

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION**

2017/CLE/gen/01499

BETWEEN:

MACUSHLA PINDER

Plaintiff

AND

SCOTIABANK (BAHAMAS) LIMITED

Defendant

Before: The Honourable Mr. Justice Keith H. Thompson

**Appearances: Mr. Darren O. Bain of Counsel for the Plaintiff
Mr. Raynard Rigby along with Ms. Candice Ferguson of Counsel for
the Respondent.**

**Dates of Hearing: 31st October, 2018
28th May, 2019
11th & 12th June, 2019
17th July, 2019**

RULING

[1] This action was begun by Writ filed on December 21st, 2017. The Writ is generally indorsed and provides:-

“The Plaintiff was all material times a client of the Defendant. The Plaintiff’s claim as against the Defendant is for damages arising from the Defendant’s negligence and breach of fiduciary duty and contract as between the Plaintiff and Defendant. The Defendant failed to:-

- (i) monitor or properly monitor the Plaintiff’s account;**
- (ii) failed to provide regular monthly statements and**
- (iii) failed to prevent the issuance of an authorized debit card.**

As a result of the Defendant’s breach of contract and fiduciary duty and negligence failure to prevent the issuance of an authorized ATM Card, and failure to properly monitor the Plaintiff’s account the Plaintiff has suffered loss and damage.”

[2] The Statement of Claim was filed June 21st, 2018 and provides:-

“STATEMENT OF CLAIM

- 1. The Plaintiff is a citizen of the Commonwealth of the Bahamas and at all material times a Customer of the Defendant.**
- 2. The Defendant is a commercial bank carrying on business in The Bahamas which has at all material times as part of its business *inter alia* carried on the receiving of deposits and lending of money in the Bahamas.**

- 3. On/about the year 2009, the Plaintiff in her name only, opened a savings account (the 'Account') at the Defendant's branch situated at East Street and Soldier Road ('the Bank'). The Plaintiff was the sole signatory on the Account.**
- 4. The Plaintiff authorized and was issued one ATM Card ('the Card') for the Account in her name only.**
- 5. The contractual relationship between the Plaintiff and the Defendant for the Account and use of the Card were governed by the Personal Financial Services Agreement (The 'PFSA') the Scotiacard Cardholder Agreement ('the Agreement') and any revisions made to these documents.**
- 6. Since the opening of the account, the Defendant did not issue to the Plaintiff printed statements of her account activities and ceased on/about 2015 to update her passbook. By these actions of the Defendant, the Defendant assumed and had the duty to regularly monitor the Account and/or to promptly advise the Plaintiff of any unauthorized transactions and/or transactions inconsistent with the Account's history.**
- 7. On/about the 23rd February 2016, the Plaintiff attended the Defendant's Palmdale location to make an over the counter withdrawal. At this time, the Plaintiff inquired of the teller of the Account's balance. The attending teller, stated the balance. The Plaintiff requested and received a statement (the '2015 Statement').**
- 8. Upon her review of the 2015 Statement she observed the following:-**

- i. **between the period of 30th September 2015 and 19th February 2016, there were numerous unauthorized debits on the Account. Each of the value of \$1,000.00;**
 - ii. **there were occasions where there were two debits of \$1,000.00 each on the same day;**
 - iii. **the unauthorized debits were done via various ATM machines in New Providence;**
 - iv. **of particular note, debits were done on the 23rd, 28th, 29th and 30th December 2015.**
9. **During the dates of 23rd, 28th, 29th and 30th December, 2015, the Plaintiff travelled to the United States of America.**
10. **While in the United States, the Plaintiff had the Card in her possession and used it to make minimal purchases.**
11. **While at the Defendant's Palmdale Branch on the 23rd February 2016, the Plaintiff notified the teller of the unauthorized debts.**
12. **The Plaintiff on the same date, went into the Bank and notified the Bank's Manager, Mr. Alonzo Pratt of the unauthorized debits.**
13. **The Plaintiff met with the Defendant's chief investigator, who showed her various photos of persons at the Defendant's various ATM machines. The Plaintiff was unable to identify any of the persons shown to her.**
14. **On the 8th November 2016, while attending the Defendant's branch at Wulff Road and Jerome Avenue, the Plaintiff inquired of the Account's balance. The amount stated by the teller, caused the Plaintiff to be concerned. She requested a statement. She received one (the '2016 Statement').**

- 15. Upon her review of the 2016 Statement she observed the following:-**
- i. between the period of 20th February 2016 to 08th November 2016, there were numerous unauthorized debits. Each of the value of \$1,000.00;**
 - ii. the unauthorized debits were done via various ATM machines in New Providence.**
- 16. The Plaintiff immediately brought to the attention of the attending teller, the unauthorized debits. The Plaintiff was directed to the Bank, to receive answers to the unauthorized debits.**
- 17. At the Bank, the Plaintiff again notified, Mr. Alonzo Pratt of the unauthorized debits. Mr. Pratt asked of the Plaintiff to reduce her notification in writing and submit a request for police investigation.**
- 18. The Plaintiff via letter dated 14th November 2016, addressed to Mr. Pratt, gave authorization for the police to conduct an investigation, outlined the period of unauthorized debits and demanding an immediate credit to the Account of all unauthorized debits.**
- 19. The 2015 and 2016 Statements, produced by the Defendant, do show that for the period of September 2015 to November 2016, the Plaintiff has suffered a loss of Twenty-Seven Thousand Five Hundred Dollars (\$27,500.00).**
- 20. The Defendant has not honored the Plaintiff's demand.**

- 21. The Defendant is in breach of the PFSA, the Agreement and its fiduciary duty.**

PARTICULARS OF BREACH

- i. The Defendants and/or their agents issued and activated and/or caused to be issued and activated a second ATM card for the Account that was not requested an/or authorized by the Plaintiff;**
- ii. The Defendant's computer network and security systems failed to detect that an unauthorized ATM card was being used in the Bahamas while the Plaintiff was using the Card outside the Bahamas;**
- iii. The Defendant's computer network and security systems failed to detect that an unauthorized ATM card was in use;**
- iv. The Defendant and/or its employees or agents, failed to detect that an unauthorized ATM card was in use;**
- v. The Defendant's computer network, security systems and/or servants or agents, failed to detect that unauthorized ATM card withdrawals were made that exceeded the daily Card limit;**
- vi. Failed to send to the Plaintiff's address or provide at all, statements for the Account;**
- vii. Failed to update the Plaintiff's passbook;**
- viii. Failed to detect the unauthorized debits on the Account and alert the Plaintiff of the same;**

- ix. **Failed to investigate the unauthorized debits on the Account;**
 - x. **Failed to regularly and properly monitor the Plaintiff's account;**
 - xi. **Failed to be in receipt of all monies deposited by the Plaintiff and repay the same to her at the time of her demand; and**
 - xii. **Failed in all circumstances to exercise due care and act in the best interest of the Plaintiff.**
22. **As a result of the Defendant's breach herein complained of the Plaintiff has suffered loss and has been put to cost and expense.**

PARTICULARS OF LOSS AND DAMAGES

- I. **Loss of B\$27,500.00;**
- ii. **Interest;**
- iii. **Loss of use of monies**

AND the Plaintiff claims:

- 1. **The sum of B\$27,500.00;**
- 2. **Interest;**
- 3. **Damages;**
- 4. **Costs;**
- 5. **Interest on (1) and (2) above pursuant to the Civil Procedure (Award of Interest) Act, 1992;**

6. Such further and other relief as the Court may deem just.

[3] The Defence to the Statement of Claim is as follows:-

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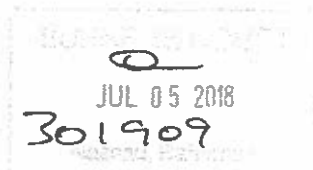
MACUSHLA PINDER

Plaintiff

AND

SCOTIABANK (BAHAMAS) LTD

Defendant



DEFENCE

INTRODUCTION

1. This Defence is filed on behalf of the Defendant, Scotiabank (Bahamas) Ltd ("The Defendant"), in opposition to the claims made against it by the Plaintiff herein, as contained in the Statement of Claim filed herein on 21st June 2018 ("the Claim").
2. In this Defence:
 - 2.1. Save where otherwise stated, references to paragraphs and paragraph numbers are references to paragraphs in the Claim.
 - 2.2. Save as is expressly admitted or expressly required to be proved or where expressly no admissions are made below, each and every allegation contained in the Claim is denied.
 - 2.3. Where appropriate, the definitions in the Claim are adopted herein, but no admissions are otherwise made.
 - 2.4. Headings are used to divide this Defence into sections.

SUMMARY

3. The Defence of the Defendant is in summary:
 - 3.1. It is denied that the Defendant breached any agreement between itself and the Plaintiff or any duty owed by it to the Plaintiff as alleged or at all. At all material times the Defendant acted as a reasonably prudent bank would in the circumstances of the instant case.
 - 3.2. No loss allegedly suffered by the Plaintiff was caused or contributed to by the Defendant. In the alternative, any such alleged loss suffered by the Plaintiff is due to her own negligence and or breach of the contractual terms between the Plaintiff and the Defendant.

