

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2007/0632

BETWEEN:

JOSETTE MICHAEL
ASOT MICHAEL

Claimants

and

ROBERT BENJAMIN WASHINGTON JR.

Defendant

Appearances:

Mr. David Joseph Q.C., Mr. John Fuller and Ms. Nelisa Spencer for the Claimants
Mr. Hugh Marshall Jr. for the Defendant

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2010: October 27
2011: February 18
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JUDGMENT

[1] **MICHEL, J.:** By Claim Form filed by the Claimant, Josette Michael, on 6th November 2007, the aforesaid Claimant claimed against the Defendant, Robert Benjamin Washington Jr., the sum of US\$500,000 together with interest, pursuant to a loan agreement made and entered into by the Defendant with the Claimant and further secured by a promissory note made and delivered to the Claimant as Holder, both dated 29th October 2002. A

Statement of Claim particularising the Claimant's claim was filed on the same date in which the Claimant also claimed an indemnity in respect of the Claimant's legal practitioner's costs and court costs.

- [2] By Defence filed on 22nd October 2008, the Defendant disputed the Claimant's claim on the grounds, inter alia, that he issued the promissory note to Asot Michael and did not at any time have any dealings with the Claimant, that he satisfied the promissory note by payment of the amount of the note with interest, and that he had no monies remaining due and owing under the promissory note or otherwise.
- [3] By Order of the Master dated 29th May 2009, the Claimant was granted leave to file and serve an amended Statement of Claim and to add her son, Asot Michael, as a Claimant in the action.
- [4] By Amended Statement of Claim filed on 29th May 2009, Asot Michael was added as a Claimant in the action and became the Second Claimant, with Josette Michael becoming the First Claimant, and averments in the Statement of Claim which previously referred to the Claimant were amended to refer instead to the First Claimant alternatively the Second Claimant.
- [5] By Reply filed by the Claimants on 29th May 2009, the Claimants joined issue with the Defendant on his Defence and averred that the Defendant did not deny in his Defence that he had previously acknowledged his obligation to pay to the Claimants the amount claimed.
- [6] By Amended Defence filed on 17th May 2010, the Defendant amended some of the references to the Claimant in his Defence to refer instead to the First Claimant.
- [7] After mediation, case management and pre-trial review of the matter, the case came to trial on 27th October 2010.

- [8] At the trial, evidence was given by the two Claimants and by the Defendant.
- [9] The first witness was the Second Claimant, Mr. Asot Michael.
- [10] In his witness statement, the Second Claimant stated that on or about 29th October 2002 the Defendant concluded and signed a loan agreement with him and by its terms agreed to pay him US\$1,000,000 in two instalments of US\$500,000 each (together with interest) - the first instalment was due on 31st December 2003 and the second on 31st December 2004 or on the change of control and ownership of Leeward Islands Lottery Holding Company Inc (hereafter "the company") whichever came first. He stated that the loan agreement between him and the Defendant was further evidenced and secured by a promissory note dated 29th October 2002 under which the Defendant promised to pay to the holder of the note US\$500,000 fourteen months from the date of the note, together with interest at 10% per annum from 30th November 2002. The Second Claimant denied that the loan agreement was concluded upon his making some kind of collateral representation that he would assist the Defendant in the sale of the company. He stated that the Defendant paid the first instalment of US\$500,000 under the loan agreement in May 2004 (5 months late). The Second Claimant stated that the First Claimant is the holder of the promissory note, which the Defendant is fully aware of and that the Defendant was always aware that he (the Second Claimant) had sourced the loaned funds from the First Claimant. He also stated that the Defendant wrote a letter dated 29th October 2002 to "The Holder of the Note" which letter was signed by the First Claimant as the holder of the note and so any attempt by the Defendant to now assert that he did not know the First Claimant to be the holder of the note is disingenuous at best. The Second Claimant stated that he has made repeated written requests to the Defendant to pay the outstanding US\$500,000, together with interest owed under the loan agreement, and that the Defendant acknowledged the debt under the loan agreement, particularly by emails to him and his attorney, Mr. John Fuller, in May 2004. He stated that he and the First Claimant have made further demands to the Defendant under both the loan agreement and the promissory note, but the Defendant has simply failed to make payment and the

sum of US\$500,000 remains outstanding under the loan agreement and/or the promissory note.

