MALTA

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Today, the 3rd of March, 2016

Application Number 363/2013 SM

Rene Giermo also known as Ren Spiteri (I.D. 33257 A) on his own behalf and on behalf of *Virtual Bulldog Limited* (C – 33161) and of foreign company *Beagster Limited* (HE292893 – Cyprus)

vs.

Otto Malta Limited (C – 44085)

The Court,

1.0. Having seen the sworn application giving rise to the present procedure by means of which applicant briefly submitted the following:

1.1. That on the 10th June, 2011, he was approached by the defendant company to commercially develop an electronic game through Facebook;

1.2. That eventually the contending parties agreed that they would develop a related but different idea;

1.3. That they developed an electronic game called *"LottoBoss"* and "*LottoReps"* aimed at attracting players in order to make profit therefrom;

1.4. That by means of a private writing dated the 5th August, 2011, (see folio 42), the parties agreed to establish a joint venture in which:

1.4.1. Applicant was to retain all intellectual property rights of the electronic game in question together with 50% of the eventual revenue that would be made once the game is commercialised;

1.4.2. The defendant company was to retain the remaining 50% of the revenue without retaining any right as regards the intellectual property thereof;

1.4.3. The defendant company was to be responsible for all the related expenses relative to the development, infrastructure and licensing thereof;

1.5. That on the basis of a subsequent agreement dated the 19th August, 2011, (not the 9th August, 2011, as indicated by the applicant at folio 2), (see folio 40), the contending parties further agreed on consultation services, on which they agreed on payment at the rate of sixteen thousand Euros, (€16,000.00), per month for the duration of the project under review;

1.6. That in spite of several difficulties that were encountered the project continued to progress until its conclusion in 2012;

1.7. That the project degenerated for reasons that are imputable to the defendant company;

1.8. That the defendant company failed to acquire the necessary license from the Lotteries and Gaming Authority of Malta so that the electronic game in question could be launched;

1.9. That as a result, the project could not be finalised or inaugurated;

1.10. That the defendant company broke the conditions so agreed upon by making it impossible for the applicant to execute his side of the undertaking;

1.11. That the behaviour of Einar Bolstad, a director of the defendant company, was most reprehensible;

1.12. That notwithstanding such behaviour applicant continued rendering his services to the defendant company;

1.13. That defendant company did not pay the sum it owed the applicant, in all amounting to forty eight thousand Euros, (€48,000.00), (see folio 6);

1.14. That although judicially called upon to pay the amount indicated in the preceeding paragraph to the applicant, the defendant company failed to do so;

1.15. That this said amount is certain, liquid and due, and there are no pleas that may be brought forward by the defendant company in its defence;

1.16. That the present judicial procedure may lead to judgement being pronounced without proceeding to trial in terms of article 167 *et sequitur* of Chapter 12 of the Laws of Malta;

1.17. That on the basis of the above, applicant *proprio et nomine* referred to this court so that the defendant company would have the opportunity to say why this court should not:

1.17.1. Decide the case without proceeding to trial, in terms of article 167 *et sequitur* of Chapter 12 referred to above;

1.17.2. Declares that the defendant company owes the complainant the sum of €48,000.00;

1.17.3. Condemns the defendant company to pay the complainant *proprio et nomine* the amount indicated in the preceeding paragraph;

1.17.4. Condemms the defendant company to pay the expenses involved together with all interest due as described in the application that initiated these proceedings up to effective date of payment;

2. Having seen its decree dated 20th November, 2013, whereby after hearing the evidence of the Chief Technical Officer of the defendant company and the legal representatives of the contending parties, authorised the defendant company to submit its reply within the time period therein specified, (see folio 125);

3.0. Having seen the reply submitted by the defendant company dated the 10th December, 2013, its submissions may be synthetically reproduced in the following manner:

3.1. That the facts as declared by the complaining applicant are not being contested;

3.2. That it is not being contested that the complainant Spiteri and the defendant company concluded a contract dated the 5th August, 2011;

