**– 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 –**
**– PLAINTIFF'S EVIDENCE NOT SUFFICIENT AND NOT ADEQUATE –**
**– DISMISSAL OF PLAINTIFF'S CLAIM –**

# SMALL CLAIMS TRIBUNAL
## (EUROPEAN SMALL CLAIMS PROCEDURE)

ADJUDICATOR
**ADV. DR. KEVIN CAMILLERI XUEREB**

**Sitting of Wednesday, 30th of September, 2020**

Claim Number: **15/2019**

**EMMA JAYNE HAYWOOD**

***VERSUS***

**HERO GAMING LIMITED**

The Tribunal,

Having seen the Claim Form (Form A) filed by the plaintiff on the 29th August, 2019 whereby the same, in line with Regulation (EC) no. 861/2007, requested the Tribunal to condemn defendant company to pay her the sum of one thousand, six hundred and twenty six British Sterling (£1,626.00c) for the reasons explained under Section 8.1 of the said Claim Form (see detailed reasons at *foll*. 10–11). Plaintiff demanded the costs of the proceedings as per Section 7.3.1 (see *fol*. 5) but failed to indicate whether she was also claiming statutory interest on the amount of £1,626.00c as per Section 7.4 (see *fol*. 5). However, plaintiff requests interest on the expenses as per Section 7.5 (see *fol*. 6) of the Claim Form. The reasons supporting plaintiff's claim, in her own words, are these:

Supporting Information for claim of £1626 against Hero Gaming Ltd (online casino site called Casino Hero's)

> I received a response from the UK Gambling Commissioner regarding a complaint against the above company, hence why I have submitted this case to the court. The complaint

related to failures to adhere to the strict regulations stipulated by the UK Gambling Commissioner, that remote gaming companies must follow.

Such companies, like Hero Gaming Ltd, haver a duty of care to consumers. There is a requirement that companies operating in the online gambling industry the follow the Social Responsibility Code as per the Gambling Act 2005. This is to protect vulnerable consumers from gambling related harm. In addition, there is an anti-money laundering policy to keep crime out of gambling. I can firmly say, Hero Gaming Ltd have not complied with any of this legislation. As a result, this had such disastrous consequences, I feel the UK Gambling Commissioner should be made fully aware. Thankfully, the commissioner is taking matters seriously, as you can see from a copy of the response I received. Whilst acknowledging my complaint, it also refers me to the court, in order to receive a refund for the deposits I have made at Hero Gaming Ltd. These are to the value of £1626.

Reasons why I am claiming against Hero Gaming Ltd

Apart from receiving advice from the UK Gambling Commissioner to commence court proceedings against Hero Gaming Ltd, I feel they need to take responsibility for the failings during 2018, which relate to my membership with the company.

Several years ago I started playing online casino's either on a laptop or on a portable device such as an Ipad or Iphone. This remote way of gambling is referred to the 'crack cocaine' of the gambling industry. It is highly addictive. Due to the nature that the games are played so remotely, the industry regulator (UK Gambling Commissioner has placed stringent policies and procedures in place that these companies must adhere too. All of these regulations are there to protect consumers. I have enclosed a copy of a document detailing the rules these companies must follow.

Unfortunately since 2016, it has become apparent that remote gambling is a huge issue within society. Over the past few years, the UK Gambling Commissioner has issued a record number of fines to these companies, for failing to adhere to social responsibility code 3.4.1 and 12.1 Anti Money laundering.

I suppose one could raise the question as to why an individual can not stop gambling by themselves. Why is there a reliance on the gaming provider to take action? I am an addict. I wish I wasn't but I am. Just like millions of others who suffer from the disease. It is a compulsive behaviour for which you can't control. Hence, why the regulator stipulates that gambling providers must have procedures in place to identify problematic gambling and to act accordingly and interact with the customer. The aim of this is to protect the customer from being exposed to gambling related harm.

