

REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY SAN FERNANDO**

NO. S – 1950 OF 2003

BETWEEN

CHRISTOPHER LA BORDE

Plaintiff

AND

NATIONAL LOTTERIES CONTROL BOARD

Defendant

Before: The Honourable

MR. JUSTICE DAVID ALEXANDER (Ag.)

Appearances:

Mr. W. Campbell for the Plaintiff;

Mr. D. Mendes S.C. with Mr. M. Quamina for the Defendant.

REASONS

- 1) The Plaintiff, Christopher La Borde claims against the defendant National Lotteries Control Board, damages for breach of an agreement in writing dated the 25th September, 2002. The defendant's counterclaim is for the sum of \$89,104.71 being monies due to it from the plaintiff for wagers accepted by him and for the sale of scratch tickets on the defendant's behalf.
- 2) The three issues for my determination are:
 - i. Whether or not by suppressing the plaintiff's computer terminal (machine) on the 13th February, 2003, by reason of wagering which deviated from the normal pattern the defendant acted in breach of contract;
 - ii. Whether or not the defendant acted in breach of contract by keeping the plaintiff's machine inoperable from the 13th February, 2003, by reason of the plaintiff's failure to have sufficient funds in his electronic transfer account to cover wagers made at his machine and
 - iii. Whether or not the plaintiff was indebted to the defendant in the sum of \$89,104.71 for wagers for the period 9th to 13th February, 2003, and for the sale of scratch tickets.
- 3) The defendant is engaged in the sale of lotteries and on-line lotteries via an agency network established by it for those purposes.
- 4) By the agreement made between the plaintiff and the defendant, the defendant appointed the plaintiff an agent to sell tickets in the on-line lottery and

lotteries on its behalf in accordance with the rules established by the defendant and the terms and conditions of the agreement.

- 5) Clause 3 (P) of the agreement provides that the agent is under an obligation immediately upon request by the Board (the defendant) to its satisfaction:
 - i. to verify that he has received monies sufficient to cover all wagers placed.
 - ii.
 - iii. to deposit such monies as are due and owing to the defendant upon request.
- 6) It is provided at clause 7 that the defendant reserves the right to render the agent's terminal inoperable immediately upon the happening of anyone or more of the events specified in clause 3 (P) and (u) and clause 6 (a), (b), (c), (d), (e), (f), (g), (i), (j) and (k). I have already set out the contents of clause 3 (p) (i) and (iii) and as regards clause 6, the subsections thereto provide the reasons for which the defendant shall automatically terminate the agreement; that specified at clause 6 (f), which I consider relevant to this action is if the agent fails to have sufficient funds available at the time of the electronic transfer sweep (EFT).
- 7) At the time of the plaintiff's appointment as agent, he was given an Agents Policy Handbook (the Handbook) which contains the rules that govern the agents' functions. On page one of the Handbook it is stated:

The NLCB reserves the right to suppress wagering on an On-Line Lottery Terminal should the agent fail to comply with the terms and conditions set out in the Agent Policy Handbook and the agent Contract.

- 8) It is provided at paragraph 6.2 of the Handbook, under the heading SALES, that selling on-line tickets to customers on a credit basis is forbidden and should routine monitoring reveal that wagering at the agent's terminal deviates from the normal wagering pattern, the NLCB reserves the right to suppress wagering pending further investigation.
- 9) The net effect of paragraphs 9.1, 9.2 and 9.3 of the Handbook, is that monies received by agents from sales of any of the On-Line games must be deposited into their dedicated On-Line bank accounts, also known as the EFT (Electronic Funds Transfer) account by 2:00 pm every Monday. If the full amount owed is not deposited in time for the EFT or "sweep" on Monday, the terminal will be shut down, halting sales and preventing the cashing of winning tickets. The terminal will not be reactivated until the full amount is deposited and the reactivation fee is paid. This the defendant can confirm through its electronic banking facility, which displays financial activity in agents' accounts.
- 10) The plaintiff's evidence-in-chief contained in his witness statement, is that in November, 2002, the defendant embarked on a drive to increase its revenues by calling upon its agents to increase ticket sales. By letter dated 21st November, 2002, the defendant called upon the plaintiff to more aggressively pursue a strategy towards securing tickets sales through his terminal failing which the defendant would terminate his agency.
- 11) By reason of such notification made in order to avoid the termination of his agency, the plaintiff made himself available to a member of the public who desired to engage in sustained betting in the Play Whe games, playing the same ten marks every draw (the desired bets) and agreed to receive the monies for such bets at his home if the sum payable therefor exceeded \$1,000.00 per bet on the day prior to the betting day and to apply the said