Particulars of Defence in response to claim.

4. Paragraph 1 of the Claim is admitted.
5. Paragraphs 2 of the Claim is admitted.
6. Paragraph 3 of the Claim is admitted.
7. Paragraph 4 of the Claim is admitted.
8. Paragraph 5 of the Claim is admitted.
9. Paragraph 6 of the Claim is denied. The Defendant states that pursuant to the terms of the Personal Financial Services Agreement between the Plaintiff and the Defendant that it was the duty of the Plaintiff to update her passbook and regularly monitor her account to verify that all transactions have been properly recorded. If upon review the Plaintiff determined that entries on the account were inaccurate, then it was her duty to immediately report such inaccuracies to the Defendant.

10. Paragraphs 7-10 of the Claim are denied. The Defendant states that on 23rd February 2016 the Plaintiff visited the Defendant and advised that several transactions occurred on her account during the period September 30, 2015 -February 16, 2016 which the Plaintiff alleged were unauthorised. In order to consider these claims, the Defendant printed account statements for the Plaintiff's review wherein she identified ATM withdrawals during the aforesaid period which totalled \$17,500.00. The Plaintiff was asked whether she was presently in possession of her ATM card, to which she replied "no", indicating that she was unable to locate her ATM card as of September 2015. However, the account statements confirmed that the ATM card was used in December 2015 at several point of sale locations abroad, which the Plaintiff confirmed she had authorised. The Plaintiff then stated that she had found her card for such purposes, but that she had misplaced her card sometime later as she was at the time not in possession of same. The Plaintiff in breach of her agreement with the Bank did not timeously advise the Bank of the allegedly misplaced ATM card. In the circumstances the Defendant cancelled the alleged misplaced card and issued the Plaintiff a replacement card which was appropriately pinned. The Plaintiff's claims were forwarded to the Defendant's Security and Investigation Team for an investigation. An internal review of the Plaintiff's card history confirmed that all of the ATM withdrawals queried and said to be unauthorised were performed with the Plaintiff's card using the unique and personalised PIN (electronic signature), belonging to the Plaintiff.
11. Save that the Defendant states that the Plaintiff alleged not to have identified any of the persons shown to her, paragraphs 11-13 of the Claim are admitted.
12. Paragraphs 14-16 of the Claim are denied. The Defendant states that in November 2016, the Plaintiff visited the Defendant and claimed that additional transactions subsequently occurring on her account were unauthorised. As before, upon an internal review of the Plaintiff's card

history it was confirmed that all of the ATM withdrawals queried and said to be unauthorised were performed with the Plaintiff's card using the unique and personalised PIN, belonging to the Plaintiff which she created after the initial complaint referenced in paragraph 10 above. Prior to the November 2016 visit (save for the initial complaint referenced in paragraph 10 above), the Plaintiff did not report or suggest that her ATM card had been compromised. In any event, the Plaintiff's ATM card was again cancelled and a replacement card was issued to her and pinned.

13. Paragraphs 17-18 of the Claim are admitted.
14. Paragraph 19 of the claim is denied.
15. Paragraph 20 of the Claim is admitted.
16. Paragraph 21 of the Claim is denied as are the particulars of breach which follow the same. There was no breach as alleged or at all. The Plaintiff is put to strict proof of the allegations raised in the Claim. The Defendant repeats paragraph 3 hereof.

No entitlement to any relief as alleged or at all

17. Paragraph 22 of the Claim is denied as are the particulars of loss and damage which follow same. In all the premises, it is denied that the Plaintiff suffered any loss cost and expense as alleged or at all or that the Plaintiff is entitled to any relief as claimed or at all. Alternatively, the Plaintiff's loss, costs and expense were caused or contributed to by her own negligence.

PARTICULARS OF NEGLIGENCE

1. Not monitoring the activity on her account so as to timeously identify anomalies;
2. Not timeously bringing alleged anomalies to the attention of the Defendant and or The Police;

3. Not timeously bringing the fact of the alleged misplacement of her ATM card to the attention of the Defendant and or the Police;
4. Not safeguarding her ATM card and/or repeatedly misplacing same;
5. In all the circumstances failing to exercise due care.

[4] The Plaintiff swore a witness statement which was filed May 27th, 2019 and is set out below:-

“WITNESS STATEMENT OF THE PLAINTIFF

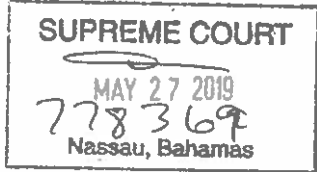
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COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
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2017

CLE/gen/01499

BETWEEN



MACUSHLA PINDER

Plaintiff

AND

SCOTIABANK (BAHAMAS) LTD.

Defendant

**WITNESS STATEMENT
Of MACUSHLA PINDER**

I, **MACUSHLA PINDER** of the Eastern District of the Island of New Providence, one of the Islands of the Commonwealth of the Bahamas make Oath and say as follows: -

ACCOUNT OPENING HISTORY

1. That I am the Plaintiff herein.
2. That I make this Witness Statement in Support of this action.
3. That sometime on/about the year 2009, I opened a savings account (the 'Account') at the Defendant's bank, situated at the Defendant's East Street and Soldier Road branch.
4. The Defendant assigned the Account the number, 19010.
5. From the date of opening the account to the date I closed it, on/about August 2017, the account was always exclusively in my name. I was the sole signatory to the account.
6. At the time of opening the account, the Defendant issue to me the following:

- i. A passbook. Whenever it was I attended the bank, I updated the Account using this book to note the Account's balance and listing of all transactions on the Account;
- ii. An ATM/ABM card. As I was the sole signatory and account holder for the Account, there was one (1) ATM/AMB card issued for the account. I never gave the Personal Identification Number ('PIN') to anyone. I never gave the ATM/AMB card to anyone; and
- iii. A Personal Financial Services Agreement (See **Tab 11** of the Defendant's Bundle of Documents).

ACCOUNT TRANSACTION HISTORY

7. At the time of opening the Account, I was advised that I could only withdraw a maximum of One Thousand Dollars (\$1,000.00) per day.
8. That since the date of opening the account, I only withdrew funds from the account in person via a teller at a branch of the Defendant's bank.
9. I have on occasion, by use of the ATM/ABM card made Point of Sale purchases.

SUSPICIOUS TRANSACTIONS

10. That sometime on/about the 23rd February 2016, I went into the Defendant's Palmdale location to report the card lost and to make an over the counter withdrawal. At this time, I asked the teller for the balance on the Account.
11. The amount stated to me by the teller, seemed odd. The balance was lower than I expected it to be. I kept a journal log withdrawals.
12. I then asked the teller for a statement/account balance. I was given a printed statement (I will herein after refer to this statement as the '2015 Statement'). A redacted¹ copy of the 2015 Statement provided to me by the Defendant is at **Tab 10** of the Plaintiff's Bundle of Documents.

¹ Only as to the total balances on the Account.

13. Since the opening of the account, the Defendant never issued to me printed statements of the Account transactions (unless requested). Sometime in 2015, the Defendant ceased to update my passbook.

14. As I reviewed the 2015 Statement, I noticed that there were several One Thousand Dollar (\$1,000.00) withdrawals listed as:

“AUTO TELLER DEBIT SBW1BW
RUBIS WULFF ROAD NASSAU, BS”
(I will herein after refer to these as the ‘Rubis Withdrawals’)

15. The 2015 Statement also revealed that:

- i. between the period of 29th September 2015 and 19th February 2016, there were eighteen (18) debits on the Account, which totaled Seventeen Thousand Five Hundred Dollars (\$17,500.00);
- ii. the Debits were for various Rubis locations using the card numbered 4303817110698209.
- iii. On the 4th January 2016 and the 21st December 2015 there were two debits of One Thousand Dollars (\$1,000.00) each on the same day; and
- iv. A Passbook Net Credit of \$14,849.90. There was no itemization as to what this net credit was for. There was also a Passbook Net Debit of \$91,979.04. Again, there was not itemization of these entries on the 2015 Statement advising as to what these sums represent and for what period.

16. I was perplexed by the 2015 Statement, given the fact that I never used an ATM machine to withdraw monies off of the account. I was even the more perplexed by the 2015 Statement wherein it recorded that:

- i. During the dates of 23rd, 28th, 29th and 30th December 2015, there were several withdrawals conducted in the Bahamas. During these dates in particular, my family and I travelled to New York. I used my card in New York during this time of travel. I had my card, the only authorized card, in my possession;


ii. Additionally on the 21st December 2015 and the 4th January 2016, there were two debits of One Thousand Dollars (\$1,000.00) on each day. This ought not to have occurred as the Account had a daily ATM withdrawal limit of One Thousand Dollars (\$1,000.00).


