- PLAINTIFF IS DUTY BOUND TO DILIGENTLY FOLLOW THE PROCEEDINGS –
- ART. 1008 OF CHAPTER 16 OF THE LAWS OF MALTA –
- EX ANTECEDENTIBUS ET CONSEQUENTIBUS FIT OPTIMA INTERPRETATIO –
- ART. 559 AND ART. 560(1) OF CHAPTER 12 OF THE LAWS OF MALTA –
- CONTRADITTORIO (THE ADVERSARIAL PRINCIPLE) –
- SUING THE PROPER DEFENDANT –
- SECUNDUM ACTA ET PROBATA NON SECUNDUM PRIVATAM SCIENTIAM –
- NON REFERT QUID NOTUM SIT JUDICI SI NOTUM NON SIT IN FORMA JUDICII –

SMALL CLAIMS TRIBUNAL
(EUROPEAN SMALL CLAIMS PROCEDURE)

ADJUDICATOR
ADV. DR. KEVIN CAMILLERI XUEREB

Sitting of Monday, 12th of March, 2018

Claim Number: **4 / 2016**

CHRISTOPHER WARNER

VERSUS

BILOM GROUP

The Tribunal,

Having seen the Claim Form (Form A) filed by the plaintiff on the 10th August, 2016 whereby the same, in line with Regulation (EC) no. 861/2007, requested the Tribunal to condemn defendant to pay him the sum of one thousand, fifty seven euros (€1,057.00c) for the reasons explained under Section 8.1 of the said Claim Form (see *fol*. 5). Plaintiff did not request the costs of the proceedings as per Section 7.3.2. (see *fol*. 5), nor he claimed interest on the amount of €1,057.00c as per Section 7.4 (see *fol*. 5) of the Claim Form;

Having seen that the defendant, although duly notified on the 15th of December, 2016 (see *tergo* of *fol*. 17), did not file any response (Form C) in terms of Article 5(3) and/or 5(6) of Regulation (EC) no. 861/2007;

Having noted that the plaintiff required no oral hearing (*vide* section 8.3 of the Claim Form);

The Tribunal took cognizance of all the acts and documents relating to the case;

The Tribunal considers:

As regards the facts of this case, these may be explained thus: plaintiff, Christopher Warren (and his wife, Julie Ann Warren), appear to have purchased a property here in Malta for the global price of €130,000.00c (see *fol*. 15) by virtue of a public deed dated 29th of April, 2016 in the acts of Notary Public Dr. Sam Abela (see *fol*. 14).[1] The vendor on the said deed appears to be a company by the name of "BLMG Limited". It appears that certain works had to be carried out in the said property as may be inferred from the e-mail correspondence exhibited by the plaintiff (see *foll*. 9–12). From the said e-mails it transpires that the contractor engaged to do the works did not complete the same as scheduled and that the plaintiff (and his wife) had to spend a period of time in a hotel (see hotel invoice and receipt at *fol*. 13) since the purchased property, as the plaintiff alleges, was not "fit for purpose" (i.e., was not habitable due to the pending works). By means of the present proceedings, the plaintiff demands compensation from the defendant in the amount of €1,057.00c, being the fee the hotel charged for his stay (with his wife) at the Maltese hotel.

Although being duly notified with the pertinent acts of the proceedings, the defendant registered no formal opposition as above described.

After taking cognisance of the acts of these proceedings and after noticing certain shortcomings, omissions and *lacunæ* in the documents produced by the plaintiff with his Claim Form (Form A), in terms of Art. 7(1)(a) of Regulation (EC) no. 861/2007, on the 13th of November, 2017, this Tribunal issued a decree (see *fol*. 18) which held, *inter alia*, as follows:

> The Tribunal notices also that along with the Claim Form (Form A) of 10th August, 2016, the claimant, instead of exhibiting an entire copy of the deed dated 29th of April, 2016, he elected to exhibit solely two (2) pages therefrom (see *fol*. 14 and *fol*. 15 of the acts of the proceedings). On one of the said pages (page 1 at *fol*. 14) the claimant wrote (presumably in his own handwriting) thus «*Scanned copy of front cover and specific page 10*».
>
> The Tribunal does not deem such copies adequate in the circumstances and therefore orders the claimant to produce and exhibit a complete copy of the mentioned deed (i.e., with all the relative pages) and, if any, all enclosures thereto (for *e.g.* power of attorneys, company resolutions, property plans, site plans, *etc*. attached to the said deed).