[11] Under cross examination by Counsel for the Defendant, the Second Claimant testified that he does not agree that he is not a party to the agreement dated 29th October 2002. He testified that he is aware of the allegation of the Defendant in his witness statement that he (the Second Claimant) had undertaken to assist the Defendant in the sale of the company and he accepts that he rendered no assistance to the Defendant, adding that he was never asked to render any. He testified that a letter written to the Defendant by Mr. Elliot Mottley, QC which stated that, in consideration of he (the Second Claimant) agreeing to extend to the Defendant a credit facility in the amount of US\$500,000 repayable under the terms set out in the promissory note, the Defendant agreed to pay him the amount of US\$1,000,000 on terms specified, is correct in that he (the Second Claimant) agreed to extend the credit facility to the Defendant if the First Claimant would provide the money. He testified that at the time of entering into the agreement with the Defendant he (the Second Claimant) did not make any distinction between himself and the First Claimant because he made the agreement with the Defendant and asked the First Claimant to lend the money.

[12] In re examination by Counsel for the Claimants, the Second Claimant testified that the Defendant approached him for a loan of US\$500,000, which he indicated to the Defendant that he would ask the First Claimant to provide and the Defendant agreed that if he (the Second Claimant) could get the First Claimant to provide the US\$500,000 he (the Defendant) would pay it back with interest and he would also extend a further inducement or bonus of an additional US\$500,000. The Second Claimant testified that on these conditions he agreed to do his best to influence the First Claimant to lend the money and the Defendant then prepared the promissory note and the letter of agreement himself on his lap top in his office.

- [13] The second witness was the First Claimant, Ms. Josette Michael.
- [14] In her witness statement, the First Claimant essentially repeated what was contained in the witness statement of the Second Claimant about the written agreement between the Defendant and the Second Claimant and it being further evidenced and secured by the promissory note and the payment by the Defendant of the first instalment of US\$500,000 and the non payment of the second instalment despite demands for payment by or on behalf of the Claimants and acknowledgement of the debt by the Defendant.
- [15] Counsel for the Defendant declined cross examination of the First Claimant.
- [16] The final witness in the case was the Defendant, Robert Benjamin Washington Jr.
- [17] In his witness statement, the Defendant stated that in 2002 he was an owner and director of the company and that the partners of the company were investing additional capital into it, so in order to retain his ownership interests he approached the Second Claimant for a soft loan to invest in the company. He stated that the Second Claimant agreed to advance him the money on condition of a promissory note as security. The Defendant stated that the Second Claimant was at the time an influential person in the Government of Antigua and Barbuda and he (the Defendant) told him that it was their intention to sell the business and asked him to help with the required approvals from the Ministry of Finance, which the Second Claimant agreed to do on condition that the Defendant gave him an upside benefit derived from the proposed sale and that they agreed that the benefit would be US\$500,000. The Defendant stated that this collateral agreement was separate and distinct from the loan agreement and was based on the Second Claimant using his contacts to assist the company in securing the required approvals from the government. He stated that the Second Claimant did not in any way assist with the sale or the required approvals from the government and so he feels no obligation to pay the Second Claimant anything. He stated further that in fact he (the Defendant) was unable to get approval for the sale during the tenure in office of the previous government of which the Second Claimant was a part and it was only upon a change of government that approval was given

for the new owners of the company to own the shares and manage the company and that he is of the view that the Second Claimant played no positive role in effecting the sale or securing government's consent. The Defendant stated that he repaid the monies and interest due under the promissory note and he considers that his obligations to the Second Claimant are wholly discharged.

[18] The Defendant also went on to state in his witness statement that the arrangement – presumably what he referred to as the collateral agreement – was purely a gentleman's agreement, that there was no consideration given for the undertaking and that there was no intention for him to be legally bound by the arrangement. He stated too that at no time did he have dealings with the First Claimant, whom he knew personally, and that he neither met with her to negotiate nor arranged the loan or made any arrangement with her with respect to assistance in the sale or governmental approval.