17. I asked the teller to explain the reason for the withdrawals to me. She could not. She then told me that it would be best for me to go to my home branch for an explanation.
18. I left the Defendant's Palmdale branch and drove directly to the East Street & Soldier Road Branch.
19. When I arrived at the East Street & Soldier Road Branch, I spoke with branch manager Mr. Alonzo Pratt. I told Mr. Pratt that the Rubis Withdrawals did not belong to me.
20. Mr. Pratt in turn asked if I was certain I hadn't given my card to someone or disclosed my card's PIN number to anyone. I told him I had not.
21. At this time, the ATM/ABM card that I had in my possession was destroyed. I was issued a new card and received a new PIN.
22. Like the previous card, I did not disclose the PIN to anyone, nor did I give permission or allow anyone to make withdrawals from the Account.
23. Sometime on/about April/May 2016, I met with the Defendant's chief investigator, Edward Smith. He showed me various photos of persons at the Defendant's various ATM machines. I was unable to identify any of these persons as they were unknown to me.
24. Sometime on/about the 8th November 2016, while attempting an over the counter withdrawal at the Defendant's Wulff Road and Jerome Avenue branch, I asked the teller for the Account balance.
25. As it was in February 2016, the Account's balance appeared to be lower than I had expected.

26. I asked the teller for a Statement. I was given a statement (I will herein after refer to this statement as the '2016 Statement').
27. When I reviewed the 2016 Statement, I observed that there were further Rubis withdrawals, each of the value of One Thousand Dollars (\$1,000.00).
28. These withdrawals were done after my first report to the Defendant in February of 2016.
29. I immediately said to the teller that the debits at the various Rubis locations were not my own. I was issued another new card with another new PIN number.
30. As before. I was then instructed to report the debits to my home branch.
31. I left the Wulff Road and Jerome Avenue Branch and went directly to the East Street and Soldier Road Branch.
32. I told Mr. Alonzo Pratt that all of the recent Rubis withdrawals were still not my own. Mr. Pratt at this point, asked me to re-submit my notification to him in writing and submit a request for police investigation.
33. By letter dated the 14th November 2016 (see **Tab 14** of the Defendant's Bundle of Documents), I gave authorization for the police to conduct an investigation, and I outlined the period of unauthorized debits. In this letter, I also demanded an immediate credit to the Account of all unauthorized debits.
34. Sometime in October/November 2016, I met with then Assistant Superintendent Barrett of the Royal Bahamas Police Force. Former Assistant Commissioner of Police, Ashton Greenslade had turned the case over to him.
35. Assistant Superintendent Barrett at his office said that there is a possibility that my card had been skimmed; that a group of men had recently been taken into custody for a similar crime and that hopefully one of the suspects would be responsible for my matter.
36. That was the extent of my involvement with the police on this matter.

37. The matter was brought to the attention of Scotiabank's upper management as a call was placed to its Managing Director, Dwight Burrows. A message was left. There was no return call. The Defendant has not refunded me any of my monies. I have lost the use of my monies, the ability to earn interest and/or to make other investments.
38. The 2015 and 2016 Statements, produced by the Defendant, do show that for the period of September 2015 to November 2016, the Plaintiff has suffered loss.
39. The contents of this Statement are correct and true.

SWORN at Nassau,)
Bahamas, this 24th day)
of May A.D., 2019)



Before me,

NOTARY PUBLIC



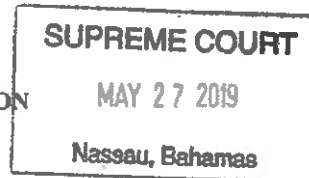
[5] The Defendant in its defence filed three sworn witness statements.

WITNESS STATEMENT OF SHERELLE MINNIS

**The Defendant's Witness
Witness Statement of Sherelle Minnis**

**COMMONWEALTH OF THE BAHAMAS
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BETWEEN**

2017



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MACUSHLA PINDER

Plaintiff

AND

SCOTIABANK (BAHAMAS) LTD.

Defendant

WITNESS STATEMENT OF SHERELLE MINNIS

I, **SHERELLE MINNIS**, of the Eastern District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas **SAY** as follows:

1. I am an employee of the Defendant Bank having joined the Bank in August 2001.
2. I presently serve as Assistant Manager, Services and Support at the Bank's East Bay Street Branch. I joined the Branch in June 2018. My duties include general oversight of the operations of the Branch inclusive of human resources, customer services and the Bank's ATMs.
3. I am familiar with the Plaintiff because in November 2016 she made a complaint of unauthorized transactions on her savings accounts. I was stationed at the Bank's Branch located at East Street South and Soldier Road at that time, serving in the position of Assistant Manager, Services and Support. Mr. Alonza Pratt was the Branch Manager.

The November 2016 incident

4. In my role, I was responsible for submitting Mrs. Pinder's complaint to the Bank's Security and Investigation Department. On 8th November, 2016 I completed the Large Incident Report ("**LIR**"), providing a description of the incident as shared by Mrs. Pinder. The LIR is a standard report which records the circumstances when a customer

alleges that funds were removed without their authorization from an account at the Bank. In the case of Mrs. Pinder, her complaint was that her Visa Debit Card (“the Card”) was compromised and that 17 ATM withdrawals which occurred from 5th September to 3rd November, 2016 were fraudulent. She also reported that she went to the Palmdale Branch to get a replacement Card and that when the transactions were conducted she was not able to locate her Card.

5. The Bank did not reimburse Mrs. Pinder for the sums that she alleged was withdrawn from her account without her authorization because the correct Personal Identification Number (“PIN”) was used in all instances. It was the Bank’s view that based on the conduct of the transactions on Mrs. Pinder’s account reimbursement was not warranted. Additionally, it appeared that Mrs. Pinder was not taking all diligent steps to safeguard the Card and the PIN. The fact that she could not locate the Card suggested that she may not have been as careful with its storage and safety as possible. She also did not report the missing Card to the Bank and hence no preventative steps could have been taken to remove the Card from the system and delist the PIN.
6. The Bank’s Personal Financial Services Agreement mandates that customers report a missing card promptly to the Bank and it also highlights the importance of a customer securing the card and the PIN. The Agreement sets out the specific circumstances when the Bank will be liable for withdrawals from a customer’s account; of which none applied in the case of Mrs. Pinder. Mrs. Pinder had the benefit of the Bank’s standard terms and conditions governing the use of her account and the Bank issued Card.

The Bank’s system and the PIN

7. The Bank’s uses an encrypted card with a PIN that is inserted by the customer. The Bank is not aware of a customer’s PIN. Only the customer has the benefit of knowing the PIN as well as any one that the customer tells or shares that information with. The Bank typically tells its customers to maintain the PIN in the strictest confidence.
8. When a customer is given a bank issued card, whether it is a credit or debit card, the customer is allowed to insert a four-digit PIN and once that is keyed into the Bank’s central computer, it identifies the customer and his card. One PIN is used per card.
9. As far as the Bank’s records indicate, Mrs. Pinder had one card for the account. That card would have had its own PIN. For that PIN to be used, the customer had to use the Card or allow someone to use the card with the PIN.
10. In the case of the transactions involving Mrs. Pinder’s Card, the Bank was able to determine that the correct PIN was used.

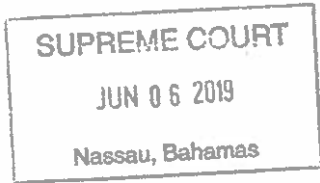
11. Upon receipt of Mrs. Pinder's complaint and the completion of the LIR the Branch reported the matter to the Corporate Security, Investigation Services department for an investigation to be conducted.

12. The contents of this witness statement are true and correct.

DATED the 22nd day of May, 2019


.....
SHERELLE MINNIS

WITNESS STATEMENT OF ALONZO PRATT



**The Defendant's Witness
Witness Statement of Alonza Pratt**

**COMMONWEALTH OF THE BAHAMAS
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MACUSHLA PINDER

Plaintiff

AND

SCOTIABANK (BAHAMAS) LTD.

Defendant

WITNESS STATEMENT OF ALONZA PRATT

I, **ALONZA PRATT**, of the Eastern District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas SAY as follows:

1. I am a Branch Manager of the Defendant Bank stationed at Paradise Island Branch. I joined the Bank in 2004 and have been serving as a Branch Manager for the past 6 ½ years. I also served as the Branch Manager for the Soldier Road and East Street Branch from February 2014 to April 2018.
2. In my capacity as Branch Manager I am responsible for all matters of general operations and customer relations. I often meet with customers of the Bank to ensure that they are happy with the services provided and to ascertain if they require any of the Bank's services.
3. The Plaintiff was a customer of the Bank at the Soldier Road and East Street Branch. She opened a joint savings/deposit account on 24th November, 2009 along with Sybil Darville. The account details were such that it required one signature to authorize payments and general instructions. The account's record keeping was by way of a passbook. The account application did not provide for any withdrawal activity, only deposit activity. The deposit activity is to assist the Bank in being aware of the customer's profile as well as expected activities. For this type of account, it is

customary for no withdrawals activity to be provided to the Bank given the fact that it is a savings account.