[1] No further details about the property (*e.g.*, description thereof, street, locality) may be extracted from the evidence submitted.

Moreover, from the acts of these proceedings (as compiled at present) it appears that claimant (and his wife) entered into a contractual relationship with a specific company, being "BLMG Limited" (C-51824) as represented by Laura Bartolo (see *fol*. 14 of the acts of the proceedings). In view of this, the Tribunal orders the claimant to explain:

(a) why he filed proceedings against "Bilom Group" and not against the company "BLMG Limited" (C-51824). In this respect, the claimant is requested to explain what connection, if any, exists between "Bilom Group" and "BLMG Limited" (C-51824); and

(b) why he filed the present proceedings alone and not also on behalf of his wife, Julie Ann Warner. In this regard, the claimant is requested to explain whether the amount claimed in these proceedings (i.e., €1,057.00c) is being claimed solely by him or also for an on behalf of his wife, Julie Ann Warner.

The Tribunal orders claimant to produce the requested copy of the entire deed and the above information within twenty (20) running days from receipt of this decree.

Failure on the part of the claimant to abide by the directions/orders herein contained within the time-frame above-stipulated, shall empower the Tribunal to proceed toward judgment on the acts of the proceedings as compiled at present.

Notwithstanding the directives contained in the above-cited decree (which was sent by email to the claimant on the 13th of November, 2017 by the Tribunal's deputy registrar – see *fol*. 20), the plaintiff appears to have remained inert and has taken no initiative, personally or through any legal counsel or other representative, to produce the requested documentary evidence and provide the required clarifications, albeit the warning therein contained, namely that *"Failure on the part of the claimant to abide by the directions/orders herein contained within the time-frame above-stipulated, shall empower the Tribunal to proceed toward judgment on the acts of the proceedings as compiled at present."* After the 13th November, 2017 (to the present date) no e-mail, no letter, no document, *et similia* was received by the Tribunal's deputy registrar (from the plaintiff) regarding this case.

This complete inertia on the part of the plaintiff cannot but be interpreted as being tantamount to an absolute lack of interest in pursuing these proceedings further. Such lack of interest is equivalent to the plaintiff's abandonment of his claim against the defendant.

As already expressed in previous decisions of this Tribunal (as currently presided), it is a known tenet at Law that a party who initiates proceedings is duty bound to diligently follow the proceedings which it instigated and gave rise to. A party is not allowed to file judicial proceedings and expect Justice to take its course in the absence of any contribution on its part or without any impetus whatsoever from its

side. When proceedings are initiated, the party instigating such judicial process (i.e., the plaintiff) triggers a number of procedural mechanisms by virtue of which it calls upon the Court's or Tribunal's jurisdictional authority to delve into a specific subject-matter and decide thereupon. However, in order to do so the Court or Tribunal (i.e., to consider and decide the issue at hand) must be 'aided' by the party calling upon its authority. Certain formal requirements, particular procedural norms and specific normative mechanisms must be addressed and adhered to by the interested party in order for the Court or Tribunal to do so, failing which the deciding authority finds itself incapable and paralysed to consider or accord that which is desired or demanded. All this dilutes itself into the imperative requirement that when proceedings are set in motion, the party seeking a remedy ought to meet a certain level of diligence, care, zeal and vigour in following the process it voluntarily gave rise to. In relation to these observations, reference is made to the judgment *in re* **Raymond Cauchi et v. Kontrollur tad-Dwana** (Court of Appeal, 15th December, 2015) wherein it was held that: "*huwa palezi li l-partijiet f'kawza ghandhom l-obbligu li jsegwu l-kawza b'mod diligenti u li jattendu ghall-udjenza fid-data u fil-hin indikat fl-udjenza precedenti sabiex jinformaw ruhhom dwar dak li jkun qed isir fl-udjenza u dak li jkun qed jigri fil-kawza*." Furthermore, in the case of **Mary Zammit v. Paul Camilleri Paul pro et noe** (First Hall, Civil Court, 16th March, 2012) it was *inter alia* pointed out that, "*parti ghandha l-oneru li kull tant zmien tivverifika mill-atti x'ordnijiet ikunu qeghdin jinghataw mill-qorti in camera b'riferenza ghall-kawza*."

