

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2018/0404

BETWEEN:

JEROME DE ROCHE

Claimant

and

THE NATIONAL LOTTERIES AUTHORITY

Defendant

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Mr. Ruggles Ferguson for the Claimant

Ms. Melissa Modeste-Singh for the Defendant

2021: May 17;
July 30 .

JUDGMENT

[1] **ACTIE, J.:** This claim concerns whether the National Lotteries Authority is holding the sum of \$540,000.00, on trust for the claimant for the jackpot of the Super 6 prize, which took place on Saturday, 4th November, 2017.

The Claimant's case

[2] The claimant, (Mr. De Roche) in his statement of claim filed on 12th October 2018 says that on Friday 3rd November 2017 he purchased a Super 6 Lotto ticket from an

agent of the National Lotteries Authority (Lotteries Authority) at Parris Pharmacy in Grenville, Saint Andrew for a draw on that same date. The draw instead took place on Saturday, 4th November 2017 and the winning prize of \$540,000.00 was announced. Mr. De Roche visited the Lotteries Authority's outlet in St. George's and recognised that the numbers drawn for the Saturday draw were the numbers he had played. He presented his ticket but was informed by the Lotteries Authority's agent that the Friday ticket was invalid as the draw was cancelled. Upon further enquires Mr. De Roche discovered that the information given by the agent was misleading, but by then he had lost his ticket.

- [3] Mr. De Roche avers he made contact with the Lotteries Authority through its manager who informed that it would not be able to consider his claim without producing the winning ticket before the expiration of three months. Closer to expiration of the three-month period, Mr. De Roche returned to the Lotteries Authority to again claim his prize money. However, the Lotteries Authority refused to pay him the winning sum of \$540,000.00.
- [4] Mr. De Roche states that the Lotteries Authority breached its duty as constructive trustee to act honestly and in good faith and pleaded particulars of a series of fraudulent actions designed to mislead and deprive him of his winnings.
- [5] Mr. De Roche therefore claims for special and or general damages for breach of contract and/or an order directing the Lotteries Authority to pay the said sum of \$540,000.00 held on trust for him together with interest, costs or other reliefs.
- [6] The Lotteries Authority in its defence filed on 12th November 2018 denies that it is in breach of contract. The Lotteries Authority avers that the lottery ticket is a bearer instrument and constitutes the only proof of a bet and the terms of the contract are endorsed at the back of the lottery ticket. The ticket, together with a valid signature and identification, must be presented in order to claim the prize within 90 days, unless the Manager of the Lotteries Authority otherwise directs.

Evidence of Mr. De Roche

[7] The salient points in Mr. De Roche's witness statement filed on 15th November 2019 and evidence at trial are that:

- (1) On Friday, 3 November 2017, he purchased a Super 6 lotto ticket bearing number 08 10 11 19 26 28 from an agent of the Lotteries Authority, Parris Pharmacy located at Victoria Street, Grenville, Saint Andrew operated by Dr. Reginald Buckmire PHD MBE. He said he regularly buys Play Way and Lotto tickets, but this was the first time he bought and played a Super 6 ticket.
- (2) After he purchased the ticket, he watched the television and listened to the radio to hear the announcements for the Super 6 draw on Friday, 3rd November 2017, but did not hear any announcements.
- (3) On 7th November 2017, he went to cash the play way ticket that he won at the Lotteries Authority's office in the Bruce Street Mall. While at the office he saw the Super 6 numbers displayed on a board and recalled that the numbers were the same that he played on his Super 6 ticket.
- (4) He went to the agent at the desk of the lotto office, cashed his play-way ticket and received \$600.00. After cashing the play way ticket, he inquired from the agent when the Super 6 numbers were announced as he did not see them on the Friday night. The agent informed him that the Super 6 lotto was played on Saturday, 4th November 2017.
- (5) He signed the super 6 ticket and handed it to the agent who then placed it into the lotto machine. However, the agent informed him that the ticket was cancelled. He inquired how could the ticket be

cancelled, and the agent replied that the ticket he purchased was for Friday 3rd and not Saturday, 4th November 2017. What he understood from that statement was that the ticket was not valid.

