

IN THE SUPREME COURT OF BELIZE

CLAIM NO. 407 of 2013

BETWEEN:

INDIRA BOWDEN CLAIMANT

AND

GEOFFREY AUSTIN ARZU DEFENDANT
MALCOLM SOBERS ANCILLARY DEFENDANT

In Court.

BEFORE: Hon. Chief Justice Kenneth Benjamin

April 2 & 9, 2014.

Appearances: Mrs. Robertha Magnus-Usher for the Claimant.
Mr. Philip Zuniga, SC for the Defendant.

JUDGMENT

[1] By a Claim Form filed with a Statement of Claim on July 30, 2013, the Claimant, Mrs. Indira Bowden claimed against the Defendant, Mr. Geoffrey Arzu the sum of \$48,650.00 and interest at the rate of 10% per annum for money paid by the Claimant to one Malcolm Sobers on or about August 2012 at the Defendant's request. The Claim

was made for the total sum of \$56,028.00 inclusive of fees, fixed costs and interest accrued.

Statement of Case

[2] The Claimant claims that on or about the 20th day of August, 2012 and the 28th day of August 2012, pursuant to a request by the Defendant, she paid the sum of \$50,000.00 to Malcolm Sobers as deposit against a proposed investment. The Claimant further claims that by an acknowledgement in writing dated the 3rd day of March, 2013, the Defendant undertook to repay her the said sum of \$50,000.00. It is claimed that the Defendant has repaid a total of \$1,350.00 leaving a balance of \$48,650.00.

[3] The Claimant further claims that she borrowed the principal sum of \$50,000.00, as requested by the Defendant to pay the Ancillary Defendant, Mr. Malcolm Sobers, from Belize Bank Limited and is repaying the principal and interest thereon at the rate of 10% per annum.

Defence

[4] In his defence filed on September 27, 2013, the Defendant admits that payments were made on the dates alleged to Mr. Sobers not at his request but rather as a result of the Claimant's own decision to enter into business with the said Malcolm Sobers. The Defendant states that at all material time, he and the Claimant were partners trading under the name "Le Savoy-PG Call Center" under which name they entered into an oral agreement with Malcolm Sobers for the establishment of a call center and to acquire Export Processing Zone (EPZ) status for "Le Savoy-PG Call Center" at the price of \$50,000.00.

[5] The Defendant denies that he undertook to repay the Claimant \$50, 000.00 and says he agreed to pursue action against Malcolm Sobers for the return of the said \$50,000.00.

[6] In the Defence he denies that the sum owing is \$48, 650.00 and asserts that the balance owing by him, after payments totalling \$1350.00, is \$23, 650.00. Accordingly, judgment was entered upon admissions on October 22, 2013 for the sum of \$23, 650.00 with interest at the rate of 10% per annum with effect from August 27, 2012. This trial is therefore as to the balance of \$25,000.00 claimed by the Claimant but not admitted by the Defendant.

Ancillary Claim

[7] On September 27, 2013, the Defendant commenced an Ancillary Claim against Malcolm Sobers, the Ancillary Defendant, for \$50,000.00 being an amount paid by the Claimant and the Defendant to the Ancillary Defendant for a consideration which had wholly failed. In the alternative, the ancillary claim was for \$25,000.00 as to the Claimant and \$25, 000.00 as to the Defendant as money due on an account stated.

[8] The Ancillary Defendant was served on October 4, 2013 with the Ancillary Claim together with the Statement of Case (Claim Form, Statement of Claim and Amended Defence). The Ancillary Defendant failed to file a Defence within 28 days of service. A request for entry of judgment in default was made on behalf of the Defendant and on the same date, November 8, 2013, judgment in default of defence to the Ancillary Claim was purportedly entered for the sum claimed.

[9] The Ancillary Defendant by way of Notice of Application filed January 28, 2014 sought an order setting aside the judgement in default made November 8, 2013 and grant permission to file a defence. On February 25, 2014, this Court ordered that the judgment in default be set aside but permission to file a defence refused. It was further

ordered that all execution against the Ancillary Defendant be stayed pending the outcome of the substantive claim.

