COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/CLE/gen/00689

IN THE MATTER of certain provisions of the Central Bank of the Bahamas Act.

AND IN THE MATTER of certain provisions of The Banks and Trust Companies Regulation Act of The Bahamas.

AND IN THE MATTER of The Exchange Control Regulations 1956.

AND IN THE MATTER of a Permit dated 29 June 2016 issuing from the Exchange Control Department of The Central Bank of The Bahamas.

BETWEEN

MAURICE O. GLINTON

(in the practice of law under the name and style of Maurice O. Glinton & Co.)

Plaintiff

AND

SCOTIABANK (BAHAMAS) LIMITED

Defendant

Before Hon. Mr. Justice Ian Winder

Appearances: Maurice Glinton QC with Meryl Glinton for the Plaintiff

John Wilson with Krista Moxey for the Defendant

28 May 2018, 12 June 2018, 28 June 2018 (Plaintiff Reply Submissions) and13 September 2018 (Defendant Reply Submissions)

JUDGMENT

WINDER, J.

[1.] The Plaintiff ("MG"), who sues in the name of his law firm, which operates in The Bahamas, brings these proceedings as a result of what he contends was the involuntary and without notice closure of his US$ client bank account with the Defendant (Scotiabank) on 23 November 2016 the B$ clients account from about 17th November 2016.

[2.] The action began with the Central Bank of The Bahamas as a party. The Central Bank has since been removed and the proceedings continued only against Scotiabank.

[3.] According to MG, he opened the US$ account since January 2000 and save for one occasion when the Firm neglected to provide Scotiabank with an original copy of a renewed Central Bank Permit to continue to maintain its a US Dollar Clients account, its access to the facility was never impeded or interrupted by Scotiabank. The US$ account was last renewed by Scotiabank on 29 June 2016. MG says that it discovered the closure of the US$ account by chance when he met with the branch manager.

[4.] Scotiabank, sought to justify its action on the basis of MG's failure to respond to correspondence requesting updated information. Scotiabank says that in seeking to comply with its obligation to ensure that it possessed updated *"Know Your Customer"* (KYC) information on all of its customers, numerous attempts were made to obtain requested KYC information from the Plaintiff. Scotiabank detailed the following attempts to obtain the information requested:

a) By letters dated 5 December, 2014 and 17 March 2015 it requested updated account information from MG but received no response.
b) On 18 March, 2016 it's Small Business Banking Manager for its Freeport branch Ms. Sherell Bullard and Banking Business Officer

Ms. Patrice Russell attended personally at MG's office to see if the requisite KYC information could be obtained directly from MG but was unsuccessful.

c) On the 23 March, 2016 Ms. Bullard followed up her visit with an email request for the following documents:
   i. A business license for the firm
   ii. Certificate of registration
   iii. Current certificate of good standing-GBPA
   iv. Current certificate of good standing-Registrar
   v. Current certificate of good standing – Bahamas Bar Association
   vi. Up to date E-passport for the Plaintiff
   vii. Up to date Driver's license for the Plaintiff
   viii. Recent utility bill with street address for the Plaintiff
   ix. Complete Business Account & Services Application (BASA)

[5.] Scotiabank accepted that on 7 April, 2016, MG provided copies of three of the nine documents requested, namely: MG's insurance Card; MG's passport; and MG's GB power bill. They maintained that up to the date of the account closure MG had still not provided the remainder of the information requested. They say that on 17 November 2016 its branch and retail management it took the decision to close both of the accounts of MG.

[6.] MG says that the information was already in its possession having been provided to Scotia by hand in respect of the operating of the B$ Account sometime in mid-2015 in an envelope containing all of the items listed in the letter of 5 December 2014, except (i) a Current Certificate of Good Standing (which he says only applies to a body corporate); (ii) a second form of identification which is the National Insurance Board Identification Card that was eventually e-mailed to it on 26 July 2016; and (iii) address verification for the Firm.

[7.] MG says "so long as [it is not] alleged or suggested to be operating the Facility and/or the Account in a grossly negligent manner so as to give rise

to suspected fraud or other criminal activity or to expose [Scotiabank] itself to unusual or inordinate risk, or civil or criminal liability, [it is not liable] to closure until reasonable notice of termination of the relationship is given". Further "in the specific case of the US$ Facility, Scotiabank would have had to obtain permission of Exchange Control before proceeding to close it." MG contends that Scotiabank did not exercise any caution or restraint out of respect for the legal obligations and duty it owed to him as its customer.