- (6) Being dissatisfied with the response he received from the agent, he went to see the Manager of the Lotteries Authority, Mr. Gilbert, at the main office on the Carenage, St. George's on the same day, Tuesday 7th November 2017, but the Secretary to the Manager informed that he was not in office. He returned to the office on Wednesday, Thursday and Friday of that same week, but was again unsuccessful as he was informed that the Manager was not in office.
- (7) On Saturday, 11th November 2017 at around 8 am, he met the Manager, Mr. Gilbert, in a junction at the Bocas. He informed Mr. Gilbert of his several trips to his office. He then asked Mr. Gilbert whether the Super 6 tickets purchased on Friday would be valid if the draw was announced on the Saturday. Mr. Gilbert replied that the ticket was valid and states that there was no draw on Friday as there was a holiday in the Commonwealth of Dominica, one of the participating islands in the Super 6 Lotto.
- (8) Mr. De Roche had accidentally thrown away his ticket on Saturday morning 11th November 2017 at about 5 am, when he usually puts out his garbage for the truck. Mr. Gilbert informed him that if he could not find the ticket, he will see what he can do. On Monday 13th November 2017, he visited Mr. Gilbert at the Lotteries Authority's office. Mr. Gilbert inquired whether he knew the numbers of the ticket. Mr. De Roche informed him that the numbers were 08, 10, 11, 19, 26, 28. Gilbert then told Mr. De Roche that he would send him to obtain a print-out from the place of purchase and that he had to wait

for 3 months. He inquired when will the print-out be available to which Mr. Gilbert replied by the middle of January 2018.

- (9) Between the middle of January and 30th January 2018, Mr. De Roche went to see Mr. Gilbert at the main office at the Carenage, but the staff on each visit informed him that Mr. Gilbert was not in office. He eventually met Mr. Gilbert on 30th January 2018 who again inquired where the ticket was purchased. Mr. Gilbert told him to go for the print-out and to speak with Dr. Buckmire privately. He journeyed to Parris Pharmacy on the same day to get the print-out but was unable to do so as a workman from the Lotteries Authority was present. Dr. Buckmire accused the workman of the Lotteries Authority of deliberately freezing the system so that Mr. De Roche would not be able to obtain a print-out. Dr. Buckmire gave him a copy of the work order prepared by the Lotteries Authority for 30th January 2018,

- [8] The court notes the inconsistent statement of Mr. De Roche in his pleadings where he stated that he lost the Super 6 ticket on Saturday 4th November 2017 when he visited the Lotteries Authority's office in St. George's. However, Mr. De Roche in his witness statement and in his evidence at trial clarified that inconsistency and stated that he lost the ticket on Saturday, 11th November 2017. This inconsistency was not specifically challenged by the defence and in the court's view, it is also not fatal to his claim since it is not in dispute that Mr. De Roche lost or misplaced the physical Super 6 lotto ticket.

Evidence of Dr. E. Reginald Buckmire

- [9] On 15th November 2019, Dr. Buckmire, the owner of Parris Pharmacy in Grenville, Saint Andrew filed a witness statement in support of Mr. De Roche's claim. Dr. Buckmire says that he recalls hearing a radio and television announcement sometime on Monday after the draw on Saturday 4th November 2017 that the winning ticket was purchased from Parris Pharmacy. After the announcement Dr.

Buckmire says that Mr. De Roche came to the Pharmacy to say that he won but had thrown away the ticket.

[10] Dr. Burkmire states that “Mr. Jerome told me on one occasion which was a day or so before the 30th January 2018 that the general manager told him to get a printout of the sales”. He says that he informed Mr. De Roche that he does not understand why he was sent for a print-out when all the information is at the head office.

[11] Mr. De Roche returned on January 30th 2018 for the printout but Dr. Buckmire recalls that he was unable to view the sale records for the month of November 2017, although he was able to see the preceding and following months. Upon inquiry, Dr. Buckmire said that he was informed by his staff member, Jenny Tobias, that Mr. Beggs from the Lotteries Authority serviced the terminal. Dr. Burkmire says that he found this was strange as he had seen the sales records for November 2017 before the machine was serviced. Dr. Burkmire further states that servicing of the machine or terminal is usually done at the request of the agent, however, on this occasion the Lotteries Authority showed up unannounced.