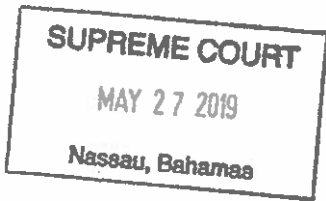
4. The account application signed by Mrs. Pinder and Ms. Darville confirmed that they were provided with a copy of the Bank's standard terms and conditions set out in the Personal Financial Services Agreement ("the Agreement"). Customers are always asked to read the booklet to be familiar with the terms governing the operation of the account.
5. I recall that Mrs. Pinder was the primary person who would deal with the account and would often come to the Branch to update her passbook and make general banking inquiries. I recall that sometime around April 2016 I informed Mrs. Pinder that the Bank will cease to use passbooks and I suggested that she sign up for Internet banking. Given that she was a young customer I thought that Internet banking was best suited for her to monitor her account details and activities.
6. On 23rd February, 2016 Mrs. Pinder came into the Branch and informed me that a substantial amount was withdrawn from her account during the period 30th September 2015 to 19th February, 2016 and that she had no knowledge of the withdrawals. I had a teller print the activity of her account and had her identify the various disputed withdrawals. The disputed amount of the withdraws total \$17,500. I informed Mrs. Pinder of the Bank's process to investigate these matters and promised to get back to her. I also suggested that she send me a formal letter setting out the details of her complaint.
7. On 13th May, 2016 I received a letter dated 1st May, 2016 from Mrs. Pinder. The matter was dealt with by the staff in the Bank and a Large Incident Report ("LIR") was completed. I referred the matter to the Bank's Security & Investigation department led by Edward Smith.
8. During the course of the Bank's investigation, Mr. Smith shared with me that all of the withdrawals were carried out by the Bank issued Card to Mrs. Pinder and the correct Personal Identification Number ("PIN") attached to her account. I recall having a conversation with Mrs. Pinder about this conclusion. It was at this time that a new Card was issued to her and she was allowed to enter a new PIN. The old Card was destroyed and removed from the system.
9. Due to the fact that all of the disputed withdrawals were actioned by the Card issued to Mrs. Pinder and the corresponding PIN and were not disclosed to the Bank within the 30 days after they occurred as set out in the Bank's standard Agreement, the Bank decided to refuse to refund Mrs. Pinder's account.

10. Mrs. Pinder visited the Branch once again on the 8th November, 2016 to complain of another series of disputed withdrawals on her account. On this occasion she suggested that the total sum of \$17,000 was withdrawn without her authorization during the period of 5th September to 3rd November 2016. A LIR was also completed for this incident.
11. I received a letter dated 14th November, 2016 from Mrs. Pinder which indicated that she had reported the matter to the Police. I referred this incident to Edward Smith of the Bank's Security & Investigation department.
12. In respect of this incident, I recall that Mrs. Pinder had a replacement Card issued at the Bank's Palmdale Branch. I am not sure why she went to that Branch and not to the Branch where the Card was issued and the account kept.
13. The Bank also refused to reimburse Mrs. Pinder for the sums that she alleged was withdrawn from her account without her authorization because the Bank issued Card and the correct PIN were used for all of the withdrawals.
14. I also cautioned Mrs. Pinder that she should be careful where she leaves her Card and not to disclose the PIN to anyone. It appeared to me that Mrs. Pinder may not have taken care to protect the Card and the PIN. She indicated that she had misplaced the Card but did not bother to report the missing Card to the Bank.
15. The Bank's standard Agreement requires customers to immediately report a missing or lost card to the Bank. This is for the customer's protection and to avoid the card from getting into the hands of unscrupulous persons.
16. As far as I can recall only one card was issued at a time for Mrs. Pinder's account.
17. The contents of this witness statement are true and correct.

DATED the 4th day of June, 2019


.....
ALONZA PRATT

WITNESS STATEMENT OF EDWARD SMITH



The Defendant's Witness
Witness Statement of Edward R. Smith

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
BETWEEN

2017

CLE/gen/01499

MACUSHLA PINDER

Plaintiff

AND

SCOTIABANK (BAHAMAS) LTD.

Defendant

WITNESS STATEMENT OF EDWARD R. SMITH

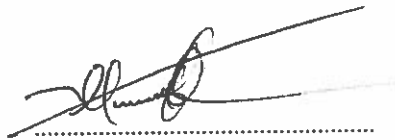
I, **EDWARD R. SMITH**, of the Western District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas SAY as follows:

1. I am the Senior Manager with responsibility for Corporate Security, Investigation Services at the Defendant Bank. I joined the Bank on 1st March, 2010 and is a former member of the Royal Bahamas Police Force. My career on the Police Force span from 11th May, 1979 to 30th June, 2009. I spent some years investigating commercial and cybercrimes.
2. In my role as Senior Manager I am the Bank's chief investigator and hence I review complaints made by the Bank's customers involving their accounts.
3. There were two allegations that were referred to me involving the unauthorized use of the Visa Debit Card for Macushla Pinder's account at the Bank ("the Card"). The incidents were reported to me around March and November of 2016. The March incident led to a thorough investigation by me and I discuss the details hereinafter. The incident which occurred in November 2016 was also investigated by the Bank after the matter was brought to my attention by the Police. The investigation identified the location of the withdrawals and sought to obtain images of the person/s making the withdrawals, which proved to be unsuccessful. The Police had requested images of the

person/s who made the withdrawals to assist their investigation. The Bank was unable to provide the same.

4. As a part of my investigation of the March 2016 incident, I retrieved copies of the Bank's Online Banking Processing Trial Balance ("**Trial Balance**") Reports for the period of the disputed transactions relating to Mrs. Pinder's card and sourced her card number with the ATM location (17145) of the various withdrawals. To be successful with a withdrawal, the card and PIN number are required.
5. I also visited the Rubis Headquarters and spoke with management and was able to gain access to some of the video footage. I printed the photos retrieved from the surveillance footage and presented them to Miss. Pinder. She denied knowing the men in the photographs. I also provided the Police with copies of the photographs.
6. I also retrieved from Ms. Pinder her travel itinerary and carried out the standard inquiries, seeking the aid and assistance of our partners in Toronto, Canada. Once I had the information in my possession, I thoroughly reviewed them and on 29th April, 2016 I concluded my investigations into the matter. I determined that the all of the disputed transactions were in the form of ABM withdrawals using Mrs. Pinder's Debit Card and PIN.
7. The findings of the Banks' investigation were shared with Mrs. Pinder and she communicated her disappointment in the findings.
8. Based on my years of experience in investigating such matters on behalf of the Bank, it appears to me that the matter involving the withdrawals from Mrs. Pinder's account at an ABM could not have been prevented by the Bank. It must also be noted that Mrs. Pinder did not immediately report the matter to the Bank and the delay on her part may have compromised the Bank's investigation.
9. The contents of this witness statement are true and correct.

DATED the 22nd day of May, 2019



EDWARD R. SMITH

CROSS-EXAMINATION OF THE PLAINTIFF:

- [6] Under cross-examination the Plaintiff explained that the account with Scotiabank was her first and only account. The account was in her name and her Mother's name. She recalled signing the form at Tab 12 of the Defendant's bundle of documents. The form is entitled "APPLICATION FOR DEPOSIT SERVICES." The signing arrangement is for one (1) signature.
- [7] One ATM card was issued to the Plaintiff, which she pinned. No ATM card was issued to her mother. She could not say whether she had read the personal finances agreement but confirmed receiving one which she accepted governed her relationship with the bank.
- [8] The Plaintiff agreed that there was nothing in the agreement which limited her to \$1,000.00 a day. Her mother never did any transactions on the account, however, she accepted that she could have.
- [9] The Plaintiff's home branch was East Street and Soldier Road. She first discovered that her ATM card was lost or misplaced in early January however, she only reported the card being lost or misplaced on February 23rd, 2016. She was provided another card from Palmdale Branch, while there she requested a printout. Thereafter she went to her home branch and filed a complaint with Mr. Alonzo Pratt. The Plaintiff wasn't sure whether she got the new card from Palmdale or her home branch but she did receive one.
- [10] The Plaintiff never used her card in an ATM machine. She recalled using her card while on a trip to the US in December 2015. She lost or misplaced the card after she had returned from the US in January 2016, but never reported it until February

2016. Before leaving in December 2015 she says if she did carry out any transactions it would have been in the bank.

[11] The Plaintiff wrote the Bank a letter on May 13th, 2016 which is set out below.

Dear Mr. Pratt,

I do apologize for only now sending this statement, so please forgive me.

As you are well aware by now, I walked into your Soldier Road and East Street location on February 23 to inquire about a substantial amount of funds missing from my account.

Based on a print out of my transactions, several thousand dollars had been taken using my debit card, dating as far back as September 30, 2015 and as recent as February 19, 2016.

In all instances but one - January 12, 2016 - \$1000.00 was withdrawn from the ATM of Rubis Service Station's Wulff Road and Jerome Avenue location.