3.3. That the contending parties also agreed that complainant Spiteri was also to render consultancy services to the defendant company as per contract signed on the 19th August, 2011;

3.4. That however, the payment agreed for said services was not at the rate of sixteen thousand Euros, (€16,000.00), per month but of fifteen thousand Euros, (€15,000.00), per month;

3.5. That the contract for services was distinct from the previous contract of the 5th August, 2011;

3.6. That the contract dated the 5th August, 2011, (see folio 42), was for the development of the electronic game called *LottoBoss*, subsequently changed to *LottoReps*;

3.7 That the contract dated the 19th August, 2011, concerned other projects which the parties intended to develop;

3.8. That complainants exclusively worked on the project that was regulated by the contract of the 5th August, 2011, concerning the development of *LottoReps*, which contract was a definite contract;

3.9. That the license required by the defendant company was not needed in order to develop and to effectively finish, the said game, but to actually operate it;

3.10. That it was the complainants that did not live up to the obligations assumed;

3.11. That payments effected by the defendant company were unduly made as the complainants did not execute the work for which they were paid;

3.12. That the balance claimed by the complainants is not due;

3.13. That the defendant company does not owe the complainants any money;

3.14. That in view of the above, the pleas submitted by the complainants are to be rejected;

3.15. That all expenses relative to these procedures are to be paid by the complainants;

4. Having seen the note dated the 29th January, 2014, whereby the lawyer therein indicated refrained from assisting the complainants any further, (see folio 143);

5. Having seen the decree dated the 17th June, 2015, whereby, at the request of the parties, it authorised said parties to proceed with final written and oral submissions within the time-frame therein indicated, (see folio 280);

6. Having seen the submissions of the contending parties respectively dated the 10th August, 2015, (see folio 292), and the 27th October, 2015, (see folio 301);

7. Having heard the final oral submissions of the legal representatives, (see folio 307);

Considers:

8.0. That succinctly applicant is hereby requesting the following:

8.1. The sum of €48,000.00 is due to the complainants from the defendant company together with the relative interest and costs, (see folio 2, 38 and 258);

8.2. That the global amount indicated in the proceeding paragraph is due to the complainants for consultancy services rendered during a three (3) month period between October to December, 2012, (see fol 2, 38 and 258);

8.3. That the amount due is worked out at the rate of €16,000.00 per month, (see folio 2, 38 and 150);

Considers:

9.0. That the juridical relationship that existed between the contending parties resulted from the following two (2) private agreements entered into between the parties;

9.1. One is dated the 5th August, 2012, (see folio 42);

9.2. Another subsequent agreement is dated the 19th August, 2012, (see folio 40 and 150);

Considers:

10. That on the basis of the former private agreement the parties concerned determined that they were developing a "social media driven lottery", (see folio 42), called "LottoBoss", (see folio 42), subsequently called "LottoReps", (see folio 258 where it is referred to as "Lotto Wraps");

11. That the term of said contracts was indefinite, (see folio 43);

12. That as a result thereof complainant was entitled to *"profit share/commissions after operating costs have been deducted, is agreed at 50% to RS"*, (see folio 42);

13. That the defendant company was likewise entitled to the remaining 50%, (see folio 42);

Considers:

14. That on the basis of the latter private agreement the parties determined the issue regarding the consultancy services which the complainant was to render to the defendant company, (see folio 40);

15. That this private agreement, unlike the former, was for a definite period of time, specifically for the period therein expressly stated from the 1st January, 2012, to the 31st December, 2012, (see folio 40);

16. That the consultancy fee therein expressly agreed upon was of €15,000.00), (including VAT), per month, (see folio 40), for the duration thereof;

Considers:

17. That the complainant is claiming the consultancy fee therein agreed upon for the period October till December, 2012, (see folio 258);

Considers:

18.0. That on the basis of the evidence submitted the results thereof may be submitted in the following manner:

18.1. That during the period October till December, 2012, the complainant worked exclusively on the project identified as *"LottoReps"* and *"LottoBoss"*, (see folios 127, 154, 240, 285 and 295);