[12] Dr. Buckmire says that he called the Lotteries Authority’s office, but they informed him that the ticket was purchased from their Grenville sub-office not from Parris Pharmacy. He said he found this information to be odd given the previous announcement on radio and television. Dr. Buckmire alleges that he received a call from the General Manager of the Lotteries Authority saying that he should forget Mr. De Roche.

Evidence of Jennie Tobias

[13] Jennie Tobias in a witness statement in support of Mr. De Roche’s claim says that she knows Mr. De Roche “as the “stew man” purchasing the ticket because he regularly comes to the Pharmacy most Fridays to purchase different types of lotto tickets. With regard to the print-out, Ms. Tobias says that she recalls Mr. De Roche

returning saying that he won but had lost the ticket and asked for a print-out of the ticket sale details/history after the draw.

- [14] Ms. Tobias recalls that on two occasions, Dr. Buckmire tried to obtain a print-out of the sale history but was unable to find anything in relation to the record for the month of sale as the lotto machine's screen was blank. Ms. Tobias says that she was also present when an agent from the Lotteries Authority came to service the machine/terminal. He took the terminal to the back of the Pharmacy, serviced it and returned it to its original location before Dr. Buckmire arrived. She says that it was on that same day, after the servicing was done that Dr. Buckmire was unable to retrieve the sales history and the printout for Mr. De Roche.

Defendant's case

- [15] The Lotteries Authority denies that it was a constructive trustee and owed a duty to act honestly and in good faith towards Mr. De Roche as the person holding the winning ticket. The Lotteries Authority avers that Mr. De Roche did not present the winning ticket within the stipulated time frame for claiming the jackpot prize. Further, the Lotteries Authority denies the particulars and assertions of fraud and avers that the games, including the Super 6 lotto are managed and run by the Canadian Bank Note Company based in Canada.
- [16] The Lotteries Authority avers that the data of the Super 6 game is encrypted and stored in a server on the island of St. Lucia. The removal of a terminal does not in any way impact the point of sale of a ticket. The Lotteries Authority says that it does not have clearance to wipe any data from the Super 6 lottery database and it is also impossible to wipe off data on the database from Grenada. The Lotteries Authority states further that an investigation carried out revealed that the point of purchase of the winning ticket was at the Lotteries Authority's Grenville sub-office and not the Parris Pharmacy as alleged by Mr. De Roche.

Evidence of Craig Bascombe

- [17] Mr. Craig Bascombe, President of Lottery Systems and Chief Financial Officer of Canadian Bank Note Company Limited (CBN) with its headquarters in Canada, in his witness statement in support of the defence, says that CBN operates and manages the Super 6 Lotto which is multi-island jackpot game. He says that CBN owns the point-of-sale terminal in Grenada and the back-end server used to administer the Super 6 Lotto games. Mr. Bascombe says that all communication between the lottery point-of-sale devices and the back-end server are encrypted while in transit and the back-end gaming server is located in St. Lucia at CBN St. Lucia Inc.
- [18] Mr. Bascombe says that only employees of CBN and CBN St. Lucia Inc. have access to the gaming servers and can confirm that CBN had not deleted or altered any gaming data in its system related to any Super 6 Lotto draws. In relation to the draw on 4th November 2017 he says that there was a winning Super 6 ticket, and the system reveals that the said winning ticket for draw 1761 was purchased on 4th November 2017 and sold at Grenville, Grenada (Retailer No. 2) and not at a pharmacy in Grenville.

Evidence of Geoffrey Gilbert

- [19] Mr. Geoffrey Gilbert, General Manager of the Lotteries Authority, in his witness statement and evidence at the trial says that Super 6 draw 1761 was aired on the Grenada Broadcasting Network on Saturday, 4th November 2017 which was a change from the regular Friday airing due to the public holiday (Independence Day) in Commonwealth of Dominica. The jackpot for draw 1761 was \$540,000.00 and the winning numbers were: 08, 10, 11, 19, 26, and 28. The system generated report from the CBN mainframe indicated the winning Super 6 lottery ticket was purchased at the Grenville sub-office.
- [20] In relation to the meeting with Mr. De Roche, Mr. Gilbert says that around the middle of January 2018 he met with Mr. De Roche at his office who intimated that he won

the super 6 jackpot and did not received his prize money. Mr. Gilbert says that he informed Mr. De Roche that a prize can only be claimed by presenting the winning ticket and suggested to him to retrace his movements in order to retrieve the ticket he claimed he purchased. Mr. Gilbert says that he sent notification out on 23rd January 2018 via the news media encouraging the winner to come forward to collect the jackpot prize. Following the expiration date of 2nd February 2018, the jackpot of \$540,000.00 not claimed within 90 day period and was deemed as an unclaimed prize.