[8.] Scotiabank says that whilst the plaintiff's verification documents had not been updated since 1993 with the initial opening of the plaintiff's B$ account, the evidence shows that Scotiabank took extraordinary efforts to obtain the necessary verification documents from the plaintiff. MG, they say stubbornly refused to provide the necessary documentation, even though a manager of Scotiabank took the initiative of visiting the plaintiff's office to obtain the necessary documentation to no avail.

The SBFSA

[9.] Scotiabank says that these accounts were governed by the Small Business Financial Services Agreement (SBFSA) which set out detailed terms on which small business accounts would be managed by Scotia. Under the SBFSA, Scotiabank says that:

a) it had the right to terminate any account with or without notice where the account holder "*breaches any terms and conditions of the [SBFSA] and have long outstanding unpaid service charges*";
b) the customer is obligated to "*provide the Bank with any additional information reasonably required*" by it.

Additionally, it says, as MG's accounts were in debit Scotiabank was entitled to close the accounts without notice to MG.

[10.] With respect to the SBFSA, MG contends that it is unaware how by its terms (if ever it did), that Agreement expressly or implicitly governed its

use and operation of their business accounts with Scotiabank so as to absolve Scotiabank of liability for unilaterally closing the Firm's US$ facility and the B$ Account, in derogation of protections, afforded to customers of Scotiabank and other licensed commercial banks.

The Application

[11.] The Originating Summons, so far as remained relevant as against Scotia, sought, on behalf of MG, numerous declarations which may be condensed into questions of: whether Scotiabank ought to be permitted to unilaterally impose and enforce measures which operate to prejudice or derogate from the rights and duties inherent in a banker/customer relationship; and, whether Scotiabank is contractually or otherwise legally obligated to give MG reasonable notice prior to finally closing either the US$ Facility or the B$ Account or both. In the event the Court finds in favor of MG's position it seeks an order for: (1) damages against Scotiabank for failing to give reasonable notice of the account closures, and for breach of contract and/or unlawful interference with the Plaintiff's right (or liberty) to maintain the said Accounts: and, (2) damages for personal embarrassment the Plaintiff experienced and for injury to his character and professional reputation as a counsel and attorney because of Scotiabank's preemptory and unlawful closure of either the US$ or the B$ account, or both.

The Issue

[12.] MG's principal complaint is simply that Scotiabank acted improperly when it closed the accounts and facilities and terminated the relationship without giving him of any notice of its decision and intended action, so as to afford him opportunity to make other accommodating arrangements for the convenience of his firm's clients.

Analysis and Discussion

The SBFSA

[13.] Scotiabank argue that under the SBFSA Scotiabank was entitled to close both the B$ and US$ accounts of MG without notice as it was reasonable

to do so. They also suggest that in the wake of the enactment of the Financial Transactions Reporting Act (FTRA) in December 2000 Scotiabank became subject to a statutory obligation identify and verify all of its facility holders, whether new or existing. Section 6 of the FTRA provides:

> "(1) Subject to subsection (5), where any request is made to a financial institution for a person to become a facility holder (whether in relation to an existing facility provided by that financial institution or by means of the establishment, by that financial institution, of a new facility), that financial institution shall verify the identity of that person."

[14.] MG denies that the SBFSA applies to him.

[15.] Respectfully, whilst Scotiabank says that SBFSA applies to the relationship between it and MG it has not demonstrated how this is the case. It simply says that SBFSA was incorporated into the terms of the contract, that the document was promulgated in November 2013 and is available on the Scotiabank's website. The evidence merely states, without more, that according to Ms Ambrosine Huyler of Scotiabank, the SBFSA was an addendum to the banking contract. This document clearly came into effect after the contractual arrangements with the parties were made, making it difficult to appreciate a unilateral variation of the banking contract. It is also noteworthy that Scotiabank does not respond to MG's assertion that the SBFSA does not apply him.

[16.] In the circumstances I am not satisfied, on balance, that the SBFSA was incorporated into the contractual arrangements between Scotiabank and MG as it alleges.

