insufficjenza jew in-nuqqas tal-provi tac-cirkostanzi dedotti mill-konvenut biex jikkumbatti l-pretensjoni ta' l-attur ma tiddispensax lil dan ta' l-ahhar mill-piz li adegwatament juri u jipprova l-legittimità u l-fondatezza tal-pretensjoni tieghu*." Moreover, in the case *in re* **Dottor Herbert Lenicker v. Joseph Camilleri** (First Hall of the Civil Court, 31st May, 1972; not published) it was held as follows: "*F'kawza civili l-attur li jallega li gratlu hsara b'tort tal-konvenut, irid jipprova huwa a soddisfazzjon tal-Qorti li l-konvenut kellu tort. Jekk l-attur ma igibx din il-prova l-azzjoni tieghu ma tistghax ikollha ezitu favorevoli (anki jekk il-konvenut ma jipprovax – ghaliex legalment ma hux obbligat li jipprova – li l-incident jkun gara b'tort tal-attur; dan mhux ghaliex it-tort ghall-incident jkun tal-attur imma semplicement ghaliex ma jkunx irnexxielu jipprova dak li allega bhala bazi tal-azzjoni tieghu*."

[15] In the decision *in re* **Jean Schembri v. George Galea** (Court of Appeal, 28th March, 2008): "*il-principju tal-piz tal-provi a norma ta' l-Artikolu 562 tal-Kapitolu 12 li wkoll jesigi bilanc serju ta' probabilità, valutabbli mill-gudikant ghall-konvinciment prudenzjali tieghu, u li, fil-verifika ta' stat ta' incertezza jew anke ta' dubju ragonevoli jikkonduci ghal dak tal-principju l-iehor illi actore non probante, reus absolvitur*."

Since the defendant company did not request the costs of the proceedings (*vide* Section 4.2 of 'Form C' at *fol*. 17), the Tribunal shall not condemn the claimant to pay legal costs to the defendant company. Therefore, all relative expenses connected with these proceedings are to be borne by each party.

Finally, the Tribunal orders that a copy of this judgment is served upon the parties in terms of Article 13 of Regulation (EC) no. 861/2007.

***sgnd*. ADV. DR. KEVIN CAMILLERI XUEREB**
Adjudicator

***sgnd*. ADRIAN PACE**
Deputy Registrar