Evidence of Damione J. Darbeau

[21] Mr. Damione Julian Darbeau, the Information Systems Manager of the Lotteries Authority, confirmed the draw on Saturday, 4th November 2017. He said that based on the information from the CBN database the winning ticket was purchased on 2nd November 2017 at 8:36.46 am at the Lotteries Authority, Jubilee Street, Grenville Retail outlet.

[22] With respect to the lotto terminal, Mr. Darbeau says that lottery tickets are printed at lottery sales locations via a computer terminal connected to a database stored on a computer server located in St. Lucia. He says that the terminal does not store ticket information at any ticket outlet in Grenada. The interface is designed to allow the salesclerk to enter and verify ticket information but does not allow a salesclerk and/or technician to alter or manipulate any user data and/or tickets.

Issue

[23] The main issue for determination in this matter is whether there was a breach of contract that entitles the claimant to the jackpot prize for the Super 6 Lotto Draw No. 1761.

Preliminary issues

[24] In his submissions, counsel for the claimant, Mr. Ruggles Ferguson raised two preliminary issues. The first, is the defendant's non-compliance with CPR 10.7. Mr.

Ferguson says that Mr. De Roche in his pleadings states that he purchased his ticket on 3rd November 2017 at 11.19 am at Parris Pharmacy. The Lotteries Authority in its defence denies that the ticket was purchased at Parris Pharmacy but failed to give any further particulars in the defence in relation to the time of purchase of the winning ticket. Counsel contends that the defendant seeks to introduce new facts that the winning ticket was purchased on 2nd November 2017 at 8:36.46 in the evidence of Damion Julian Darbeau and Mr. Bascombe.

[25] Mr. Ferguson submits that the defendant having failed to plead those facts in its defence or to obtain leave of the court at a case management conference to amend its defence is in breach of CPR 10.7 and therefore cannot rely on those facts. Counsel urges the court not to consider the evidence in the witness statements of Craig Bascombe and Damion Julian Darbeau concerning the date and time of the purchase of the ticket.

[26] Secondly, Mr. Ferguson submits that the witness statement of Craig Bascombe is expert evidence, in that it provides opinion as to the technical capacity and restriction of the information technology system used in the management of the super 6 lotto. With regard to the issue whether the winning ticket was purchased by Mr. De Roche, counsel urges the court not to consider the evidence in the witness statement of Craig Bascombe in relation to the technical capacity and restrictions of the Super 6 Lotto information system. Mr. Ferguson relies on the authority of **Bergan v Evans**¹ to support his argument that this evidence is inadmissible in accordance with CPR 32.6 without the permission of the court.

[27] With respect to the Mr. Ferguson's preliminary objections in relation to CPR 10.7. It is trite that a defendant is under a duty to set out its case. CPR 10.5 (1) requires that the defence must set out all the facts on which the defendant relies to dispute the claim.

¹ [2019] UKPC 33.

[28] **CPR 10.7** provides the consequences of not setting out a proper defence. The defendant may not rely on any allegation or factual argument which is not set out in the defence but could have been set out there. The normal consequence of failing to deny and or plead a material fact in response to a statement of claim is that the court may treat the fact as admitted.

[29] The Lotteries Authority was under a duty to set out the facts with respect to the date, place and time of the purchase of the winning ticket in its defence. This is evidence which would have been readily available from the date of filing of its defence. The Lotteries Authority in its defence stated that it had no knowledge of Mr. De Roche's assertion that he purchased the winning ticket on Friday 3rd November 2017 at 11.19 am at Parris Pharmacy in Grenville, St. Andrew's. Mr. Gilbert under cross-examination at trial gave the following responses to questions from the court with respect to when the Lotteries Authority discovered where the winning ticket was purchased:

Court: "At what point would you know the place of purchase?"

Mr. Geoffrey Gilbert: "...from the time that report is generated it's gonna say... ticket point of sale a, b, c or d."