money on the betting day (being the next day) on the desired bets at the machine at his agency.

12) The desired bets commencing 13th January, 2003, were Nos.20 – 29 inclusive. During the period 13th January, 2003, to the 8th February, 2003 the following desired bets were called:-

- i. Nos. 29, 25, 20 were played for the week 13th January to the 18th January.
- ii. Nos. 20, 20, 29, 29 were played for the week 20th January to the 25th January.
- iii. Nos. 25, 28, 27 were played for the week 27th January to the 1st February.
- iv. Nos. 21, 28 were played for the week 3rd February to the 8th February.

From wagers totalling \$11,092.00 the punter won a total of \$13,296.00.

13) During the period 8th February, 2003 to the 13th February, 2003, the punter wagered a total of \$18,350.00 without any winnings. On the 13th February, 2003, the plaintiff pursuant to the arrangement with the punter, received from him (the punter) the sum of \$112,000.00 for placing \$11,200.00 on each of the ten desired bets. The said sum of \$11,200.00 per bet resulted from the failure of any of the desired bets to be called during the week of the 10th to the 13th February, 2003, and the punter doubling the amount of monies to be placed on each bet.

14) At the time of receiving the said betting sum, the plaintiff was unaware that his machine was suppressed and rendered inoperable by the defendant.

- 15) On Friday, 14th February, 2003, the plaintiff became aware that his machine was inoperable when he went to his agency to place the desired bets. He made several futile efforts during the morning to telephone the defendant to have his machine reconnected to receive bets before the 1:00 p.m. draw.
- 16) The plaintiff said that it was not possible for him to go to another machine to place the desired bets because of the large sum involved, since bets on a single mark or number are placed to a maximum of \$100.00 while the sum on the desired bets was \$112,000.00.
- 17) At the 1.00 p.m. draw on the 14th February, 2003, No. 28 which was one of the desired bets to be placed on the punter's behalf and which would have resulted in the punter winning the sum of \$268,800.00 was called.
- 18) As a result of his failure to place the punter's bet by reason of his machine being suppressed, the plaintiff said he was forced to pay the punter the winning sum, which he did by using the \$112,000.00 received from the punter and not placed on the desired bets, \$24,000.00 from monies unutilized on the punter's betting for the draw prior to the suppressing of his machine, \$42,564.00 of his personal monies and \$40,000.00 held by him as agent of the defendant which was to be placed in the defendant's account on the 17th February, 2003, for the E.F.T.
- 19) Cross-examination of the plaintiff by Mr. Mendes was of assistance; on the question of the punter's identity it went as follows:-

Q. Was this the only person you had this type of relationship with?

A. Yes.

Q. What's his name?

A. Mr. Joseph.

Q. First name?

A. I don't know.

Q. Where does he live?

A. I have no idea.

Q. How do you make contact with him?

A. He comes to the machine and makes bets. If the bet is \$1,000.00 I'd take the money home.

Q. If there are winnings how do you contact him?

A. He comes to the machine to find out what played and then he'd come home by me to collect his winnings only if it is more than \$1,000.00 per bet and he used to bet 10 bets at one time. That is the reason why the money would be taken at my home.