Evidence

[10] The facts of the case are to be gleaned from the witness statements and the cross examination of the witnesses along with documentary evidence. Each party provided a witness statement and the only other witness was Ms. Maria Teck who witnessed the signing of the document by the Defendant on March 3, 2013.

[11] The Claimant averred in her witness statement that she got to know the Defendant whilst attending Toledo Community College during the years 1986 to 1990. Some years later they met again at the University of Belize, where they were both adjunct Lecturers.

[12] The Claimant further stated that from the beginning and throughout 2012 the Defendant tried to persuade her to invest together with him in a Call Center business which would start in Belize City and then move to Punta Gorda. Indeed, throughout the trial the Claimant adopted the posture that it was a loan and not an investment in a business partnership as asserted by the Defendant.

[13] In cross-examination by Learned Senior Counsel, Mr. Zuniga, the Claimant admitted that she was familiar with the business name “Le Savoy - Call Center,” however, she was adamant that herself and the Defendant were never partners. She was referred to the Certificate of Registration for Le Savoy-PG - Call Center and the Application for Registration of the firm and she was asked if she recognized her signature. Thereupon, the Defendant admitted to registering and signing the Certificate of Registration registering the business name “Le Savoy – PG Call Center” which

named the Claimant and the Defendant as partners. The Claimant further admitted to reading the documents before she signed same.

[14] The Claimant testified that decisions were being made by the Defendant without her knowledge. In this regard, Mr. Zuniga referred her to her witness statement where she stated that on August 15, 2012 she received an email from the Defendant explaining how the \$50, 000.00 would be spent and that Mr. Sobers would do the technical work. She was then directed to the List of Documents and in particular to a series of emails dated December 23, 2012 from Mr. Sobers addressed to herself and the Defendant. The Claimant read the emails then admitted to being aware of their contents and further admitted to asking the Defendant to end the business arrangements with Mr. Sobers because of the change in circumstances due to her health.

[15] The Claimant stated in Court that she received a loan for \$50, 000.00 and, on instructions from the Defendant, she deposited the said sum to Malcolm Sobers' bank account at Heritage Bank. It was put to her that this money was deposited for both the Claimant and Defendant to each invest \$25,000.00 in the call center business. She staunchly denied that she invested in the call center and stated that the \$50,000.00 was a loan to the Defendant. She rejected a further suggestion that the Defendant never said he would repay her \$50, 000.00 but that he was merely responsible for her investment.

[16] In further cross examination, the Claimant was referred to a document headed "Promissory Note" and dated 3rd March 2012. The text of the document reads:

"...I, Geoffrey Austin Arzu, have acknowledge that I am solely responsible for the repayment of \$50,000.00 to Indira Bowden of No. 16 Mussel Street, City of Belmopan. The monies were received by myself via BBL

cheques #250143 and #025 which was written out in the name of Malcolm Sobers and Xpert Business Solutions (Malcolm Sobers)..."

The Claimant admitted preparing the document and that it was subsequently signed by the Defendant. Mr. Zuniga suggested that the "promissory note" contradicts the Claimant's evidence as to the \$50,000.00 being given to the Defendant as against being deposited directly to Mr. Sobers' account. In response, the Claimant admitted that the money was deposited to Mr. Sobers' account.

[17] In re-examination, the Claimant told the Court that the Defendant asked her to prepare the promissory note and assured her that if anything happened he would repay the \$50, 000.00.

The Defendant's Evidence

[18] The Defendant in his witness statement narrated that in or about June 2012 he was introduced by one Emory Castillo to Malcolm Sobers with whom he subsequently met to discuss setting up a call center. The Defendant was impressed with Mr. Sobers' apparent knowledge and was convinced that a call center would be a good way to establish a small business. This idea was shared with the Claimant whom he said became immediately interested as she wanted to invest some money after selling a house in Hopeville in the Toledo District of Belize.