Court: "Was there an announcement that it was from Parris pharmacy?"

Mr. Geoffrey Gilbert: "No, no, no, no! There was never any announcement that it was from Parris Pharmacy."

[30] Given Mr. Gilbert's evidence above, it was certainly within the Lotteries Authority's knowledge to disclose its own versions of the facts in its defence concerning where the winning ticket for the draw No. 1761 was purchased. The Lotteries Authority defence failed to set out these relevant facts or assertions when it would have been available for it to do so in its defence.

- [31] Furthermore, the Lotteries Authority cannot rely on the exhibited a letter² from Mr. Craig Bascombe in his capacity as President, Lotteries and CFO of Canadian Bank Note which sought to disclose facts that “***the gaming system shows the winning ticket for the November 4, 2017 Super 6 Lotto game was sold at Grenville, Grenada (Retailer No. 2)***” and the statement at paragraph 11 of the witness statement of Craig Bascombe which repeated the above statement contained in the letter. It cannot be argued that there was any significant change in the circumstances of the evidence which became known to the Lotteries Authority after its defence.
- [32] The CPR requires that all facts on which the Defendant rely must be pleaded. In **Leon O. Taylor v Wilfred Julien**³ Baptiste JA states “a pleading must make clear the general nature of the case of the pleader since it is inimical to a fair hearing that a party should not be exposed to issues and arguments of which he has no fair warning”.
- [33] The Lotteries Authority made no application for permission to amend its defence to adduce such new facts, assertions or arguments after case management and cannot rely on facts not pleaded. Paragraph 13 in the witness statement of Damione Julian Darbeau where he states that the winning ticket was purchased on 2nd November 2017 at 8:36:46 am at the National Lotteries Authority- Grenville Retail Outlet, Jubilee Street in Grenville, Saint Andrew is not in keeping with the requirements of CPR 10.7. Accordingly, the Lotteries Authority cannot rely on the above facts, assertions, evidence or arguments which were not set out in its defence.
- [34] In relation to Mr. Ferguson’s objection that the evidence of Craig Bascombe is expert evidence and as such is inadmissible without the court’s permission, the court is of the view that the evidence of Mr. Craig Bascombe does not fall within the scope of the authority of **Bergan v Evans**. To begin with, Mr. Bascombe is the President, Lottery Systems and the Chief Financial Officer of Canadian Bank Note Company Limited and has working knowledge and experience of the operations of the company. In the court’s view, Mr. Bascombe’s evidence is not of a technical or specialist knowledge but is simply

² Exhibit “GG1” in the Witness Statement of Geoffrey Gilbert filed 15th November 2019.

³ GDAHCVAP2016/0019.

an explanation as a witness of fact to the operations of the games and how the data is stored and accessed. Accordingly, Mr. Bascombe's evidence as to the storage and restricted access of the data of the Super 6 lotto draws which are stored on servers is not expert evidence but evidence of fact and is accordingly allowed.

Whether the claimant is entitled to the prize

[35] The main thrust of the Lotteries Authority's case is that the Super 6 ticket is a bearer instrument and the conditions printed on the back of all Lotteries Authority's tickets, including signing and presenting of the tickets must be followed. In essence, the Lotteries Authority argues that Mr. De Roche failed to present his ticket within the 90-day period in order to collect the jackpot prize. It is the evidence of the Lotteries Authority that after the 2nd February 2018, the Super 6 jackpot of \$540,000.00 was deemed as an unclaimed prize.

[36] Mr. Ferguson for the claimant argues that Mr. De Roche's presentment of the signed ticket to the agent of the Lotteries Authority on Tuesday, 7th November amounted to the requirement of proof that he had the winning ticket in his possession. This was the primary condition for obtaining a prize for a winning ticket. Mr. Ferguson says that if the court finds that Mr. De Roche did purchase the winning ticket, it would be unfair in the circumstances of this case for the Lotteries Authority to rely on the strict terms of the contract to deny him his winnings.