Moreover, a party must diligently abide by the orders and/or directives issued from time to time by the deciding authority during the proceedings. The decree of this Tribunal dated 13th of November, 2017 was completely ignored by the plaintiff and such omission negatively impinges on the plaintiff's request as contained in his Claim Form (Form A).

The plaintiff exhibited parts of a public deed dated 29th of April, 2016[2] (solely 2 pages) and not the entire copy. Upon that primary basis, plaintiff alleges and claims that there was a contractual obligation in his favour and that the defendant did not honour the same. However, from the portions of the public deed so submitted before this Tribunal, there emerges no such contractual commitment between the parties.

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[2] Even the date of the deed is ambiguous. At the very top of this deed there is indicated thus: "*Today the **twenty ninth** day of April of the year two thousand and sixteen (**19**/4/2016).*" The parts in bold and underlined show the apparent discrepancy. The Tribunal shall deem that the correct date is the 29th of April, 2016.

It stands to reason that no judicial (or quasi-judicial) body, no matter the informal nature of the proceedings before it, may emit any reasoned decision by basing itself on few pages of a deed that is originally composed of various pages. A public deed is a single and unitary document, made up of all its relative clauses which must be read one in conjunction with the other. In this regard reference is made to the maxim "ex antecedentibus et consequentibus fit optima interpretatio" which means that the best interpretation is made out from what precedes and follows. In other words, the whole instrument is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual. This also aids in ascertaining the true and real intention of the parties thereto.

Apart from being enshrined under Art. 1008 of the Maltese Civil Code[3] (Chapter 16 of the Laws of Malta), this basic tenet is also embraced in our domestic case-law as mirrored in the case, among others, *in re* **Francesca Curmi et v. Aristide Pizzuto** (First Hall, Civil Court, 31st October, 1935) where there was stated that: "*Il-klawsoli f'kuntratt ghandhom jigu interpretati wahda bl-ohra, u lil kull wahda ghandu jigi moghti s-sens li jirrizulta mill-att intier*." The same was affirmed *in re* **Giovanni Sciortino v. Wisq Rev. Don Filippo Bonnici** (First Hall, Civil Court, 29th March, 1960) namely that, "*il-kuntratt, sabiex jigi rettament interpretat, irid jigi vizwalizzat fl-interità tieghu, u mhux a spizziku*." In recent times, the First Hall of the Civil Court, in the case *in re* **Marika Mizzi v. Onor. Prim Ministru Dr Joseph Muscat et** (26th of September, 2016) made reference to the Italian author **Giovanni Criscuoli** ("Il Contratto, Itinerari normative e riscontri giurisprudenziali", CEDAM, 1996; p.141) and stated that Art. 1008 of the Maltese Civil Code is identical to Art. 1363 of the Italian Civil Code, and thus the rule under the said provision of the law, "*ha il suo fondamento logico in ciò che il contratto, come ogni altro atto espressivo di un intento, non può non essere caratterizzato, quando sia formato da una pluralità di determinazioni, di una linea di coerenza alla stregua della quale ciascuna clausola che concorre a formarlo, lungi dal costituire una monade isolata, coordinandosi con le altre, getta luce sul tutto. Un corollario naturale della necessità di procedere ad una considerazione globale del contesto contrattuale è l'irrelevanza della collocazione topografica delle singole clausole che lo compongono*."[4]

[3] Art. 1008 holds that, "*All the clauses of a contract shall be interpreted with reference to one another, giving to each clause the meaning resulting from the whole instrument.*"