[19] Under cross examination by Counsel for the Claimants, the Defendant testified that he is a lawyer by training and a graduate of Harvard University. He testified that he was the majority shareholder in the company and that he owned between 60 to 64% of the shares and that the purpose of seeking the loan of US\$500,000 was to prevent his shareholding from being diluted in advance of a sale of the enterprise. He testified that he did sign the promissory note and the letter agreement both dated 29th October 2002 and that he did agree to pay the amounts stated in the letter (referring to the two payments of US\$500,000 each). He testified that the transaction involved a set of dealings between him and the Second Claimant, that the condition attached to the payment of the amounts was the sale of the company and good faith assistance surrounding government's consent to transfer the licence. He admitted though that there was no reference in the document (the description of which as a letter agreement he accepted) to the provision of assistance in the sale of the company or good faith assistance surrounding government's consent to transfer the licence.

[20] Under further cross examination, the Defendant admitted receiving the following email addressed to him from Mr. John Fuller, an attorney at law acting on behalf of the

Claimants, dated 4th May 2004: "This serves to confirm your undertaking to me during our meeting of Saturday the 1st of May 2004. You agreed that under your promissory note to Asot and the additional inducement document that you would be paying the sum of \$500,000.00 US together with accrued interest on or before the 10th of May 2004 and that although the second \$500,000.00 US would be due earlier, you would pay same by February 28 2005...." The Defendant also admitted sending the following email response to Mr. Fuller on 4th May 2004: "Your email does reflect my understanding of the conversation. My understanding was that the first payment (\$500,000 plus unpaid interest) will be received prior to May 10, 2004 and the balance from the reserved escrow account which is to be released one year after closing and not February 28, 2005. Remember the delay in closing is associated with the conduct of the prior government in refusing to deliver the required letters of consent...." The Defendant also acknowledged receipt of another email addressed to him from Mr. Fuller and dated 24th May 2004, which stated: "I apologise for not contacting you sooner. Your call on the 10th May was true to its word, Asot received the funds 2 days later. Regarding your email of the 4th May, I'm sorry but I distinctly remember your saying that the second \$500,000.00 would be paid shortly after the end of February next year. Your email of the 4th states that the second \$500,000.00 would be paid 1 year after closing. Does "closing" mean 10th of May 2004? I believe that I am correct in stating that your original note agreed for the full \$1 million to be paid at one time, that is on condition of the sale of LIL. Does the second \$500,000.00 bear interest and how much interest? Let me know." He also acknowledged receipt of a follow up email from Mr. Fuller dated August 9, 2004, which stated: "I didn't get a reply to my email of 24th May 2004. I would appreciate a reply. As usual Asot is pushing me to close this transaction. He insists that if I don't have a positive reply to my last email that I should move to collect the second \$500k US plus interest. Please get him off my back as I am sure that will not be necessary. Let me know." The Defendant further acknowledged sending the following reply to Mr. Fuller, dated August 9, 2004: "Tell your client, my friend, he has to do what he has to do. But, I am extremely disappointed with the threats. I am a man of my word and will act accordingly. The arrangement is quite clear and if he thinks he can read into the arrangement the imposition of interests, then he is dead wrong."

[21] The Defendant agreed under cross examination that the deal for the purchase of the company was sealed in 2004 and that the monies were paid to the shareholders in 2004. He also agreed that he received a letter dated 17th May 2005 from Mr. Elliot Mottley, QC, an attorney at law acting for the First Claimant, demanding payment of the second instalment of US\$500,000, but he testified that he did not respond to the letter because it was legally incorrect. He also agreed that he received a letter dated 23rd May 2005 from Mr. Carlos Loumiet, a US attorney at law acting for the First Claimant, demanding payment of the outstanding balance of US\$500,000, but he testified that he did not respond to the letter because it was incorrect. He further admitted that he never responded to emails, letters and other communications from attorneys at law, Mr. Fuller, Mr. Mottley and Mr. Loumiet, to the effect that he did not owe the money being claimed from him.

[22] In response to questions by the Court, the Defendant testified that when he spoke of the first payment of \$500,000 plus interest in his email of May 4, 2004 he was not implying that there was a second payment; he was referring to the balance.