During 2018, Hero Gaming Ltd allowed me to play gambling games, on their website. Some of these gambling binges were in-excess of 48 hours of continuous play. During which, I put one consecutive deposit on after another, after another. Two of the key indicators the gambling commissioner states are sign of problematic play is 1) length of time played and 2) chasing losses by putting one deposit on after another. I have my gaming file from Hero Gaming Ltd and it clearly demonstrates both of these are a huge issue. I have enclosed copy.

In addition to this failure, Hero Gaming Ltd has never requested identification from me. It is a requirement by the gambling commissioner that remote gaming providers satisfy the rule KYC – Know your customer. Neither has Hero Gaming Ltd ever established the source of funds deposited. As a company, they have no idea who I actually am nor do they know where the £1626 deposited came from i.e source of wealth. As a company, they have an obligation to keep gambling crime free. They are prepared to accept funds from any source. The enclosed document shows that Hero Gaming Ltd breached rule 19 of the 2007 money laundering regulation. In addition, it highlights another breach under the 2017 regulation that is applicable to remote gaming. Rule 28(11) of the 2017 regulation – monitoring transactions and evidence of source of funds to ensure deposits are consistent with the operator's knowledge of the customer i.e. bank statements/salary slips to prove the funds deposited are legit. Relying on a third party company to carry out these checks is not suffice.

For me personally, the consequences of companies like Hero Gaming Ltd, not adhering to consumer protection, has resulted in me losing my home, four suicide attempts and receiving a custodial prison sentence for fraud/theft. During my sentencing hearing, at Crown Court, the judge made reference to online gambling, as he was horrified by the number of transactions listed on my bank statements. His words were 'How can this be allowed'.

I'm not the only who has not been adequately protected against gambling related harm. I have attached a number of public statements issued by the Gambling Commissioner, highlighting other remote gaming companies, who have each failed in their obligations to protect consumers. In all instances, some player has ended up with a criminal conviction as a result of online gambling.

You can see from the legislation document, the first page refers to senior officials and how they intend to deal with remote gambling companies, who fail to protect consumers and profit from their misery and vulnerability.

Duly notified with the relative acts of the proceedings (see *tergo* of *fol*. 27), the defendant company filed its response (Form C) in terms of Article 5(3) and/or 5(6) of Regulation (EC) no. 861/2007, wherein it explained as follows:

We are writing in response to **Ref: 15/2019 KCX Re: European Small Claims Procedure instituted by Emma Jayne Haywood in the small claims tribunal**.

With reference to the above-mentioned procedure, Hero Gaming Ltd (the "Company") disputes Ms. Haywood's claim in full. Whilst we are sorry to hear about the claimant's gambling problems, our firm view is that we have acted in accordance with applicable law and regulation.

The Company is incorporated in Malta and holds a Maltese gambling licence. The claimant is a UK resident and made use of the Company's services provided under its UK gambling licence, which has subsequently been surrendered due to commercial reasons. Therefore, the requirements of the UK Gambling Commission apply to this case.

Ms. Haywood claims that the Company has never requested any identification from her. This is factually incorrect. In our registration and verification procedure, which Ms. Haywood

completed on 04-02-2018; the customer, in this case, Ms. Haywood, is required to input a unique username along with her email address and desired password. The customer is then required to fill in the following details: first and last name, the date of birth, the address and the country of residence. Furthermore, the customer is required to tick/confirm that she is above the age of 18 and has read through the Terms & Conditions and the Privacy Policy, as required by law. Once this process is complete, the customer will go through a second verification step, where the customer receives an SMS to further verify the account.

Furthermore, Ms. Haywood states that the Company has never established the source of funds deposited by her. As per the requirements of the European Union's Fourth Anti-Money Laundering Directive, the Company requests source of wealth information upon the customer reaching € 2,000 in deposits (or equivalent in £). If the requested information is not submitted instantly, the account will automatically freeze to prevent further depositing and withdrawing of funds, and actual gameplay. Ms. Emma Jayne Haywood's total amount in deposits was £ 1,626.00 (€ 1,885.75).