[4] According to Italian jurisprudence, clauses in a contract "*non sono autosufficienti o indipendenti, ma legati da un vincolo di unitarietà; poiché la loro separazione cronologica nell'iter interpretativo viene assorbita da una contestualità logica, in un procedimento in cui ogni parola è nel contempo oggetto e strumento di interpretazione*" (cass. civ. 6389/1998 – *cfr.* "Commentario Breve al Codice Civile" by **Giorgio Cian** & **Alberto Trabucchi**, CEDAM 2017; p.1608). It is also underlined that, "*In tema di contratti, il giudice di merito, anche a fronte di una clausola estremamente generica ed indeterminate, deve comunque presumere che sia stata oggetto della volontà negoziale, sicché deve interpretarla in relazione al contesto per consentire alla*

In the light of the above, it results manifestly clear that it is a legal (and also, procedural) anathema that a party in judicial proceedings simply exhibits few pages (and clauses printed thereupon) out of a deed (which are unilaterally deemed pertinent to his or her own thesis) without exhibiting the complete version thereof. That is why the Tribunal requested plaintiff "*to produce and exhibit a* <u>*complete copy*</u> *of the mentioned deed (i.e., with all the relative pages) and, if any, all enclosures thereto (for e.g. power of attorneys, company resolutions, property plans, site plans, etc. attached to the said deed)*."

Therefore, the Tribunal cannot emit any significant or reasoned decision by basing itself on such partial piece of evidence produced by the plaintiff, even more so when it is a procedural norm that a party to judicial proceedings must bring forward the best evidence that it may be able to produce [*ex* Art. 559 of the 'Code of Organisation & Civil Procedure' (Chapter 12 of the Laws of Malta)], failing which, the court shall disallow any evidence which it considers to be irrelevant or superfluous, or which it does not consider to be the best which the party can produce [*ex* Art. 560(1) of the 'Code of Organisation & Civil Procedure'].

Moreover, another ambiguity in plaintiff's case is in regard to the person of the defendant. In its decree of the 13th of November, 2017 this Tribunal had remarked that, "*from the acts of these proceedings* [...] *it appears that claimant (and his wife) entered into a contractual relationship with a specific company, being "BLMG Limited" (C-51824) as represented by Laura Bartolo (see fol. 14 of the acts of the proceedings). In view of this, the Tribunal orders the claimant to explain* [...] *why he filed proceedings against "Bilom Group" and not against the company "BLMG Limited" (C-51824). In this respect, the claimant is requested to explain what connection, if any, exists between "Bilom Group" and "BLMG Limited" (C-51824) ...*". The plaintiff tendered no clarification on this aspect of the proceedings.

It is a general rule in all judicial proceedings that all claims are directed against the proper and relevant party (defendant). In other words, there must be some form of juridical relationship between the plaintiff and his adversary, the defendant, and

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stessa di avere qualche effetto." (cass. civ. 13839/2013; 1950/2009 – *ibid*.). Furthermore, "*Anche quando l'interpretazione di ciascuna delle clausole che concorrono alla formazione del testo negoziale è compiuta sulla base del «senso letterale delle parole» e conduca a risultati di certezza, il giudice è tenuto ad applicare il criterio dell'interpretazione sistematica, riferendo le varie espressioni adoperate all'intero testo in modo da ricavare il senso complessivo e nel contempo intendere la singola espressione in funzione del testo, di cui è parte integrale*." (cass. civ. 5747/1999; 9712/2002; 6641/2004 and 9755/2011 – *ibid*.)