What is even more mind boggling is that for four days in December 2015 - December 23, 28, 29, 30 - the debit card was used when I and my family were out of the country. My account transactions would show that on both December 28, 29 and December 30, I used the debit card at several locations in Manhattan, New York.

However, even after returning home and realizing a month later that I must have misplaced the card, it was still be used. Let it be known that this account is rarely used - big purchases ONLY you might say. While I always use Rubis' Wulff Road and Jerome Avenue location, my card has NEVER been used there.

Further, NO ONE other than myself has access to my account or PIN number.

Having stated my case to Ms. Christie Strachan on February 23, it was implied by another employee that it really didn't make since to launch an investigation into the matter considering the cost to review the surveillance cameras. Mind blowing!

Be it a missing \$18,500 as in my case or \$18.50, I am a customer and it is my money. Never once though - despite what has been said - was I told that I would have to go to Rubis and personally request permission to see their surveillance tapes over the aforementioned periods.

Nonetheless, I was assured that the matter would be looked into and that it should take about 45 days. Two months, several days and a newborn later, I heard nothing from the bank until making several calls myself.

My first attempt was actually several days before speaking to you.

I have again been assured at this point that the matter is being looked into and that some headway is being made.

I trust that this is indeed the case and that all the funds PLUS interest is returned to my account forthwith.

Regards,

Michael Prandis

MAY 13 2016
\$
[Signature]

RECEIVED
MAY 13 2016
[Signature]
MANAGER

- [12] The card was eventually found in the Plaintiff's bedroom. She believes it was there from she returned from the US. It was found after she wrote the letter of May 13th, 2016. By then she had already been given a new card. She believes she brought this to the bank's attention. Counsel pointed out that nowhere in the letter of May 13th, 2016 does the Plaintiff mention finding the lost or misplaced card.
- [13] The Plaintiff confirmed that she kept a journal log of her withdrawals and confirmed that the withdrawals from September, 2015 to February 23rd, 2016 were not made by her. She did not recall going into the bank at any other time. She was aware that there were other ways of receiving balances but said that the ways she heavily relied on had ceased but she couldn't recall when the bank stopped updating passbooks.
- [14] She couldn't recall whether the bank informed her of online banking but she was aware of telebanking but was adamant that the banks should have told her what was going on with her account. She accepted that as a customer she too had a duty.
- [15] At Tab 8 of the Plaintiff's bundle of documents is the agreement which she confirmed governs her relationship with the bank. She accepted that she did not comply with the 30 day period.
- [16] The Plaintiff was aware that the bank had carried out an investigation and that the matter was reported to the police. On or about November 08th, 2016 the Plaintiff was carrying out an over the counter transaction and requested the balance on the account. Like in February of 2016, the balance appeared to be lower than the Plaintiff expected it to be. She was not yet enrolled in online banking. She accepted that at this time pass books were no longer being updated.

[17] Other transactions were discovered by the Plaintiff, all at RUBIS ATM machines. These matters were reported to the police and the bank. Being wiser now, the Plaintiff stored the new ATM card in her wallet. As to the police investigations, they showed the Plaintiff photos of a suspect and Inspector Barrett told her that it was probably a scam called skimming. As far as she was aware no one had her pin number. Even though she monitored the account, the funds were frozen.

[18] On the 8th November, 2016 when the Plaintiff went into the bank she discovered yet another transaction. She had stopped checking the account after receiving a new ATM card. She was of the strong view that the bank's system failed them and her. In the letter dated the 8th November, 2016 to Alonzo Pratt Branch Manager of Scotia Bank, Soldier Road and East Street she states;

“As a client of Scotiabank, this is not a complicated issue for me. Your systems have failed and the failures of your systems have resulted in my loss of \$34,500.00 and interest. I will not belabour this matter. I demand an immediate credit of \$34,500.00 plus interest.”

[19] She explained that when she said “systems failed” she meant checks and balances. She was of the view that the bank should have notified her. Counsel then asked her if she was advised that the card and the pin used were not coordinated.

[20] Mr. Edward Smith, the person in charge of Corporate Security, Investigation Services for the Defendant bank did show her some photos. She accepted that if the card and the pin matched that the system would not have failed. She was then shown photos at Tab 2 of the Defendant's Supplemental bundle of documents

which she acknowledged seeing before. The Plaintiff agreed that she was responsible for her ATM card and the pin.

RE-EXAMINATION OF THE PLAINTIFF:

[21] Under re-examination, the Plaintiff said she did not recognize anyone on the photos going in or coming out the RUBIS Stations. These were the same photos Alonzo Pratt would have shown her. The Plaintiff was advised at the opening of the account that she would only be able to withdraw \$1,000.00 per day. She recognized that the balance was not right because she had a ball park figure in her head.

[22] When the bank ceased using passbooks, they never advised the Plaintiff that it was mandatory to enroll in online banking. The Plaintiff was directed to Tab 12 of the Defendant's bundle of documents, the "APPLICATION FOR DEPOSIT SERVICES" form. Counsel directed her to the last box, in particular the rubric "RECORD KEEPING". When asked if she ever said to the bank that she no longer wanted to use a passbook she said "NO".

[23] The Plaintiff was directed to Tab 8, page 19 of the Plaintiff's bundle of documents and asked to read the second paragraph under 10 which provides;

"If you believe there are any errors in your paper account statement, you must tell us in writing within 30 days of the statement date. If you have a passbook account or only have a paperless record-keeping option for your account, you must tell us in writing of any error or

omission in your account entries within 60 days of the date of the disputed entry.”

[24] The Plaintiff did not resile from the position that her account was a passbook account. She was of the view that the bank took away her ability to update and she never received a paper statement. She arrived at the figure of \$34,500.00 by calculating withdrawals for the period September 2015 to November, 2016.

CASE FOR THE DEFENDANT:

[25] Counsel prefaced his case in opening by stating that this dispute is about bank and customer relationship. It's a case of creditor and debtor not a fiduciary relationship. Counsel further put that there are standard terms and conditions. There is also a verification clause which he says the Plaintiff breached, not the bank. Counsel's position is that there is nothing in the agreement which obligates the bank to verify accounts.

EVIDENCE OF ALONZO PRATT:

[26] Mr. Pratt was sworn in and his witness statement confirmed. He executed a witness statement which was exhibited at paragraph 5 above.

CROSS-EXAMINATION OF ALONZO PRATT:

[27] Mr. Pratt's evidence is that the document at Tab 1 of the Defendant's Second Supplemental Bundle of Documents and the one at Tab 8 of the Plaintiff's Bundle

of Documents govern the relationship between the Plaintiff and the Defendant. According to Mr. Pratt, the bank discontinued the use of passbooks and requested customers to sign up for online services. Mr. Pratt was directed to the Defendant's bundle of documents Tab 12, the "APPLICATION FOR DEPOSIT SERVICES" Form in particular the box which says "PASSBOOK". However, his evidence is that the bank ceased using passbooks but he couldn't recall when. However, it wasn't mandatory to move to online banking. Therefore, the only way a customer would know his/her balance would have been to physically go into the bank.

[28] Mr. Pratt was directed to the 2009 agreement and asked to read the second paragraph of clause 10, which he did. Thereafter counsel asked if he was correct in saying that because it was a passbook account, the required period was 60 days instead of 30 and he answered "Yes". I do recall that paragraph 9 of the Pratt witness statement it says;

"Due to the fact that all of the disputed withdrawals were actioned by the Card issued to Mrs. Pinder and the corresponding pin and were not disclosed to the Bank within the 30 days after they occurred as set out in the Bank's standard Agreement, the Bank decided to refuse to refund Mrs. Pinder's account."

[29] Mr. Pratt confirmed that the Plaintiff came to his office sometime in February, 2016. Paragraph 6 of Pratt's witness statement reads;

"On 23rd February, 2016 Mrs. Pinder came into the branch and informed me that a substantial amount was withdrawn from her account during the period 30th September, 2015 to 19th February, 2016 and that she had no knowledge of the withdrawals. I had a teller print the activity of her account and had her identify the various disputed

withdrawals. The disputed amount of the withdrawals totaled \$17,500.00. I informed Mrs. Pinder of the banks process to investigate these matters and promised to get back to her. I also suggested she send me a formal letter setting out the details of her complaint.”

[30] In the Defendant’s Second Supplemental bundle of documents is the 2013 Scotiabank Personal Financial Services Agreement. Counsel wanted Mr. Pratt to zero in on paragraph 6 of his witness statement the 2013 agreement and the transactions of September 2015 to November 2016. Mr. Pratt interjected that one can also go to the ATM and do a balance inquiry or get a mini-statement. He did not complete the security investigation of the Plaintiff’s complaint. However, he did review the transaction statements and the formal letter given to him by the Plaintiff. In his review, he said he confirmed that a Scotia Card was used along with a pin. When asked how he could tell, he said when he goes to her account he can see whether it was a pin or non-pin transaction.