However, Ms. Emma Jayne Haywood's Customer Due Diligence documents, her ID and proof of residence were requested before the above-mentioned thresholds due to a number of failed 3D secure verification attempts on her deposits. Ms. Haywood, however, never provided such documents and consequently was not allowed to continue to use the Company's services. For correspondence, please see **Attachment 1**.

Lastly, Ms. Haywood claims that she gambled on the Company's websites during a consecutive period of 48 hours. This is also incorrect. The longest logged in sessions were cumulative eight hours and forty-one minutes between the 22 and 23 of April, see **Attachment 2** for account history.

To support the compliance with applicable regulation mentioned above, we would like to refer to the information relating to Customer Identity Verification in the Gambling Commission's – Licence conditions and codes of practice and The Money Laundering Regulations respectively;

> Clause:
>
> **17. Customer identity verification, 17.1. Customer identity verification***(https://www.gamblingcommission.gov.uk/PDF/LCCP/Licence-conditions-and-codes-of-practice.pdf)*
>
> Subclause:
>
> **1.** *Licensees must obtain and verify information in order to establish the identity of a customer before that customer is permitted to gamble. Information must include, but is not restricted to, the customer's name, address and date of birth*.
> **3.** *Before permitting a customer to deposit funds, licensees should inform customers what types of identity documents or other information the licensee may need the customer to provide, the circumstances in which such information might be required, and the form and manner in which such information should be provided*.
>
> Clause:

**Prevention of money laundering and the financing of terrorism***(https://www.gamblingcommission.gov.uk/for-gambling-businesses/Compliance/General-compliance/AML/The-Prevention-of-Money-Laundering/6-F-Threshold-approach.aspx)*

Subclause:

**6.27** *As discussed in paragraphs 6.3 to 6.5, the Regulations set out thresholds which, if customer transactions reach these levels, require the casino operator to apply customer due diligence measures. These limits are:*

- *in non-remote casinos the 'threshold approach for tokens' – identification and verification are required when a customer purchases from or exchanges with the casino tokens for use in gambling at the casino with a value of €2,000 or more*
- *in non-remote casinos the 'threshold approach for gaming machines' – identification and verification are required when a customer pays €2,000 or more for the use of gaming machines, or collects winnings amounting to €2,000 or more*
- *in remote casinos the 'threshold approach for remote gaming' – identification and verification are required when a customer deposits funds to take part in remote gambling or withdraws such funds or winnings amounting to €2,000 or more.*

In conclusion, we believe that the Company has acted in accordance with all requirements relating to customer verification and anti-money laundering in the United Kingdom at each stage of the relationship with Ms. Haywood. Consequently, we are not willing to accept the claim.

The Tribunal;

Took cognizance of all the acts and documents relating to the case and having noted that both the plaintiff (*vide* section 9.1 of Form A at *fol*. 6) and also the defendant (*vide* section 3 of Form C at *fol*. 29) required no oral hearing in the present proceedings.

The Tribunal considers:

As to the factual aspects of the case, these are well inferred from the descriptions above cited. Succinctly, the plaintiff desires to be reimbursed the amount of £1,626.00 from the defendant company, alleging that she had spent that sum gambling on the defendant's website. Plaintiff stresses that defendant company had a duty to care in her respect, which duty the defendant company failed to honour. This breach of duty, facilitated plaintiff's problem – addictive gambling – leading her to easily access remote gaming systems operated by the defendant, betting on their website without any customer/consumer preventive filtering mechanism and thus make continuous bets. The defendant company opposes such allegations, stating

that it had proper and adequate procedures and structures in place to accept new customers/consumers and any subsequent betting.

At this stage, before delving into the merits of the present case – for a better comprehension of this decision and its eventual progression towards judgment, – some observations need to be highlighted and explained (particularly since the plaintiff is *a pro se* litigant, not aided and/or assisted by legal counsel[1]).