[37] Counsel for the Lotteries Authority, Ms. Melissa Modeste-Singh submits that sections 5 of the National Lottery Authority Act⁴ authorises the Lotteries Authority to "assist in the organisation and operation of lotteries" and "make arrangements for the proper and prompt payment of prize monies payable" under the Act. Counsel says that by virtue of this legislative requirement, the Lotteries Authority has outlined certain procedure and safeguards which must be adhered to in order to claim a prize and has deemed all lottery tickets as bearer instruments as printed on the back of each lottery ticket. Counsel made reference to the definition in the Oxford online dictionary of the word "bearer" as "a

⁴ Cap 205A of the 2010 Continuous Revised Edition of the Laws of Grenada.

person or thing that carries or hold something” or “a person who present a cheque or other order to pay money.”

[38] Ms. Modeste-Singh submits that the Lotteries Authority was unable to pay out any prize winning in lieu of the presentment of the winning ticket in conformity with the prize claiming procedure. Counsel relies on the United States case of **Karafa v New Jersey State Lottery Commission**⁵ where the court interpreted the statutory provisions of the New Jersey State Lottery Laws. In **Karafa**, Justice Kimmelman stated that:

“By restricting payment of prize money to “holders of winning tickets” the clear legislative purpose was to keep the administrative machinery geared for the payment of winnings as simple and as efficient as possible. That machinery was not to become bogged down in the resolution of claims, conflicting or otherwise, in the event of misplaced, lost or destroyed tickets. The procedure simply calls for the production of the winning ticket. Unless that is done, payment cannot be made. Responsibility for nonproduction of ticket is not assumed by the State but left to remain with those whose fault, neglect, carelessness or other inadvertence caused the loss.”⁶

[39] With regard to Mr. De Roche’s contention that the prize monies were kept on constructive trust for his benefit, Ms. Modeste-Singh referenced the learned authors in **Keeton’s Law of Trust**,⁷ where they elucidated:

“The term constructive trust covers a variety of relationships having very few features in common...Generally, it may be said that a constructive trust is a relationship created by Equity in the interest of good conscience and without reference to any persons express or implied intention of the parties...Wherever a person clothed with a fiduciary character avails himself of it to obtain some unauthorized personal advantage, such a person becomes a constructive trustees of all profits for the person at whose expense the profits has been made.”⁸

[40] Ms. Modeste-Singh submits that there is no basis for the imposition of a constructive trust in favour of Mr. De Roche because the ticket is a bearer instrument, and he has not shown that he is entitled to the prize winnings by producing the ticket. Counsel

⁵ 324 A.2d 97 (N.J. Super. 499 Ct. App. Div. 1974).

⁶ Ibid at page 504.

⁷ Keeton – Law of Trusts – A statement of the Rules of Law and Equity Applicable to Trusts of Real and Personal Property (5th Edn.).

⁸ Supra at page 200.

submits that in lieu of the non-presentment of the winning ticket in conformity with prize claiming, the Lotteries Authority is unable to pay out any prize winnings and urges the court to dismiss Mr. De Roche's claim.

[41] This court is of the view that the decision in **Karafa** relied on by the defendant is distinguishable because it was concerned with the interpretation and application of United States statutory provisions in relation to lottery prizes. The court in **Karafa** opined that it was bound to "follow the legislative mandate and may not establish by judicial declaration the lost ticket". The court in **Karafa** relied on the provisions of a statute that interpreted the words "*prizes to the holders of winning tickets*" to mean physical holders of winning tickets. The legislation in **Karafa** specially outlines the procedure and requirements to claim prizes.

[42] The Lotteries Authority did not identify any similar provision under the Lotteries Act or Regulations with respect to the presentation of winning tickets. This court is of the view that the **Karafa's** case does not assist the Lotteries Authority and is not relevant to the facts of this case.

Where was the winning ticket for Super 6 Draw No. 1761 purchased?

[43] In relation to the place of purchase of the winning ticket for the Super 6 draw, Mr. Bascombe for the Lotteries Authority under cross-examination by Mr. Ferguson, states that based on the report the ticket was purchased in Grenville, Grenada at Retailer No. 2. When asked about the location of Retailer No. 2, Mr. Bascombe said that he "doesn't know of the top of his head but would be able to know from checking the number in the system...we would be able to trace in our database where the winning ticket was sold."

[44] Under cross examination, Mr. Bascombe was asked about the relationship between his company, the Canadian Bank Note Company and the Lotteries Authority. He replied that his company licences the technology used by Lotteries Authority for the games under a management agreement, however, the Lotteries Authority has full operating capacity over the games.