[23] Having read the witness statements of the three witnesses who gave evidence in this case, having seen and heard the witnesses in the witness box, having read the several documents put into evidence and forming part of the record of this case, and having perused the closing submissions made on behalf of the parties and read the accompanying authorities, this Court concludes as follows:

1. There was an agreement between the First Claimant and the Defendant under the terms of which the First Claimant would loan to the Defendant the sum of US\$500,000, in consideration for which the Defendant would pay to the First Claimant the sum of US\$1,000,000 in two instalments of US\$500,000 each, the first instalment to be paid on 31st December 2003 and the second instalment to be paid on 31st December 2004 or upon the sale of Leeward Islands Lottery Holding Company Inc to a third party, whichever is the earlier. This agreement was negotiated between the Defendant and the Second Claimant and was in writing and signed by the parties to it on 29th October

2002, namely, the Defendant, Robert B. Washington Jr., and the First Claimant, Josette Michael.

2. The Promissory Note executed on 29th October 2002 by the Defendant and witnessed by the Second Claimant, constituted partial security to its holder, the First Claimant, for the fulfilment by the Defendant of his obligations under the agreement and the First Claimant continuing to hold it is evidence of its continuing validity as security for the amount still owed to the First Claimant by the Defendant.
3. The Defendant paid the first instalment of US\$500,000 (with interest) on 10th May 2004, but has failed and/or refused to pay the second instalment which was due at latest by 31st December 2004, despite having acknowledged his obligation to pay the same in his emails to Mr. John Fuller of May 4th and August 9th 2004. There is no other interpretation one can reasonably give to these email responses to Mr. Fuller's emails of May 4th, May 24th and August 9th 2004 other than that the Defendant was acknowledging his obligation to pay a further sum of US\$500,000, while disputing the date by which he undertook to pay it and his obligation to pay interest on the amount.
4. The Defendant has accordingly breached his agreement with the First Claimant and is liable in damages to her in the sum of US\$500,000.
5. The Court does not believe that there was any collateral agreement between the Second Claimant and the Defendant for the Second Claimant to use his influence in the government to assist the company to secure the required approvals from the government and, even if there was such an agreement, it had no bearing on the agreement between the First Claimant and the Defendant, as is evidenced by the clear words of the so-called letter agreement of 29th October 2002, including the following: "This agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements, representations, statements, negotiations, discussions and understandings, written or oral, between the parties hereto, including without limitation those contained in any

proposal made by the Borrower to the Holder.” It is noteworthy that in his email response to Mr. Fuller on 4th May 2004, the Defendant - while acknowledging that there was a balance due under the agreement following the first payment of \$500,000 plus interest – referred to the refusal by the previous government (of which the Second Claimant was a part) to deliver the required letters of consent, but in no way sought to link this to his obligation to pay the balance due under the agreement, which would have been the obvious thing to do if the balance had been contingent on the Second Claimant securing the assistance of the government of which he was a part in facilitating the transaction.

6. Barring specific provision in the agreement for the payment of interest on the amount outstanding of US\$500,000, interest shall be payable by the Defendant at the judgment rate of 5% per annum from the last date by which payment should have been made under the agreement – 31st December 2004 – until the date of this judgment.
7. In accordance with the agreement, the Defendant shall indemnify the First Claimant for any liability for reasonable legal fees and disbursements arising out of the breach by the Defendant of the agreement of 29th October 2002 and the claims, demands, suits, causes of action, proceedings, judgments, costs and expenses and other liabilities in respect thereof. The quantum of the legal fees and disbursements are to be agreed by the parties or otherwise assessed. ,

[24] The Court’s Order is as follows:

1. The Defendant shall pay to the Claimant the sum of US500,000.00 (or the ECC equivalent thereof) together with interest thereon at the rate of 5% per annum from the 31st day of December 2004 until the date of this Order.
2. The Defendant shall indemnify the First Claimant for any liability for reasonable legal fees and disbursements arising out of the breach by the Defendant of the agreement

of 29th October 2002 and the claims, demands, suits, causes of action, proceedings, judgments, costs and expenses and other liabilities in respect thereof, with the quantum of the aforesaid legal fees and disbursements to be agreed by the parties or otherwise assessed.

Mario Michel
High Court Judge