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) thereof that, "*The Tribunal shall determine any claim or counter-claim before it principally in accordance with equity*." Furthermore, under Art. 9(1) of the said Act, 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 discretionary latitude, 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]

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[1] On the notions of 'pro se litigants' and 'pro se litigation', reference is made to this Tribunal's decision *in re* **Celine Imbert v. Jasmin Voss** (European Small Claims Procedure, case no. 4/2013 of 26th March, 2018).

[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'.*"

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 or be replaced by any flexible rule of equity. Turning a blind-eye to such procedural 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, 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 evidence*" a certain minimum standard with respect to the intrinsic nature of the evidence must always 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 plaintiff) to produce the evidence that will substantiate the claims it has made against the opposite party (in this case the defendant company). Saving what shall be stated at a later stage, this burden (*onus*) is shifted from one party to the other solely when a party initially burdened with the same 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

[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*."

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 plaintiff is not that she must prove her 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 plaintiff must prove her 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 assertion by **LORD HOFFMAN J**. In the case of «Re B» ([2008] UKHL 35) wherein there was stated thus: "*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]

From the Tribunal's viewpoint, 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 plaintiff is in the right, the plaintiff will have his case rejected or dismissed. On the other hand, if the judge reaches the conclusion that it is fifty one per cent (51%), or more, likely that the plaintiff is in the right, then the plaintiff will win the case. In the present case, it is the plaintiff who is 'burdened' to prove his allegations against the defendant company.

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[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); **Michael Agus v. Rita Caruana** (First Hall of the Civil Court, 10th March, 2011 – decree *in camera*); and *in re* **Robert Hornyold Strickland v. Allied Newspapers Ltd** (Court of Appeal, 31st January, 2019) among numerous others.

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]

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, an arbitrator, *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, magistrate, *etc* takes a more vigorous and active role in the proceedings and in the gathering of the evidence (the quantity and/or quality thereof).

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

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[7] Reference to Latin maximx 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] Referrence 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 **Micahel 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*."

[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.*"

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 Australia, 2010, §17135, p.531). Therefore, as put by **LORD DENNING J**. 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]

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[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).

[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 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.

Having explained the above applicable principles, the Tribunal considers and observes as follows;

The evidence submitted by the plaintiff in support of her claim was this:

- A description of the facts of the case, submitted along with her Form A (quoted entirely here-above);

- Abstracts of an article, presumably[13] from the UK Gambling Commission website regarding the regulatory action taken by the said Commission, as the gaming regulator, against online casino operators and senior management on the way the industry combats problem gambling and money laundering. The said article makes reference to three gaming companies, none of which – as far as the evidence submitted shows – is connected or affiliated to the defendant company Hero Gaming Limited (*foll*. 12–20); and

- An email sent to the Assistant Registrar dated 15th October, 2019[14] in which there are listed five (5) links to websites. The plaintiff submitted this list in order to support her case against the defendant company, stating that "*These are all recent publications associated with online gaming companies and their inability to comply with legislation regarding money laundering and verification checks.*"(*fol*. 26)

The evidence submitted by the defendant company in support of its opposition was this:

- Electronic correspondence (e-mails) exchanged between the parties between 25th and 27th of April, 2018. In the email of 25.04.2018 the plaintiff was asked to supply certain documents, namely "*Copy of your ID (front and back) in color*

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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.*"

[13] From the format and general gist of the article, it appears that the same was taken from some website. No link or address is shown on the said document and that is why the Tribunal is stating "presumably".

[14] See note dated 17th October, 2019 (*fol*. 25) by which Assistant Registrar, Dr. Yvette Tonna Borg, formally filed a copy of the said email so that the same forms part and parcel of the records of the proceedings.

*or Passport (top and bottom page) where your full name, date of birth and date of expiry is clearly visible*", "*Proof of address (e.g. utility bill or a government letter) showing your full name, address, company logo and send date that is not more than 3 months*" and "*A copy of your credit card (both sides) ending with numbers XXXX.*[15] *We need to see first 6 and last 4 digits of the card number and the name of the card holder. Other information, such as the CVC code, and rest of the card numbers, should be covered.*" This request was sent again to plaintiff on two occasions on 26.04.2018 (*fol*. 33); and

- The relative account history, detailing the exact dates and specific times (including duration thereof) when plaintiff logged onto defendant's company's website (*foll*. 34–35).