[45] It is obvious from Mr. Bascombe's responses, that up to the time of trial, he did not have any reliable evidence as to the exact location and/or name of the establishment from which the ticket was purchased except that it was in the general "Grenville" vicinity. It is the evidence that the Parris Pharmacy is also located in the Grenville community and that an announcement was made immediately after the draw naming Parris Pharmacy as the point of purchase. Given Mr. Bascombe's lack of knowledge, his evidence as to the exact location where the winning ticket was purchased is unreliable.

[46] Considering the above conflicting evidence the court is left with the task of assessing the evidence of the witnesses of both parties. In **The Ocean Frost**,⁹ Robert Goff LJ (as he then was) said "It is frequently very difficult to tell whether a witness is telling the truth or not: and where there is a conflict of evidence.... Reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertain the truth".

[47] Our Court of Appeal in **Tyrone Burke v Otto Sam**¹⁰ stated as follows:

"The learned judge tested the Chief Personnel Officer's evidence against all the other material available to her and in her fact-finding task, was understandably swayed by and attached much weight to the absence of contemporary documentation to confirm his oral evidence. In assessing the Chief Personnel Officer's credibility, contemporaneous written documents were of great importance. In this case, the learned judge was entitled to test the appellant's evidence by reference to both the contemporary documentary evidence and its absence. I note that "the absence of evidence can be as significant as its presence. "The judge placed due weight on the absence of the critical contemporary documentation to confirm the oral evidence of the Chief Personnel Officer. The judge's approach is supported by Arden LJ in *Wetton v Ahmed and Others*. Arden LJ said:

"11. By the end of the judgment, it is clear that what has impressed the judge most in his task of fact-finding was the absence, rather than the presence, of contemporary

⁹ [1986] A.C. 717.

¹⁰ SVGHCVAP2014/0002 at para. 22.

documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.

“12. There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such as evidence in texts or e-mails, in which the defendant seeks or is given instructions as to how he should carry out work. ...13[2011] EWCA Civ. 610.

...

“14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.

...

“16. The approach of the judge in this case was to seek to test the evidence by reference to both the contemporary documentary evidence and its absence. In my judgment, this was an approach that he was entitled to take. The evidence of the liquidator established a prima facie case and, given that the books and papers had been in the custody and control of the respondents to the proceedings, it was open to the judge to

infer that the liquidator's case would have been borne out by those books and papers.¹¹ (Underlining supplied)

[48] Considering the dictum above, the court takes judicial notice of the totality of the evidence in the case. Firstly, the court notes the defendant failed to provide evidence to challenge the fact that the ticket was presented to its agent on Tuesday 7th November 2017 at its office outlet at the Bruce Street Mall. This is evidence which could have been easily verified by the Lotteries Authority as Mr. De Roche stated that he also presented and received \$600.00 for a play way prize on the said day.

[49] The court accepts the unchallenged evidence of Dr. Buckmire that public radio and television announcements were made immediately after the draw stating that the winning ticket was purchased at Parris Pharmacy. The evidence of Dr. Burkmire and Mr. De Roche with regards to efforts made to obtain a printout from the Pharmacy based on the advice given by Mr Gilbert, Managing Director of the Lotteries Authority is also relevant. The spontaneous and untimely service of the lottery terminal by Authority's agent and Dr. Buckmire's inability to retrieve the sales history for November 2017, after the lottery terminal was serviced also raises adverse inferences. Mr. Darbeau under cross-examination revealed that the lottery terminals are normally serviced bi-annually during the first and the third quarter of the year. It is also Dr. Buckmire's evidence that the lottery terminal is usually serviced upon request, and that it was odd for the impulsive service by the Lotteries Authority¹² on 30th January 2018, the same day that Mr. De Roche was instructed by Mr. Gilbert to visit the said Pharmacy to obtain a print-out. The Lotteries Authority did not give any cogent reason for the spontaneous service of the terminal outside the customary and established schedule. The Lotteries Authority also failed to explain Dr. Buckmire's inability to retrieve the sales history for the month of November 2017 after the service.

[50] The court further notes that Mr. Gilbert in his witness statement says that sometime in the middle of January 2018, Mr. De Roche came to his office, where he informed Mr.