The right to notice of account closure

[17.] The state of the law which I accept, seems clear that in the absence of contractual arrangements to the contrary a bank could not properly terminate its ordinary banking relationship with its customer without the

giving of reasonable notice. The learned authors of ***Chorley's Law of Banking*** sets out the proposition as follows:

> The banker, however, cannot close the account without giving reasonable notice. The length of such notice will depend on the character of the account and the circumstances of the case.... The customer must be given time to make such arrangements as are necessary to protect his credit.

In ***Joachimson v. Swiss Bank Corporation [1921] 3 KB 110, Atkin LJ*** stated:

> The question seems to turn upon the terms of the contract made between banker and customer in the ordinary course of business when a current account is opened by the bank... [and] it is a term of the contract that the bank will not cease to do business with the customer except on reasonable notice.

More recently, the Judicial Committee of the Privy confirmed this position in the case of ***National Commercial Bank of Jamaica v. Olint Corporation Ltd. Lord Hoffmann*** delivering the judgment of the Board, stated as follows:

> Their Lordships have no doubt that in the absence of express contrary agreement or statutory impediment, a contract by a bank to provide banking services to a customer is terminable upon reasonable notice: *Paget's Law of Banking*, 13th ed (2007) p 153.

[18.] I am not satisfied that Scotiabank provided any notice to MG. Scotia suggests that it provided notice to MG by way of the letter of 17 March 2015. Respectfully, that letter gave no such notice of the closing of the account as it merely provided that: "failure to provide the updated documentation can affect the further operation of your account". As MG points out, it does not state how the operation may be affected nor does it give any time frame after which such operation may be affected. Closure is not the only means of affecting the further operation of the account. I am fortified in my view that the letter could not amount to notice since the said letter was sent a full year and a half prior to the closure of the account.

Additionally some compliance by MG as well as other intervening Scotiabank correspondence (such as the email of 23 March 2016) requesting new and additional material made the effect of any such notice otiose.

[19.] Scotiabank's failure to give due notice of the closure of the account is compounded by the fact that it also failed to notify MG even after the closure of the account.

[20.] Scotiabank's case seems to be that, under the common law, if a customer breaches a term which is a condition of the banker and customer relationship, the banker is entitled to close the account and the only relevant question is whether or not Scotiabank was obligated to give the MG notice of the closure. Scotiabank alleges that no notice is necessary if the account is in debit. Scotiabank relies upon the English High Court decision in ***Prosperity Limited v Lloyds Bank Limited (1923) 39 TLR 372*** and on the following dicta of ***McCardie J.***:

> **"...there was no doubt that banker had a right to close at any time an account which was in debit,** but in the case of an account which was in credit he must give reasonable notice, which would vary according to circumstances; and there might be special arrangements between the banker and the customer as to what notice would be required."

[21.] I accept MG's submission that the ***Prosperity Limited*** case should be distinguished. Firstly, these accounts was not closed by Scotiabank as a result of any debit position but because it was felt that MG was non-compliant with its several requests for information. Secondly, the statement of ***McCardie J.*** relied upon by Scotiabank was obiter dicta as the facts of ***Prosperity Limited*** was not one of an account in debit and therefore it did not impact the ***ratio decidendi***. Thirdly, the facts of the case are distinguishable. In that case Lloyds Bank sought to terminate the relationship based upon criticisms of Prosperity Limited's insurance

business which appeared in the Press and the bank determined that it did not want to be associated Prosperity's insurance. The Note to the report of the case demonstrates that any dicta arising therefrom represented the exception rather than the rule. The Note provided:

> In his summary of the relation of banker and customer in *Joachimson v Swiss Bank Corporation*, [1921] 3 KB 110, *ante*, p. 233 Atkin, L.J., says: "It is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice." He seems, however, to contemplate only such period of notice as may provide for outstanding cheques. *Cf. Buckingham v London and Midland Bank*, 12 Times LR 70. The circumstances of the present case were exceptional and point to a possible danger with regard to banks who allow themselves to be nominated as agents for receiving subscriptions to commercial undertakings. (emphasis added)

[22.] In all the circumstances therefore I am satisfied that the dicta in ***National Commercial Bank v Olint*** represents the state of the law as it relates to this case, unqualified by the dicta in ***Prosperity Limited***, requiring the bank to give reasonable notice of the intent to close the account and terminate the banking relationship. The bank must apprehend that immediate closure without notice potentially jeopardizes outstanding cheques of the customer.