As stated earlier, this Tribunal can only emit a decision upon the evidentiary material making up these proceedings. If the party burdened with the *onus* of proof does not furnish or bring forward any relevant evidence in support of its claim, then, as a necessary corollary, the outcome of the proceedings, for that party, may only be adverse. A decision must be based on logical proof or concrete evidence and a party surely cannot expect a reasoned and favourable judgment if the nature of the evidence is merely hypothetical, conjectural or speculative in nature. As stated in the local decision *in re* **Ignatius Busuttil v. Water Services Corporation** (Court of Appeal, Inferior Jurisdiction, 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*."[16]

All the evidence submitted by the plaintiff against defendant company in this case – apart from being hypothetical, conjectural and speculative – is also irrelevant and immaterial.

The findings of the UK Gambling Commission relate to other independent companies and do not refer to the defendant company's gaming business and/or commercial operations. There is no one piece of tangible evidence showing how the defendant company breached its statutory duties in regard to the plaintiff. All the Tribunal has at its disposal (as provided by the plaintiff) is the plaintiff's allegations

[15] Digits not shown in this judgment for privacy reasons.

[16] Reference is made to the following: *in re* **Anthony Azzopardi et v. Anthony Micallef** (First Hall, Civil Court, 5th May, 2016) wherein there was sated that, "*il-parti attriċi għandha l-obbligu li tipprova kif imiss il-premessi għat-talbiet tagħha b'mod li, jekk tonqos li tagħmel dan, iwassal għall-ħelsien tal-parti mħarrka*." See also *in re* **Hans J. Link et v. Raymond Mercieca** (Court of Appeal, 12th January, 2001). Moreover, in the judgment *in re* **Jean Schembri v. George Galea** (Court of Appeal, 28th March, 2008) there was asserted that, "*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*." See also *in re* **Martin Paul Vella et v. Chris Micallef** (Court of Appeal, 6th Octoberu, 2010); **Dottor Herbert Lenicker v. Joseph Camilleri** (First Hall, Civil Court, 31st May, 1972, not published); **Dr. Stephen Thake noe et v. Ronald Apap et**, (First Hall, Civil Court, 31st January, 2003); and **Charles Gauci et v. Maria Borg Mizzi et noe**, (First Hall, Civil Court, 25th November, 2004).

and some internet articles depicting examples with respect to violations committed by third parties. As explained above, much more was required from the plaintiff.

Among other things, the plaintiff failed to prove the ingredients of fault (liability) and of causation (causal *nexus*). Whether someone is liable to pay compensation or is entitled to claim compensation or otherwise, this often depends on showing whether the person potentially liable or entitled has caused the harm or the prejudice of a sort that the law seeks to avoid. For example, our domestic systems of law holds that a person "*shall be liable for the damage which occurs through his fault*" [Art. 1031 of the Civil Code] and in that specific scenario, "*A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a bonus paterfamilias*" [Art. 1032(1) of the Civil Code]. Therefore, one must establish first and foremost that the other party was at fault and that such other party failed to adhere to a duty imposed by law. In fact, the law states that, "*Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom*" [Art. 1033 of the Civil Code]. Such failures, if established and proven, give rise to liability and, consequently, to the aggrieved party to claim compensation. To this, it may be added the general principle that "*Where any person fails to discharge an obligation which he has contracted, he shall be liable in damages*." [Art. 1125 of the Civil Code]. In this respect, first the aggrieved party must show that the other party failed to honour a legitimate obligation or duty previously contracted and if this is shown to be the case, the aggrieved party shall be entitled to be indemnified.[17] The plaintiff failed in this exercise.

It must be pointed out that it was not up to the defendant company to show that its line of defence was justified or that plaintiff's allegation were erroneous, but it rested upon the plaintiff to first show that her allegations against the said company were founded, factually and legally. In such an instance, the burden of proof then shifts from the plaintiff onto the defendant.[18] In the present case, the plaintiff's evidence did not even commence to caress the surface of her evidentiary burden.