[31] He was directed to the Defendant’s Supplemental Bundle of Documents and asked to look at page 1 item 1103 and asked to indicate where or how he could tell a pin was used. He couldn’t show where there was any indication that a pin was used. In fact, he said that entry 1103 did not provide that information. Item 1103 was a withdrawal of \$1,000.00. Items 1102, 1031, 1025, 1024, 1017, 1014, 1013, 1003, 0926, 0919, 0916, 0912, 0909, 0905, 0902, 0829, 0822 and at least twenty-two other transactions were all “AUTO TELLER” withdrawals and Mr. Pratt could not show how or where a pin was used. The majority of the withdrawals were in the amount of \$1,000.00 except two which were for \$500.00 and \$700.00.

[32] Mr. Pratt couldn’t say whether there was another document that provided the evidence of the use of a pin and he confirmed not providing the more detailed screen to his counsel. He was directed to Tab 3 of the Defendant’s Supplemental Bundle of Documents which was an “INTERNAL DOCUMENT” showing ATM

transactions, which he had seen before. When asked to show where a pin was used, he said that document didn't show that a pin was used. He couldn't say what location the document was generated from.

[33] Mr. Pratt was directed to the Defendant's Second Supplemental Bundle of Documents at page 64, the Supplemental Bundle of Documents, page 2 "0902" and also Tab 3, page 113. After reviewing the tabs and pages, Mr. Pratt couldn't say whether the Plaintiff herself went in and put in her pin. He was then asked if he was familiar with skimming and Mr. Rigby objected to the question. Counsel for the Plaintiff rephrased the question and asked Mr. Pratt what other methods could possibly have been used and he answered "SKIMMING"

[34] The hearing continued on July 18th, 2019 as did the cross-examination of Mr. Pratt. Counsel once again took him back to his witness statement in particular paragraph 8 which reads;

8. "During the course of the Bank's investigation, Mr. Smith shared with me that all of the withdrawals were carried out by the Bank issued card to Mrs. Pinder and the correct Personal Identification Number ("PIN") attached to her account. I recall having a conversation with Mrs. Pinder about this conclusion. It was at this time that a new card was issued to her and she was allowed to enter a new PIN. The old card was destroyed and removed from the system."

[35] The question put to Mr. Pratt was;

"Is it in your witness statement that you reviewed your system and concluded the same?"

[36] He answered "No Sir." Having been directed to tab 10 of the Supplemental Bundle he was asked to explain the document. He described it as being a statement given to Mrs. Pinder of her savings account. When asked if it was the same as that at tab 1, he explained that tab 10 shows the balance and tab 1 shows the history.

[37] At tab 10, pages 1,2,3,4, and 5 bottom left it says; "O WITHDRAWALS". The question to Mr. Pratt was; "How is it possible for the document to say O withdrawals?" He said that it should show the transactions in between. I hasten to point out that this, as with others is a document of the Defendant bank.

[38] Mr. Pratt was directed to paragraph 3 of his witness statement and immediately said;

"I admit that this is in fact an error because the Plaintiff made withdrawals. This account did have access and an ABM card."

[39] Paragraph 3 of his witness statement reads;

"The Plaintiff was a customer of the Bank at the Soldier Road and East Street Branch. She opened a joint savings/deposit account on 24th November, 2009 along with Sybil Darville. The account details were such that it required one signature to authorize payments and general instructions. The account's record keeping was by way of a passbook. The account application did not provide for any withdrawal activity, only deposit activity. The deposit activity is to assist the Bank in being aware of the customer's profile as well as expected activities.

For this type of account, it is customary for no withdrawals activity to be provided to the bank given the fact that it is a savings account.”

[40] Mr. Pratt was then directed to tab 1 of the Supplemental Bundle, 5th page and was asked;

“If the account history showed no withdrawals from about 2013 – 2015 wasn’t that odd?”

[41] He answered “NO SIR”. He disagreed that the pattern went outside the use of the account.

[42] Mr. Pratt was then directed to paragraphs 10 & 13 of his witness statement which read;

10. **“Mrs. Pinder visited the Branch once again on the 8th November, 2016 to complain of another series of disputed withdrawals on her account. On this occasion, she suggested that the total sum of \$17,500.00 was withdrawn without her authorization during the period of 5th September to 3rd November, 2016. A LIR was also completed for this incident.”**

13. **“The Bank also refused to reimburse Mrs. Pinder for the sums that she alleged was withdrawn from her account without her authorization because the Bank issued card and the correct PIN were used for all of the withdrawals.”**

[43] The last question put to Mr. Pratt was whether he knew if an investigation was done for the second incident and he said yes.

RE-EXAMINATION:

[44] Under re-examination, Mr. Pratt was asked to look at tab 12 of the Defendant's bundle of documents and asked if the passbook was the primary means in 2009 and he said yes Sir. He confirmed that the application said "deposit services" however, he said it was deposit and withdrawals. I point out that there is no indication on the form of withdrawals. He further confirmed that there was no credit card attached to this account.

[45] According to Mr. Pratt, it was not mandatory for the Plaintiff to use her passbook. She also had an ATM Card by which she could update. Other options were telephone banking, online banking and mobile banking which he says are set out in the agreement. Mr. Pratt said that the bank anticipated withdrawals when the account was opened. However, I take note that the application made no provision for any such withdrawals.

[46] Counsel directed Mr. Pratt to the 10th page of tab 1 of the Defendant's Supplemental Bundle of Documents, item 0218 (a withdrawal of \$1,775.00) 8th page item 0530 (a withdrawal of \$2,500.00), 7th page item 0624 which says; "FOREX DEBIT", which he said meant that the ATM card and passport was present for foreign exchange. The 6th page item 0831, 0827, 0826, 0825 and 0824, which he said were all ATM transactions.

[47] Mr. Pratt, having been directed to the 1st page of tab 10 of the Defendant's Supplemental Bundle of Documents confirmed that it was a statement for the Scotia Plus Gold, which he said was the same as the Scotiamax 1. He could not explain the difference between page 1 and page 2 ("Signature Savings Account). He again explained that the difference between tabs 10 and 1 was that tab 10 was an accumulation of the history for a certain period and these statements are mailed to the customer.

[48] Mr. Pratt further explained that he arrived at the conclusion that the card and pin were used because the system allowed him access to that information.

EVIDENCE OF SHERELLE MINNIS:

[49] Ms. Minnis executed a witness statement which is set out above at paragraph 5.

[50] After the usual formalities, Ms. Minnis under cross-examination said that she had no involvement in the February matter but she did have something to do with the September report. She liaised with the legal representatives. She did not personally verify whether a pin was used nor did she verify that the card was used.

[51] She was directed to paragraph 10 of her witness statement which reads;

10. "In the case of the transactions involving Mrs. Pinder's card, the Bank was able to determine that the correct PIN was used."

[52] When asked how this was so, she said it was based on the corporate investigation report of Mr. Edward Smith. Ms. Minnis identified the report at tab 4 of the Defendant's Supplemental Bundle of Documents as the one she was referring to. There were no further questions.

EVIDENCE OF EDWARD R. SMITH:

[53] Mr. Smith executed a witness statement. After the usual formalities he was tendered for cross-examination. His witness statement is set out at paragraph 5 above.

[54] Mr. Smith, at the time of giving evidence was the Senior Manager with responsibility for Corporate Security Investigation Services for the Defendant.

[55] During cross-examination, Mr. Smith was asked to explain skimming. He explained that it's a process where a customer's card information including a debit card is stolen, along with the Pin to perpetrate offences against the customer such as withdrawals from their account or point of sales purchases.

[56] When asked if during his career as a police officer did he have occasion to investigate crimes such as skimming, Mr. Rigby objected. However, Mr. Bain quickly pointed to the pleadings of the Plaintiff in particular paragraph 21. Mr. Bain then went to Mr. Smith's witness statement in particular paragraph 3, wherein Mr. Smith spoke of two allegations that were referred to him involving the unauthorized use of the visa debit card of the Plaintiff.

[57] As to whether Mr. Smith had prepared a report regarding the November 2016 incident, he said he did not. He however investigated the November 2016 incident to some extent. He investigated the November 2016 incident in terms of identifying where the withdrawals took place. There were seventeen withdrawal transactions disputed in November 2016.

[58] The next step was to obtain video footage of the transactions, which proved to be negative due to the fact that all of the transactions occurred at RUBIS Service Stations and they only maintain video footage for 30 days. Therefore by the time the incident came to light, the footage had already been rewritten or overwritten. He was therefore unable to provide that information to the police as requested by them for their investigation. Mr. Smith went on to say that it was the card issued to the Plaintiff.

[59] Mr. Smith was directed to the Defendant's Supplemental Bundle of Documents at tab 3, which he identified as the trial balance that he provided. He quickly realized that tab 3 was related to the March 2016 complaint and not the November complaint. Mr. Smith was hard-pressed to say which card number was used.

[60] He was then directed to tab 4, second page. Mr. Smith explained that the document at page 2 was standard practice as required by his digital forensic team. Every request is to be made in a certain format so that they could conduct the necessary analysis to assist the investigation. Mr. Smith having been directed to the box which contained a card number, explained that this was the card for the February transactions because reference was made to April 28th, 2016, when he would have received the report.