[23.] Even if I had accepted that the dicta in ***Prosperity Limited*** represented the qualified state of the law, I am satisfied that the special facts of the instant case ought not to permit the closure of the account without notice to MG. Both the US$ and the B$ accounts went into debit as a result of Scotiabank debiting these accounts to settle its service charges. Such facts, in my view, ought only to impact how much notice was reasonable in the circumstances and could not vitiate the obligation to give notice. Where, as in the case here, the accounts were slowly headed for a debit position as a result of the successive monthly service charge debits,

Scotiabank ought to have notified MG that it would close the account when the amount fell in a debit position. Additionally, in the case of the US$ account, some consideration must be made for the fact that MG could not personally put the account into credit, as it required US$ which could only occur by a deposit by a foreign client.

[24.] Even if I found that the SBFSA applied in this case, a careful reading appears to give Scotiabank a discretion to terminate the account where a customer breaches any of the terms and conditions of the agreement or have long outstanding unpaid services charges. These terms do not lend themselves to automatic closure and gives the discretion to Scotiabank to act towards closure. There must exist an expectation in the customer that Scotiabank will act reasonably is utilizing this provision of the SBFSA. In all the circumstances therefore I am not satisfied that Scotiabank would have exercised this discretion reasonably to have terminated the account without notice.

[25.] I was also not satisfied that Scotiabank's argument that outstanding matters under the FTRA warranted the immediate closure of the account. MG asserts that only 3 items remain outstanding, having delivered the items in an envelope under cover of letter dated 5 December 2015. Such matters as remained outstanding from the correspondence of 5 December, 2014, 17 March 2015 or 18 March 2016 did not, in my view, prohibit Scotiabank from verifying the accounts of MG. Having physically visited the office and having verified MG in the past these matters ought not to have caused such concern to demand the closure of the accounts in November 2016 without notice. At best the amount of notice which may have been considered reasonable would have been shorter.

Conclusion

[26.] In the circumstances therefore I am prepared to make the following declarations:

(1) Scotiabank may not unilaterally impose and enforce measures which operate to prejudice or derogate from the rights and duties inherent in a banker/customer relationship;

(2) Scotiabank was contractually or otherwise legally obligated to give MG reasonable notice prior to finally closing either the US$ or the B$ account or both.

[27.] On the question of damages there is little by way of actual damage. MG speaks of learning of the account closure when he *felt the urgency to personally inquire of the Freeport Branch about a wire transfer of a sum of money the Firm had been expecting but had not received into the US$ Facility, which had unknown to him been closed.* He also says that *he would soon thereafter discover that a New Providence resident and client of the Firm who monthly deposited payments of outstanding professional fees into the B$ Account, but whom I had no opportunity to inform of the changed circumstance, had attempted to do so around the same time, only to discover that the B$ Account had been closed.* On the evidence it does not appear that any of the funds were actually lost in the specific circumstances.

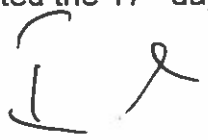
[28.] MG contends that embarrassment and inconvenience was caused by involuntary unilateral closure of the US$ and the B$ account by Scotiabank when and in the manner that it did. He also says that he apprehends that he and the firm are stigmatized and the professional reputations in the banking and wider community unjustifiably blighted, to our irremediable prejudice, for which an award of damages is hardly, if ever, adequate compensation. Given the nature of banking confidentiality, there is no evidence that the fact of the closure of the account had been published or otherwise made known outside of the specific clients and

communications between the parties. Further there was no evidence that any adverse reason for the closure of the account was given to the client.

[29.] I am satisfied that, given all the circumstances, I award MG the sum of $10,000 in damages against Scotiabank for failing to give reasonable notice of the account closures, and for breach of contract as well as damages for any professional injury as a result of Scotiabank's preemptory and improper closure of either the US$ and the B$ client account.

[30.] MG shall have his reasonable costs to be taxed if not agreed.

Dated the 17th day of July AD 2019



Ian Winder
Justice