Q. He never contacted you by phone?

A. Yes.

Q. You ever contacted him by phone?

A. No.

Q. You never knew his number?

A. Yes, but I never had cause to contact him.

Q. You know it now?

A. No.

Q. Did you try to contact him to give evidence in this case?

A. No. I did make an effort to do so.

Q. When?

A. During the years gone by.

Q. What year?

A. 2005, 2006 especially.

Q. What efforts you made?

A. I tried getting in touch with people who know him. I tried the number I had.

Q. You just said you never had cause to use the number. Are you now saying that you did have cause to use the number?

A. Yes, as the case came up.

Q. You don't have that number now?

A. No.

Q. You tried to contact his friends?

A. Yes.

Q. What are their names?

A. As I said they are people I saw him talking to.

Q. Their names?

A. I have no names.

Q. More than one person?

A. Yes. I tried three persons.

Q. How did you contact them?

A. I went in the area, looked around for them, persons I saw him talking to.

Q. What area?

A. Cocoyea.

Q. In the whole of Cocoyea?

A. In the area of my machine.

Q. What did you tell those persons?

A. I asked them if they see Joseph around?

Q. You asked for Joseph?

A. Yes.

Q. Did you ask where he lives?

A. They don't know where he lives.

Q. You asked for his telephone number?

A. Yes. They gave me some numbers. All were out of service.

Q. In addition to the number you already had?

A. They were all out of service in 2005, 2006.

Q. You don't remember any of those numbers?

A. Not off hand.

Q. You have them written down?

A. No.

Q. When you last saw Joseph?

A. When I paid money to him.

- 20) It is difficult to accept that the plaintiff would have such little information about a customer who invested such a large sum of money in the plaintiff's business. The plaintiff's inability to provide answers on the punter's full name, his address and telephone numbers gave the impression that this punter, Joseph, is a fictitious character while the plaintiff is a witness of dubious credibility. The significant consequence of all this, is that from the outset, the plaintiff faced a serious difficulty in discharging the onus of proving his claim.
- 21) At paragraph 13 of the statement of claim, the plaintiff pleaded that having regard to the number of bets and the sum of monies to be placed on each of the desired bets, the plaintiff was unable to seek an alternative machine at which to play the desired bets. Similarly, at paragraph 12 of his witness statement, the plaintiff stated that it was not possible to attend at another machine to place the size of bets represented by the desired bets, since bets on a single mark or number are placed to a maximum of \$100.00 and the betting sum involved \$112,000.00.
- 22) In cross-examination however, the plaintiff gave as his reason for not being able to place the desired bets on the 14th February, 2003, his failure to get to the top of the line at another agency. He agreed with Mr. Mendes that this reason was not stated in his witness statement. The plaintiff also agreed that the true reason was that he did not get to another machine on time and not the size of the bet.
- 23) The plaintiff further admitted in cross-examination that he owed the defendant \$90,000.00 which he did not deposit into his electronic transfer account.

- 24) At Mr. Mendes' request, the plaintiff was shown document No 5 of the agreed bundle of documents. This document, which is headed Invoice History / Commercial Services Report shows inter alia the plaintiff's net sales from the week ending 01/05/02 to that ending 02/22/03. For the week ending 02/15/03, the plaintiff's net sales were in the sum of \$91,773.00. His next highest net sales according to this document were in the sum of \$19,091.00 for the week ending 02/01/03. The plaintiff was asked if he would agree that the amount at the 15th February, 2003, deviates from his normal wagering pattern i.e. \$91,000.00 from the last year beginning 5th January, 2002. His answer was "not to me". The plaintiff answered in the affirmative to the question that he was telling the Court that this figure does not deviate from normal wagering patterns.
- 25) Finally, in cross-examination the plaintiff was asked about two letters dated 19th February, 2003, and 24th March, 2003, written by his lawyer to the defendant (documents Nos. 3 and 4 in the agreed bundle), as to why no mention was made therein of the plaintiff's repayment of the sum of \$268,000.00 to the punter, the plaintiff's answer was " I do not know what his strategy was".
- 26) Curt Honore' testified on the defendant's behalf. In his evidence-in-chief contained in his witness statement, he stated that he was the defendant's Online Supervisor since 2007. At the material time with respect to this matter he was the Senior Agent Customer Relations Officer. As such, his duties included the general supervision of all matters involving agents of the defendant, including the monitoring of sales and deposits to the accounts set up by the organization.
- 27) Mr. Honore' spoke generally of the plaintiff's agreement with the defendant, the Agents Policy Handbook, the way in which the defendant is able to

compile records of an agent's daily sales and accounts and other matters along that line.