[19] The Claimant and the Defendant both met with Mr. Sobers at Troystar Center at the Sunjay Hotchandani Building on Princess Margret Drive in Belize City. Mr. Sobers showed both the Claimant and Defendant the property and explained to them the procedure for establishing a call center and what they would need to start one. Mr. Sobers suggested they co-lease with Troystar and then eventually branch out on their own. He further explained to both of them his experience in starting up and managing

call centers as he had worked at BELTRAIDE, "Ready Call" and EVICTUS call center. Both the Claimant and the Defendant were told that \$50,000.00 would be enough to start their call center.

[20] The Defendant further stated that after the meeting with Mr. Sobers, the Claimant and himself discussed what Mr. Sobers had told them and looked at the financials together. The Defendant told the Claimant that they needed a formal partnership. The Claimant then registered "Le Savoy – PG Call Center" and has kept the certificate ever since.

[21] Mr. Sobers provided a start-up plan which included the financial aspects of the business and the potential growth of the business. The Defendant shared the business plan with the hope of securing other investors; however, he was advised by Mr. Sobers to not include other investors. The Defendant informed the Claimant as to the advice to not include other investors and she offered to finance the project with a loan from Belize Bank. He said that the Claimant offered to finance the project up to \$100,000.00 but he advised her to only secure \$50,000.00. The Defendant wrote in his witness statement the Claimant, on behalf of 'Le Savoy' deposited \$50,000.00 into Mr. Sobers' account at Heritage Bank in August 2012. He stated that he agreed to help the Claimant repay the loan by paying half of the monthly payment in the sum of \$450.00 and she would pay the other half of \$450.00.

[22] The Defendant stated that Mr. Sobers proceeded to start his own call center using Le Savoys funds of \$50,000.00, the intention being that, Mr. Sobers would own 75% of this new company and Le Savoy 25% equity in return for an agreement with Le Savoy call center when it finally got started. Operational problems ensued between Mr. Sober and Troystar and they cut ties in December, 2012. With all the problems with Mr. Sobers, the Claimant and Defendant decided that they were no longer interested in the call center and requested that Mr. Sobers return the monies paid. Mr. Sobers promised

to repay the \$50, 000.00 but this was not done. The Defendant stated that he shared all correspondence and documentation between his Attorney, Mr. Sobers and himself in order to show the Claimant that they were pursuing Mr. Sobers to repay the \$50,000.00. Notwithstanding, the Claimant requested that the Defendant sign a so-called promissory note because she wanted to be assured that the Defendant would get back her money from Mr. Sobers.

[23] At trial, Learned Counsel for the Claimant referred the Defendant to the Ancillary Claim filed by him and in particular paragraph 1.1 where the Defendant claims \$50,000.00 being the amount paid by the Claimant and the Defendant to Mr. Sobers. The Defendant accepted to the Court that the Claimant was the one that paid the \$50, 000.00; however, he said that \$25,000.00 was from the Claimant and \$25,000.00 was paid on his behalf. The Defendant further told the Court that when the consideration failed he felt responsible for his partner's investment. However, he denied that he told the Claimant that if anything happened he would repay the \$50,000.00.

Evidence from Maria Teck

[24] Maria Teck was a witness for the Claimant and in her witness statement she said that on the 3rd day of March 2013 the Claimant requested her to witness an agreement to be signed between herself and the Defendant. The Claimant further explained to her that it was necessary for the Defendant to sign the agreement to document that he had requested her to advance monies to a Mr. Sobers and that he had agreed to return those monies to her. She stated that the Claimant picked her up at her home and the Defendant was already sitting in the front seat of the car. They headed to the Claimant's home. While there, the Claimant went inside and returned with a document she handed it to the Defendant who read it and then said: "This is no problem, I owe you this money and will pay". He then signed the document. Ms. Teck said she read the said document and signed in the space reserved for a witness.