[61] No similar report was prepared for the November 2016 incident. On page 5 of tab 4 of the same bundle is a document entitled "INITIAL REPORT". Mr. Smith said that this report was prepared by him in reference to the February complaint. At the part of the document which says "FINDINGS (APRIL 29TH, 2016), Mr. Smith confirmed what he had written including "Investigations are ongoing to determine the veracity of the claim and to identify the point of compromise." Counsel wanted to ascertain from Mr. Smith how he knew that the card used was that of the Plaintiff. Mr. Smith answered by saying that the bank's records showed it was the card issued to the Plaintiff.

[62] Mr. Smith was directed to the last page of tab 4 to the last sentence, in the last paragraph which reads;

"The conclusions and recommendations in this document are opinions of the writer based on an assessment of all available information and circumstances known to security and investigation and should not be relied upon as factual or conclusive."

[63] Mr. Smith explained this by saying that the intent of the report is to report factually what occurred or what was discovered. But in the same breath when the report was sent out to the business line which would be the units within the bank, he was saying to them or cautioning them that they just couldn't rely on his report alone to make their final decisions. They should look at all the other circumstances known to them. They should look at all the policies and procedures within the bank to make a decision.

[64] Mr. Smith was directed to the page at tab 4 which says "FINAL REPORT". This relates only to the February 2016 incident. Counsel then moved on to tab 2, which contained certain photographs of several persons going into and exiting certain

RUBIS' locations. The photos were shown to the Plaintiff by Mr. Smith but she could not identify anyone in the photos. Mr. Smith also confirmed that the Plaintiff was not seen in any photo entering or exiting the various RUBIS locations. Mr. Smith disagreed that a pin wasn't always needed. In fact, he said a pin was always needed as you would not be successful with any transaction at an ABM with a debit card.

[65] According to Mr. Smith, it was common to see a fraudster being successful in skimming a customer's debit or credit card number and pin. Mr. Smith did look at the possibility of skimming. At this point, Mr. Smith advised that on the lunch break while back at his office he found correspondence where he did go to his card security center in the Dominican Republic because they are responsible for fraud monitoring and he had correspondence from them where they did not identify the card as being compromised. However, this evidence was not before the court and is of no importance.

[66] The court asked Mr. Smith if the offsite ATMs had internal cameras. According to Mr. Smith, they did not at the time in question. However, as a result of this incident, Scotia installed internal cameras in all of their offsite ATMs. Mr. Smith denied that there was any delay on the part of the Defendant to investigate because he was fully aware of the urgency especially the maintaining of footage by RUBIS.

[67] Counsel went back to tab 4, page 2 the box which says "IF PRIORITY HIGH REASON" it provides;

"Customer has disputed several ABM transactions which occurred between September 2015 and February, 2016. There has been a lapse

in the time of customer's complaint to branch and Branch escalating the matter to S & I for investigation."

[68] What counsel rightly pointed out was the fact that Mr. Smith himself said there was a lapse on the Bank's part in escalating the matter to his department. I accept whatever was written by Mr. Smith as his report. The words speak for themselves. Mr. Smith accepted that if he wrote that, he was confident that there was a lapse. Counsel put to him that the delay was not only attributed to the Plaintiff but also to the bank. Mr. Smith said "it is what it is".

[69] Mr. Smith was familiar with the financial services agreement, however, he was only aware that it required the customer to review statements in a timely manner and thereafter to bring any matters of concern to the attention of the bank. He could not recall the specific time frame. He would have had to refer to the agreement itself.

[70] He was directed to page 14 of the Defendant's Second Supplemental Bundle of Documents, which contains the agreement only. Counsel pointed Mr. Smith to the paragraphs under "VERIFYING YOUR ACCOUNTS" and asked Mr. Smith if he knew what "IF YOU OPTED TO RECEIVE" means. Mr. Rigby objected to the question but Mr. Smith answered; "IT'S A CHOICE. YOU CAN SAY TO THE BANK I WANT TO RECEIVE ELECTRONIC STATEMENTS OR YOU CAN RECEIVE PAPER STATEMENTS. IF YOU GET PAPER STATEMENTS IT COMES TO YOU IN THE MAIL OR IF YOU WANT ELECTRONIC STATEMENTS, YOU MUST HAVE ACCESS TO ON-LINE BANKING."

[71] Counsel then read that section which said;

“IF YOU OPTED TO RECEIVE ELECTRONIC ACCOUNT STATEMENTS OR IF YOU SUBSCRIBE TO A PAPERLESS RECORD-KEEPING OPTION, YOU AGREE TO GO ON-LINE AND TO CHECK YOUR STATEMENTS REGULARLY AND AT LEAST ONCE EVERY THIRTY (30) DAYS INTERNET BANKING.”

[72] Counsel then asked Mr. Smith if he would agree that the obligation to check at least once every thirty (30) days related to on-line banking but Mr. Smith said he didn't know if he could agree with that. He said he would prefer the legal minds to say as it was a legal document.

[73] He was then directed to page 15, first paragraph;

“If you believe there are any errors, omissions, unauthorized transactions or other discrepancies of any kind whatsoever, whether or not arising from unlawful or improper transactions If you have a passbook account or if you have a paperless record-keeping option for your account or if you have some other method of record-keeping (such as on-line or telephone) transaction history, you must tell us in writing of any error, omission, unauthorized transaction or any other discrepancy in your account within Sixty (60) days of the date of the applicable entry.”

[74] The question then put to Mr. Smith was;

“Would it be correct to say Mr. Smith, that the ability to report within 60 days, is where the client has the information in her passbook, if it is a passbook account?”

[74] Mr. Smith answered, “I would say so”. The follow-up question to him was; “So if they don’t have the passbook they cannot report it within 60 days.” Mr. Smith answered; “I would imagine it would be extremely difficult to report something that YOU ARE UNAWARE OF.”

[75] He was then asked if he knew what type of record keeping Ms. Pinder’s account had. He answered by saying; “I would say yes because during my discussion with Ms. Pinder I learned that she did not have access to on-line banking.” He continued; “So it means that she would have access to I guess to any other type of banking provided by the bank but not on-line banking. So she did not have the capacity to review her accounts on-line. Because this was a concern for me as well, are you able to review your accounts on-line, because if you are you can almost do it at random but this was not the case.”

[76] Mr. Smith’s further evidence was that certainly the matter was reported to the bank before it was reported to him on April 16th. However, having to then look back to 2015, was a pretty long period of time. He couldn’t say when Mrs. Pinder became aware of the suspicious transactions, but was certain that she did report it to the bank and he would have seen the necessary documentation escalating the matter to him to investigate.

[77] Mr. Smith could not recall seeing a large incident report of this matter, but he said it wasn’t necessary for him to see one and it was not a requirement for corporate security. There was a discussion as to the promptness of the Plaintiff bringing the

suspicious transactions to the Defendant and the Defendant's promptness in escalating the matter to security. Mr. Smith was of the view that if the matter had reached him promptly he would have been able to go to RUBIS and view the video footage because they only retain images for 30 days. He was only able to obtain some footage relating to the latter transactions. He was of the view that if he could have seen the videos when it first started he could have stopped it from happening.

RE-EXAMINATION:

[78] Mr. Rigby revisited whether Mr. Smith had carried out an investigation with respect to the second matter. Mr. Smith repeated that he did to a limited extent, it certainly was not as much as the earlier matter. He did basically the same thing he did in the earlier matter. He wrote a report for the earlier matter but there was no report for the latter. He simply was advising the police whether or not he had the ability to provide them with video footage of the perpetrator. He confirmed that the police were involved in the second incident. In fact the police were already involved by the time he got involved in the second incident. The police contacted him for some assistance and that was when he acted. He only became aware of it when the police came to him.

[79] Mr. Smith confirmed that a bank card was used in the second incident. He confirmed that the number on the card issued by the bank to the customer was the number used for the seventeen transactions, which were all at RUBIS Service Stations, nine at East West Highway, six at Carmichael Road, one at East and Soldier Road and one at Robinson Road. He further testified that in order for the transactions to be successful, the pin had to be present. Mr. Smith was directed to tab 13 of the Defendant's bundle of documents, second paragraph of the Plaintiff's letter to Mr. Pratt and was asked if he had seen the letter before and he answered "Yes". He also confirmed that the letter was in respect of the first

incident. As far as Mr. Smith was aware, this was the first time that the Plaintiff had officially notified the bank. Mr. Smith agreed that the Plaintiff came into the bank on February 23rd, 2016 and her letter indicated that the incidents dated from as far back as September 30th, 2015 and as recent as February 19th, 2016. He said it certainly would have been prompt in reference to the February incident because she went in in February and complained about incidents in February. As it related to the matters in September 2015, he would say no due to a lapse of several months.

[80] The last question put to Mr. Smith was if he was familiar with the bank's policy associated with the stop use of passbooks and he said "No."