- 28) On the specific facts of this case, his evidence is that on the 13th February, 2003, routine monitoring of the plaintiff's terminal by his department and in particular by his subordinate, Stafford Wheeler revealed wagering in excess of the plaintiff's usual patterns. Prior to the 13th February, 2003, the plaintiff's sales did not exceed the sum of \$20,000.00, as seen in the defendant's Invoice History for the plaintiff.
- 29) As at the 13th February, 2003, the plaintiff had total sales of \$91,773.00 and for that day in particular, the sales amounted to \$60,178.00 which sum is reflected in the retailer invoice snapshot generated by his department dated 13th February, 2003. A copy of this document is annexed to his witness statement and marked "E". He prints this document from his computer terminal. It was generated by his terminal using the information stored in the central system at GTECH and supplied to the defendant.
- 30) Mr. Wheeler checked the agent's bank account at the time which showed a balance of \$43.61. A cash management systems report form the bank generated on 17th February, 2003, showing the balance of \$43.61 is annexed to his witness statement and marked "F. He also printed out this document from his terminal. It was generated by his terminal using the information stored on the Bank's computer system to which he has access via dial up.
- 31) When the information was brought to Mr. Honore's attention, he tried calling the plaintiff's outlet on the 13th February, 2003, but his phone was out of service. A decision was accordingly taken by one Rolph Clarke and him to suppress sales on the plaintiff's terminal pending an investigation into the unusual activity as well as into the balance in the defendant's account.

- 32) On the 17th February, 2003 Mr. Honore' contacted the plaintiff by telephone and told him of the unusual activity on his machine and that his account showed that he did not have money to cover the sales. The plaintiff told Mr. Honore' that he knew about the bets placed on his terminal and that he had the money to cover them however, he was alarmed when his terminal was suppressed.
- 33) Mr. Honore' told the plaintiff that they wanted him to deposit \$85,600.00 before 2 p.m. that day and to fax them a deposit slip. The amount actually owed by the plaintiff on that day was \$85,549.61.
- 34) At 2 p.m. Mr. Honore' checked the plaintiff's account via dial up and found that the plaintiff had not complied with his request.
- 35) Mr. Honore' asked the plaintiff by telephone why he did not make the deposit, to which he answered that he was in his attorney's office and was advised to hold until he communicated formally to the defendant.
- 36) Mr. Honore' was cross-examined by Mr. Campbell but, in my view, nothing in the plaintiff's favour arose from Mr. Campbell's cross-examination. Mr. Honore's evidence-in-chief which was to a large extent supported by documentary evidence stood up to the scrutiny of cross-examination. I find Mr. Honore' to be a witness of truth.
- 37) Mr. Stafford Wheeler next testified on the defendant's behalf. He is the defendant's Compliance Officer since 1995, but at the time material to this matter, he was an Agent Customer Relations Officer. His duties then included monitoring the on-line system, interacting with agents and the general public and dealing with their complaints and queries.