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[17] Among the many and several, reference is made to the local judgment *in re* **Francis Busuttil v. Sammy Meliaq noe** (First Hall, Civil Court, 9th December, 2002) wherein there was stated that, "*l-attur jehtieglu jipprova l-fatt dannuz, l-imputabilità ta' dan il-fatt ghal min ikun ikkagunalu d-danni, u l-event dannuz emergenti minn dan l-istess fatt. Il-Qorti ghalhekk jehtiegilha tezamina attentament il-provi biex tara jekk l-attur iddizimpenjax ruhu biex jissodisfa dawn l-elementi u fuq kollox u fl-ewwel lok irnexxielux jipprova konkludentement il-gustifikazzjoni li hu javanza biex jakkolla l-htija fuq il-konvenut*". On the same lines is the decision *in re* **Martin Paul Vella et v. Chris Micallef**. (Court of Appeal, Inferior Jurisdiction, 6th October, 2010)

[18] As stated in the decision *in re* **Anthony Azzopardi et v. Anthony Micallef** (First Hall, 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 identical reasoning is enshrined in the judgment *in re* **Emanuel Ellul et v. Anthony Busuttil** (Court of Appeal, 7th May, 2010) where the Court affirmed that, "*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*

The plaintiff must understand that if certain companies in the gaming or gambling industry have been found to be in breach of their licences, *et cetera*, these particular findings do not indiscriminately apply to all other similar companies across the board and neither do the same findings automatically imply that all other companies in the same industry are in breach or perpetrating the same violation. Any findings of a breach (or more than one) are closely connected to a particular set of events and circumstance and intimately linked to a specific gaming/gambling corporate entity. Those findings are specific and cannot implicitly and generally extend to all other entities in the industry. Therefore, those findings do not underline that all gaming companies are also, and *a priori*, to be deemed in violation of their statutory duties and obligations vis-à-vis their clients or customers. If this was to be deemed as such, this would easily turn into a modern age witch-hunt, whereby every other company or entity in the industry – irrespective of the factual set of circumstances at the background of the specific matter – is *a priori* denounced, chastised and condemned, making it the pre-determined 'victim' of the failures and/or sins of other companies who have been found deficient in their obligations at law. Fortunately, the tenets of substantive law and the principles of procedural law succour a party from such attempts. Such other findings may be useful for general statistical purposes or serve as a generic indication of how the relative commercial sector is evolving, but at Law each case must be assessed on its own merits and demerits, upon the peculiar set of factual events which actually occurred and on the basis of the relevant and pertinent evidence at hand.

As already pointed out, the *onus probandi* rested on the plaintiff to adequately and sufficiently – and on a balance of probabilities – prove her allegations and her case against the defendant company. In this task, the plaintiff failed abysmally and no amount of mere generic articles extrapolated from the internet (or from any other source whatsoever) regarding alleged analogous instances committed or perpetrated by third parties can make real or concrete any allegation put forward by plaintiff in these proceedings. If this was otherwise, the legal system would collapse upon itself, succumbing to mere unproven or frivolous allegations, where every plaintiff would undoubtedly win his/her case against a powerless defendant. Fortunately, our legal system's roots are embedded in firmer ground and richer soil: "apud bonum iudicem argumenta plus quam testes valent"; "iudex debet iudicare secundum alligata et probata"; "qui accusare volunt probationes habere debent"; and "cum sunt partium iura obscura, reo favendum est potius quam actori".

**THEREFORE**, in the light of the above considerations and for the above-mentioned reasons, this Tribunal decides the present case by rejecting the plaintiff's claim.

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*mill-piz li adegwatament juri u jipprova l-legittimità u l-fondatezza tal-pretensjoni tieghu*." The First Hall of the Civil Court, *in re* **Philip Grima v. Chris Grech** (28th January, 2010) held that, "*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*."

All relative 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*