[25] At trial, during cross examination, Mr. Zuniga suggested to Ms. Teck that the Defendant said nothing when he signed the document. Ms. Teck said: “he read it and said it was not a problem and he will sign it”! Mr. Zuniga then suggested to her that that was all the Defendant said and Ms. Teck agreed.

Submissions on behalf of the Claimant

[26] The main thrust of the submissions made by learned Counsel for the Claimant was grounded on the fact that the Claimant did deposit \$50,000.00 to Mr. Sobers’ account but that this was done upon the request of the Defendant. In support of the cause of action relied upon **Atkins Court Forms, 2nd Ed, Volume 12(2) p.63, para. 58** which states:

“where money is paid by one person to a third party at the express or implied request of another or to the use of that other under compulsion of law or under compulsion arising out of the law, the person so praying is entitled to recover that money”

[27] It was submitted that the Defendant assured the Claimant that he would be solely responsible for repaying the \$50,000.00 and Learned Counsel pointed to the “promissory note” signed on the 3rd day of March 2013 by the Defendant and witnessed by Ms. Maria Teck.

[28] Learned Counsel rejected the possibility that the Defendant and the Claimant had a partnership arrangement and that monies were paid on behalf of Le Savoy. In this regard the Court was taken to Section 3(1) of the Partnership Act, Chapter 259 of the Laws of Belize, which defines a partnership as *“the relation which subsists between persons carrying on a business in common with a view of the profit”*. It was submitted that if the Claimant and the Defendant were indeed partners, then between themselves, they would be under legal obligation to contribute to the partnership capital in their

respective agreed proportions or shares. However, Counsel argued that this was not the case of contributions to partnership capital between partners but a request by the Defendant for the Claimant to submit money to a third party. This argument did not countenance the Defence's position that the Defendant admitted being responsible for the repayment of \$25,000.00 of the \$50,000.00 paid to Mr. Sobers.

Submissions on behalf of the Defendant

[29] Learned Senior Counsel for the Defendant disputed the claim by the Claimant for the sum of \$50,000.00. It was submitted that the Defendant admitted that he paid \$1,350.00 and averred that he owed \$23,650.00 and no more. Consequently, on the 22nd day of October, 2013 the Court ordered that the Claimant be granted Judgment by Admission, against the Defendant in the sum of \$23,650.00 and interest thereon at the rate of 10% per annum as of the 27th August 2012.

[30] The averment by the Claimant that she and the Defendant were never partners was also challenged. Learned Counsel pointed out that the Claimant herself registered the business name "Le Savoy-PG Call Center" on the 14th August 2012 and admitted during cross examination to reading and signing the Certificate of Registration. Counsel submits that the Claimant and the Defendant were partners with effect from 15 August 2012 when the business name was registered.

[31] Learned Senior Counsel further submitted that when the Claimant paid the sum of \$50,000.00 to Malcolm Sobers it was a deposit against a proposed investment. It was a joint investment of the Claimant and the Defendant who were equal partners. Senior Counsel pointed to the fact that it was after the registration of the partnership on 15 August 2012 that the Claimant paid the \$50,000.00 to Mr. Sobers which according to the Statement of Claim were made in two payments on the 20th August 2012 and 28th August 2012.

[32] Learned Senior Counsel pointed to paragraph 21 of the Claimant's witness statement where she says, *"I told the Defendant that he should have consulted me before he made any decisions about changing the intended use of the \$50,000.00"*. It was submitted that if the \$50,000.00 was merely a loan to the Defendant then it would have been of no concern to her if a decision was made changing the intended use of the \$50, 000.00. In addition, paragraph 22 of the Claimant's witness statement reads: *"I told the Defendant that I would not have invested if I knew that the Defendant was going to make decisions on his own"*. This suggests that the Claimant did invest and expected to be a part of the decision making. The email correspondence between the Claimant and the Defendant was offered as further proof that they were joint investors. Emails between the Defendant and Mr. Sobers were copied to the Claimant and emails from Mr. Sobers began with "Dear Mr. Arzu and Mrs. Bowden".