vice versa. This is based on the fundamental premise and legal rule that any proceedings must embrace those parties who have a direct interest in connection thereto, failing which no effect may result therefrom. As stated by the Italian legal author **Foramiti** ("Enciclopedia Legale" Vol: II, Napoli 1864; voce: "contradittorio" p.392) the "contradittorio" (the adversarial principle) is "*tuttio ciò che si fa in presenza delle parti interessate*." A reflection of this may be seen in the local judgments *in re* **Mary Magdalene Symes et v. Robert Eder et** (Court of Appeal, 13th of June, 1980) where there was stated that, "*il-litis konsorzju bejn dawk kollha li huma partecipi hu necessarju*" and *in re* **Scicluna v. Azzopardi** (Court of Appeal, 3rd of April, 1964) which held that, "*Kif inhu sew maghruf biex gudizzju jkun integru hu necessarju l-presenza tal-interessati kollha*." This line of reasoning was recently embraced *in re* **Karin Spiteri Maempel et v. L-Avukat Susan Lena Mercieca et** (First Hall, Civil Court, 14th of November, 2017). In the case *in re* **Bernard Zammit v. Emmanuele Formosa et** (Court of Appeal, 11th of June, 1948) the court made reference to the Italian author Ludovico Mortara, who asserts thus: "*il convenuto deve essere il contradittore legittimo alla domanda dell'attore, cioè colui dal quale, volontariamente o non, proviene l'impedimento, ossia lo stato di violazione del diritto dell'attore ... Solo chi è in questa situazione, o vi appare in virtù dell'asserzione dello attore, può stare contro di lui in giudizio, perché eventualmente può avere utilitá a far respingere l'istanza contenuta nell'azione*." The same identical principle is enshrined within the judgment *in re* **Kavallier Lawrence Darmanin noe et v. Marcel Mifsud noe** (Court of Appeal, 13th of May, 1992).

From a *prima facie* examination of the relevant acts of these proceedings, the public deed published on the 29th of April, 2016 (*at fol*. 14) classifies the plaintiff (along with his wife, Julie Ann Warner) as "Purchasers" and the "Vendor" is a company by the name of «BLMG Limited» (C-51824) as represented by a certain Laura Bartolo. From the two (2) pages produced and exhibited by the plaintiff, the Tribunal cannot truly trace and/or investigate the participation, if any, of «Bilom Group», the defendant in these proceedings. From the (scant) evidence produced, it appears that any contractual commitment, understanding and/or obligation (if any) was with the company «BLMG Limited» (C-51824) and not with the defendant entity, «Bilom Group». These proceedings were instituted against this latter entity and not against the former. It was up to the plaintiff to clarify this aspect of the matter – a thing he failed to address and prove.

As already made amply clear above, the Tribunal cannot investigate out of its own motion (*ex officio*) this aspect of the issue, even if here we are considering a public

deed which, out of its own very nature, is an instrument in the public domain. However, such publicity does not divest the plaintiff from bringing forth complete evidence in any proceedings which he instigated and gave rise to.

It must be recalled that, "*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). This is so because, "*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). This latter author continues to state that, "*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, "*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). Another Italian author, holds 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*" (*cfr.* **Aurelio Scardaccione**, "Le Prove", UTET 1965; §3, p.8). On these lines is the domestic judgment *in re* **F. Advertising Limited v. Simon Attard et** (Court of Appeal, 21st of May, 2010) which held that the person who is to ultimately judge a dispute must "*jestraji d-decizjoni tieghu unikament mill-allegazzjonijiet provati, u mhux ukoll minn dak li messu ngieb ghab-bazi tad-domanda u baqa' ma giex offert bi prova konvincenti*." Moreover, in the case *in re* **Saviour Brincat et v. Salina Estates Limited** (Court of Appeal, 25th of February, 2004) it was held thus: "*l-Qorti ma kellha l-ebda obbligu li tikkonduci hi l-provi ta' xi parti*." Other examples of this reasoning may be seen in the following judgments: **Carmelo Zammit v. Kummissjoni ghall-Kontroll ta' l-Izvilupp** (Commercial Appeal, 10th of April, 1995); **Ignatius Busuttil v. Water Services Corporation** (Court of Appeal, 12th of January, 2005); **Perit Carmel Mifsud Borg v. Kurt Farrugia** (Court of Appeal, 11th of

December, 2009); and **Michael Debono et v. Joseph Zammit et** (First Hall, Civil Court, 30th of June, 2010). Also of interest is the observations made in this Tribunal's judgment *in re* **Joërg Baverle v. Co-Gaming Limited** (European Small Claims Procedure, 28th of November, 2017).[5]

Therefore, in the light of the above considerations and for the above-mentioned reasons, this Tribunal decides the present case by rejecting plaintiff's claim. All the expenses connected with these proceedings are to be borne by the plaintiff.

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

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[5] *«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. 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 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."»*