¹¹ Ibid at para 22.

¹² Para. 24 of the Witness Statement of Jerome De Roche.

De Roche that a prize can only be claimed by presenting the winning ticket. In relation to the issue of the presentment of the winning ticket, the court received the following answers from Mr. Gilbert to questions it posed:

Court: In your witness statement you said the winning ticket must be presented, yes?

Mr. Gilbert: Yes, you must present the ticket.

Court: But in your answer to counsel you said that you asked the gentleman to go back to the place where he thought he purchased the ticket.

Mr. Gilbert: Yes, I did.

Court: How would that assist him if he did not have the ticket?

Mr. Gilbert: Well, at least, in terms of assisting him it would not really assist him in any way, but it would just probably help to confirm or create some sort of clarity in his mind he did purchase the ticket at that particular point. Even though he got the information that it came from there, the key and critical matter would be presentation of the bearer borne instrument which would be the valid ticket.

[51] Given Mr. Gilbert's answers to the questions posed by the court, it begs the question as to his true intent or motive when he informed Mr. De Roche sometime in January 2018 to journey to Parris Pharmacy to retrieve a printout from the lotto terminal at the said pharmacy. The report as to the place of purchase of the winning ticket would have been readily available to Mr. Gilbert when he first met with Mr. De Roche. Based on Mr. Gilbert's evidence such a printout would in no way assist Mr. De Roche in proving that he purchased the winning ticket at that location, especially when he contends that the winning ticket was not purchased at Parris Pharmacy. Therefore, the court finds that the instruction and advice given to Mr. De Roche by Mr. Gilbert to be illogical and accordingly it affects the credibility and reliability of his evidence

[52] Considering the above anomalies and unreliable evidence from the witnesses of the Lotteries Authority, the court is of the view that greater weight is to be attached to the evidence of the Mr. De Roche and his witnesses. The court notes the factual assertions of Mr. De Roche that he signed and presented the ticket to the agent at the Lotteries' office on 7th November 2017. The court also takes into consideration that Mr. De Roche made immediate and frequent visits to the main office of the Lotteries Authority to see the Manager, Mr. Gilbert, in relation to issue concerning the validity of his ticket. Mr. Gilbert in his evidence did not dispute that Mr. De Roche had visited his office before their meeting in middle of January 2018 and his subsequent meetings. These actions suggest, in my view, that Mr. De Roche had a genuine concern in relation to the inaccurate advice that he received from the agent of the Lotteries Authority at its outlet office. However, his ticket was no longer in his possession because of the misleading information given by the agent. To date, the prize for the super 6 lottery draw for that date has not been paid.

[53] The court is satisfied on a balance of probabilities that Mr. De Roche purchased the winning ticket for the Super 6 Draw No. 1761 on Friday, 3rd November 2017 at Parris Pharmacy on Victoria Street in Grenville, St. Andrew. The court is of the view that the claimant satisfied the requirement in presenting and signing the ticket which was rejected by the defendant's agent. Damages for breach of contract are to put the party in the position he would have been had the contract been performed. The damages which the other party ought to receive in respect of the breach of contract should be such as may fairly and reasonably be considered arising naturally. The court finds that the Lotteries Authority is holding the winning prize for the super 6 draw on trust for Mr De Roche.

Conclusion

[54] For the foregoing reasons, the court is of the view that the claimant has succeeded in his claim for breach of contract and that the defendant is holding the sum of \$540,000.00 on trust for Mr. De Roche as the winner of Super Lotto Draw No. 1761 which took place on 4th November 2017 for which Mr. De Roche purchased the winning ticket.

ORDER

[55] It is hereby ordered and directed as follows:

- (1) The claimant, Jerome De Roche, is entitled to sum of \$540,000.00 being special damages suffered upon the Lotteries Authority's breach of contract in failing to pay the winning prize in Super Lotto Draw No. 1761 which took place on 4th November 2017
- (2) Interest on the sum of \$540,000.00 at three percent (3%) per annum from the date of the filing of the claim until judgment and at the rate of six percent (6%) per annum from the date of the judgment until satisfaction.
- (3) Prescribed Costs pursuant to CPR 65.5.

Agnes Actie

High Court Judge

By the Court

Registrar