[33] Learned Senior Counsel further submitted that the written document dated 3rd March 2013, which the Claimant describes as "an Acknowledgement" in paragraph 3 of the Statement of Claim and then later as a "Promissory Note" at paragraph 12 (b) of the Amended Reply to Re-Amended Defence, was neither an acknowledgement of debt nor a promissory note. It was contended that the document does not acknowledge a debt of \$50,000.00 but states that the Defendant is "solely responsible" for the repayment of \$50,000.00 to the Claimant. Further, the Claimant testified that she paid \$50,000.00 directly to Mr. Sobers and not to the Defendant and that the words "the monies were received by myself via BBL Cheque#250143 and #025 which was written out in the name of Malcolm Sobers and Expert Business Solution (Malcolm Sobers)" were not true because she had admitted depositing the cheques directly to the account of Malcolm Sobers. It was urged that the object of the document was no more than to provide some comfort to the Claimant that the Defendant as C.E.O. would continue to pursue Malcolm Sobers for the repayment of the \$50,000.00.

FINDINGS

[34] The Court is called upon to decide whether the Claimant and the Defendant were business partners conducting business under the name “Le Savoy-PG Call Center” and whether the \$50,000.00 was paid to Mr. Sobers as a joint investment in a call center business. Following upon on this, a finding is to be made to whether the Defendant owes the Claimant the further sum of \$25,000.00. The issue is plainly one of fact.

[35] The Claimant grudgingly admitted to having registered the business name although she sought to suggest that this was done out of convenience as she lived in Belmopan in close proximity to the Belize Companies and Corporate Affairs Registry. This might be so, but the document described the Claimant and the Defendant as partners and they both signed the application form in that capacity.

[36] The Claimant was hardly indifferent to or disinterested in the business as the facts revealed that she visited the office space of Troystar and was copied with the email correspondence. Indeed, Mr. Sobers addressed his emails to both parties. The Claimant in her witness statement protested that the Defendant had made decisions about the intended use of the \$50,000.00 without consulting her, which is hardly expected as a conduct from one who had merely made a loan at the request of another.

[37] The ‘so-called’ promissory note does not contain language that expresses a promise being made by the Defendant to repay the Claimant the whole amount of \$50,000.00. As a matter of fact, admitted by the Claimant, the document inaccurately states that the monies were paid to the Defendant, when the sums were paid by the Claimant directly into the bank account of Mr. Sobers. The document is stated to be acknowledgement and accordingly cannot put the relationship any higher than existed from its inception. As I see it, the document was intended to reassure the Claimant that the Defendant would pursue the recovery of the \$50,000.00.

[38] The evidence at trial of Maria Teck is of some significance as she departed from her witness statement in cross-examination when she told the Court that all the Defendant said was that he had no problem with the document and signed it. The Court accepts Ms. Teck's viva voce testimony.

[39] Further evidence of the partnership to invest in the establishment of a Call Center is to be found in paragraphs 21 and 22 of the Claimant's own witness statement wherein she admitted to having an interest in the intended use of the \$50,000.00 and to having invested alongside the Defendant.

[40] In all probability, viewing the evidence in the round, there existed an arrangement between the Claimant and the Defendant to make a joint investment of \$50,000.00 using monies borrowed in the name of the Claimant and paid over to Malcolm Sobers. The evidence from the Defendant is consistent with this factual conclusion.

[41] Accordingly, the Claimant is not entitled to judgment on the remaining sum of \$25,000.00 and the balance of the claim is dismissed. The judgment on admission already entered in favour of the Claimant at the stage of Case Management Conference entitles the Claimant to 55% of the prescribed costs. However, the Defendant having successfully defended against the sum of \$25,000.00 is entitled to his prescribed costs of \$6,250.00. Therefore, the Court awards the Defendant the difference of costs in the sum of \$3,000.00. It is further ordered that the stay of execution imposed on February 25, 2014 in respect of the Ancillary Claim be discharged forthwith.

KENNETH A. BENJAMIN
Chief Justice