- 38) In his evidence-in-chief Mr. Wheeler said one of his duties at the time was to monitor agents' sales activity in order to single out for further investigation instances where daily sales were above normal. The defendant had set a threshold amount of \$10,000.00 which would trigger further inquiry. On February 13th, 2003, while monitoring agents' sales activity, he observed the plaintiff's sales for that day were way above \$10,000.00. He brought this to the attention of Curt Honore', his superior.
- 39) Mr. Wheeler stated further that after having discovered the unusual activity on the plaintiff's machine, sometime that day he checked the plaintiff's account by way of the on-line system which showed a balance of \$43.61. He recalled seeing the Retailer Invoice Snapshot as at the 13th February, 2003, printed by Mr. Honore' which showed the plaintiff's weekly sales to date in the sum of \$91,773.00 and sales for that day in the amount of \$60,178.00.
- 40) In answer to Mr. Campbell in cross-examination this witness said that he was not aware of a benchmark placed on the plaintiff's machine. No specific amount is directed to any one agent. A threshold amount was set up and because it is a computerized system all terminals will pop up on the screen as soon as they hit the amount set. He explained that they perform periodic checks on agents' activities. Each year agents' sales would be looked at and categorized into 4 groups. Group 1 being those with the highest average sales and group 4 the lowest. Agents are so grouped because of their sales which take on a particular pattern. Their sales do fluctuate, sometimes by \$5,000.00 or even \$10,000.00, but generally their sales averages are the same.
- 41) In answer to the question "why should it be a cause for worry if a punter is punting a great deal of money on a particular mark?" Mr. Wheeler stated "if an agent were to have sizeable sums of wagering taking place and not be able to account for it, that's the concern. So where an agent is not used to such sizeable bets being wagered at his terminal it would be of extreme concern".

- 42) As with the witness Mr. Honore', I find Mr. Stafford Wheeler to be a credible witness. There is nothing in all of his testimony which has assisted in advancing the plaintiff's case.
- 43) The last witness for the defendant was Mr. Marlon Carew, Technology Section Manager of GTECH Latin America Corporation. His witness statement was tendered into evidence but Mr. Campbell opted not to cross-examine.
- 44) The facts which I find have emerged from the evidence are:-
- i. For the week ending 15th February, 2003, the Plaintiff's net sales were in the sum of \$91,773.00.
 - ii. The plaintiff's total sales for the 13th February, 2003, totalled \$60,178.00.
 - iii. The plaintiff's next highest net sales were in the sum of \$19,091.00 for the week ending 1st February, 2003.
 - iv. Mr. Honore' made futile attempts to call the plaintiff's outlet on the 13th February.
 - v. On the 17th February, 2003, the plaintiff was indebted to the defendant in the sum of \$85,549.61.
 - vi. On the 17th February, 2003, the balance on the plaintiff's account was \$43.61.

- vii. On the 17th February, 2003, Mr. Honore' requested the plaintiff to deposit the sum of \$85,600.00 before 2 p.m. and fax him a deposit slip. The plaintiff failed to do so.
 - viii. When asked by Mr. Honore' why he failed to make the deposit, the plaintiff stated that he was in his attorney's office and was advised to hold until he communicated to the defendant formally.
 - ix. The plaintiff has never deposited the said \$85,600.00 into his account.
45. In consequence of these findings, I hold that the plaintiff's net sales as at the 13th February, 2003, in the sum of \$91,773.00 deviated from his normal pattern of sales. The defendant was therefore then entitled to suppress the plaintiff's machine pursuant to paragraph 6.2 of the Handbook, and by so doing did not act in breach of contract.
46. The defendant having suppressed the plaintiff's machine on the 13th February, after Mr. Honore' failed to contact him as his phone was out of service, was entitled pursuant to clause 3 (P) (iii) of the agreement not to reactivate it by reason of the plaintiff's failure to deposit monies as were due and owing to it upon request on the 17th February. Pursuant to clause 6 (F) of the agreement the defendant was further entitled so to do as a result of the plaintiff's failure to have sufficient funds available at the time of the EFT. The defendant did not act in breach of contract by so doing. The agreement in this regard is reinforced by paragraphs 9.1, 9.2 and 9.3 of the Handbook.
47. My ruling in this action is therefore that the plaintiff's claim is dismissed. The costs of the claim are to be paid by the plaintiff to the defendant certified fit for senior and junior counsel to be taxed in default of agreement. The plaintiff is to pay the defendant the sum of \$85,549.71 together with interest at the statutory rate on the counterclaim. The costs of the counterclaim are to be

paid by the plaintiff to the defendant certified fit for senior and junior counsel
to be taxed in default of agreement.

August 6, 2010

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DAVID ALEXANDER

Former Judge (Ag).