18.2. That no proof regarding other works performed by the complainants was submitted in sustenance of their claims;

Considers:

19. That as a result thereof it seems evident that whilst the complainant worked exclusively on the basis of the first contract, (refer to paragraph number 10 above), he is presently claiming remuneration on the basis of the second contract, (refer to paragraph 14 above);

20.0. That the remuneration package agreed upon in the two (2) said contracts is quite distinct one from the other, as:

20.1. One is based on profit sharing, (see paragraph 12 above);

20.2. The other is based on a monthly consideration, (see paragraph 16 above);

Considers:

21. That the two (2) remuneration packages are separate and distinct from each other;

22. That hence, the services rendered by the complainant in this particular regard are specifically regulated by the private agreement dated the 5th August, 2011, (see folio 42), and not by that dated the 19th August of the same year, (see folio 40);

23. That therefore, as a result thereof, the "*profit share"* condition alone applies;

24. That hence, the requests of the complainants cannot be acquiesced;

Considers:

25. That in these cases, when in a contract the intention of the parties is clear and unequivocal, then there should not be space for manipulative interpretation;

26. That in this regard article 1002 of the Civil Code attests the following:

> "Where, by giving to the words of an agreement the meaning attached to them by usage at the time of the agreement, the terms of such agreement are clear, there shall be no room for interpretation;

27. That the above has also been confirmed by the judgement of the ***Civil Court, First Hall*** in the case ***Terres Company Limited and Gauci Holdings Company Limited vs. L-Ghajn Construction Limited and Ideal Constructions Limited dated the 15th January, 2013*** which held that:

> "... dan il-principju gie applikat konsistentement minn dawn il-qrati u hawn issir riferenza ghas-sentenzi **"Bartolomeo Micallef vs. JCR Limited (PA datata d-29 ta' Jannar, 2009)**, fejn inghad li la darba "min qari tal-istess kuntratt jirrizulta car li l-kliem tal-istess ftehim jindikaw b'mod preciz x'kienet l-intenzjoni tal-partijiet u dan kien li jigi trasferit bhala korp il-hanut indikat, b'mod li ma hemm bzonn ta' ebda interpretazzjoni (artiklu 1002), **"Avukat Dottor Joselle Farrugia vs. Dr Pascal Demajo *et nomine",* (PA 9 ta' Dicembru, 2002)**, mela allura ghandu jigi ritenut li l-intenzjoni tal-partijiet hija manifesta b'dak li jipprovdi b'mod car l-istess kuntratt u ma ghandux ikun hemm ebda lok ta' interpretazzjoni";

Considers:

28. That on the basis of the teachings referred to above one only has to examine the actual wording used in the contract or private writing under review and see if this wording is clear and unequivocal;

Considers:

29. That upon examination of the wording used in the actual private writings referred to above, one can safely affirm that said wording therein used is clear and unequivocal;

30. That therefore as regards the first private writing, that dated the 5th August, 2011, (see folio 42), relative to the agreement concerning *LottoBoss*, the aim thereof was simply to specifically regulate the particular electronic game therein referred to;

31. That all other electronic games that may have subsequently been deviced were subject to the second and subsequent private writing, dated the 19th August, 2011, (see folio 40), identified as the *"Consultancy Agreement"* which does in no way make any reference to the game *"LottoBoss"*;

32. That in view of the above the intention of the parties to create two (2) separate and distinct relationships is clear, manifest and unequivocal, and therefore leaves no room for any interpretation;

DECIDE:

33.0. That on the basis of the above the court considers that the complainants failed to prove the pleas they submitted, and therefore:

33.1. Dismisses all the pleas submitted by the complainants;

33.2. Acquiescess to the replies submitted by the defendant company;

33.3. That the procedural expenses involved are to be borne by the complainants.

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Onor. Imhallef Silvio Meli

DECIZJONI FINALI