THE LAW:

[81] The Plaintiff is claiming breach of contract. The Defendant in its defence claims negligence on the part of the Plaintiff. The Defendant also denies any breach of contract.

[82] The Plaintiff is a customer of the Defendant. In order to become a customer, the parties had to have entered into a contractual arrangement. That contractual arrangement is to be found in the Personal Financial Services Agreement, (P.F.S.A.)

[83] On page 7 under the rubric "OPERATION OF THIS AGREEMENT" third paragraph it provides:

“We can add or change the terms and conditions of this Agreement from time to time. Notice of additional or amended terms and conditions may be given to you through notices in our branches, and may also be given through notices in our monthly statements, ATM Screens or on public Internet sites.”

[84] The above paragraph seems to be making an attempt to reserve to the bank a right to amend or change the terms of the PSFA whenever the bank wishes to do so. However, it obligates the bank to give notices by various means to the customer. No evidence was produced to show that the Plaintiff was given any notice of any change until she went into the bank to update her pass book.

[85] Counsel for the Defendant takes the position at paragraph 9 of his closing submissions that:

“9. The Court will note that the Plaintiff’s account at the Bank reflected the terms of the Application for “Deposit Services” and its record keeping was a passbook. The account was not a passbook account. No such account exists.”

[86] While I agree in principle that the application form itself is entitled “APPLICATION FOR DEPOSIT SERVICES”, I hasten to highlight. Section 10 of the P.F.S.A. page 19 which provides;

“10. You must verify your Accounts

You must promptly review your paper account statements, internet or telephone transaction history, automated banking statement, or passbook to check and verify the entries.

If you believe there are any errors or omissions in your paper account statement, you must tell us in writing within 30 days of the statement date. If you have a passbook account or only have a paperless record-keeping option for your account, you must tell us in writing of any error or omission in your account entries within 60 days of the date of the disputed entry.

If you do not tell us of an error or omission within the applicable time periods described above, you a) will be deemed to have conclusively agreed to the contents of the paper account statement, online transaction history or passbook, as applicable, whether or not you have reviewed your statement or online transaction history or updated your passbook. As you are required to do under this Agreement, and b) agree that you will have no claim against us for reimbursement, relating to any account entry, even if the instruction charged to your account was forged, unauthorised or fraudulent.”

- [87] The above section in the second paragraph makes clear reference to a “PASSBOOK ACCOUNT”. It therefore speaks for itself, it does exist.
- [88] A breach of contract as claimed by the Plaintiff occurs whenever the other party, in this case the Defendant has failed to comply with its obligations under the contract or has been negligent in doing so.

[89] What is critical in the instant matter is “NOTICE”. Did the Defendant give the Plaintiff reasonable notice of discontinuing the use of the passbook, it being the only way of keeping a check on the activities on the account?

[90] The Defendant says that it had no obligation or duty to monitor customers’ accounts. In the transcript of the 17th July, 2019 at lines 18 – 30, counsel puts that position to the court on behalf of the Defendant. However, in the PSFA page 13, fourth paragraph it provides:

“We may monitor your account to meet our legal and regulatory obligations, including using automated surveillance systems to prevent or detect fraud or criminal activity such as money laundering or terrorist financing.”

[91] The above is a part of the contract between the Plaintiff and Defendant. I disagree with the statement put by counsel for the Defendant that there is no duty owed by the Bank either in the agreement or in law for it to monitor its customer’s account. In fact there is legislation which places such a duty on the bank. In the transcript of 17th July, 2019 lines 26 – 30 counsel states.

**“26. The second question is whether the bank
27. breached any duty owed to the Plaintiff we say
28. No. There is no duty on the bank either in the
29. agreement or in the law for it to monitor its customers
30. account.”**

[92] In the Financial Transactions Reporting Act, 2018 (FTRA) under Part II – “DUTY OF FINANCIAL INSTITUTIONS” in particular Section 5 (1), (b) it provides:

“5. CONDUCT OF RISK ASSESSMENT:

(1) Every financial institution shall –

(a) -----

(b) develop and implement a comprehensive risk management system approved by the financial institutions senior management and commensurate with the scope of its activities, incorporating CONTINUOUS IDENTIFICATION, MANAGEMENT, MONITORING and CONTROLLING OF IDENTIFIED RISKS.”

[93] Also in section 12, (b), FTRA it provides:

“12. ON-GOING DUE DILIGENCE

Every financial institution shall exercise risk based on on-going due diligence throughout the course of each business relationship, which shall include:

(a) -----

(b) Scrutinizing transactions to ensure that the transactions are consistent with the financial institutions knowledge of the customer the facility

holders risk profile, and where necessary the source of funds.”

[94] I am reminded that the claim here is for breach of the PFSA and breach of the Defendant’s fiduciary duty. In this regard, I make reference to the case of **J.P. MORGAN CHASE BANK, N.A. V. THE FEDERAL REPUBLIC OF NIGERIA [2019] EWCA Civ. 1641** wherein Lady Justice Rose in delivering her decision stated at paragraphs 12 – 17:

“12. Ground 1: the ambit and nature of the *Quincecare* duty:

In *Quincecare*, Barclays Bank had loaned £400,000 to a company, Quincecare, formed to purchase four chemist shops. The chairman of the company caused about £340,000 to be drawn down and misapplied the money for his dishonest purposes. Barclays sued Quincecare and the guarantor of the debt for repayment of the loan. Quincecare and the guarantor raised a defence that Barclays had paid out the money in breach of its duties to Quincecare as its customer. Steyn J said that the most substantial issue in the case was whether Barclays had been put on notice that the chairman was acting for his own benefit or for an unauthorised purpose. He held first that it is an implied term of the contract between a bank and the customer that the banker will exercise reasonable skill and care in and about executing the customer’s orders. Steyn J said that in approaching the problem, everything will depend on the facts of the particular case. The relationship between a banker and customer in respect of the drawing and payment of cheques was a relationship of principal and agent. There was no logical or sensible reason for holding that bankers are immune from

the elementary obligation to exercise reasonable care and skill in carrying out the instructions of their principal when executing the customer's orders. He recognized however that that duty to exercise reasonable skill and care "must generally speaking be subordinate to the bank's other conflicting contractual duties" (pages 376 - 377). He went on:

"Ex hypothesi one is considering a case where the bank received a valid and proper order which it is prima facie bound to execute promptly on pain of incurring liability for consequential loss to the customer. How are these conflicting duties to be reconciled in a case where the customer suffers loss because it is subsequently established that the order to transfer money was an act of misappropriation of money by the director or officer? If the bank executes the order knowing it to be dishonestly given, shutting its eyes to the obvious fact of the dishonesty, or acting recklessly in failing to make such inquiries as an honest and reasonable man would make, no problem arises: the bank will plainly be liable. But in real life such a stark situation seldom arises. The critical question is: what lesser state of knowledge on the part of the bank will oblige the bank to make inquiries as to the legitimacy of the order? In judging where the line is to be drawn there are countervailing policy considerations. The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, the law should guard against the facilitation of fraud, and exact a reasonable

standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers. In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for as long as the banker is ‘put on inquiry’ in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company... And, the external standard of the likely perception of an ordinary prudent banker is the governing one. That in my judgment is not too high a standard.”

- 13. Steyn J’s judgment in *Quincecare* was considered by the Court of Appeal in *Lipkin Gorman (a firm) v Karpnale Limited* [1989] 1 WLR 1340 (*‘Lipkin’*). In the case Mr. Cass, a partner in the appellant firm of solicitors, withdrew a large amount of money from the solicitors’ bank account for which he was a signatory and lost it gambling at a casino. The trial judge held that the bank’s manager had either shut his eyes to the obvious or had willfully or recklessly failed to make the proper inquiries as to the use of the funds. He held that the bank had been in breach of its duty to the solicitors and was liable as a constructive trustee of the money. The Court of Appeal allowed the bank’s appeal. Parker LJ held that it was not necessary for the**

customer to show a want of probity on the part of the bank in order to establish a breach of the bank's duty of care. He said at pages 1377 – 1378:

“If a reasonable banker would have had reasonable grounds for believing that Cass was operating the client account in fraud, then, in continuing to pay the cash cheques without inquiry the bank would, in, my view, be negligent and thus liable for breach of contract ...”

14. Parker LJ went on:

“I would not, however, accept that a bank could always properly pay if it had reasonable grounds for a belief falling short of probability. The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility albeit not amounting to a probability that its customer might be being defrauded, or, in this case, that there was a serious or real possibility that Cass was drawing on the client account and using the funds so obtained for his own and not the solicitors' or beneficiaries' purposes. That, at least, the customer must establish. If it is established, then in my view a reasonable banker would be in breach of duty if he continued to pay cheques without inquiry. He could not simply sit back and ignore the situation.”

15. I considered the application of the *Quincecare* duty in *Singularis Holdings v Daiwa Capital Markets Europe Ltd* [2017] EWHC 257 (Ch), [2017] 1 BCLC 625, the first case in which damages were awarded for a breach of the duty ('Singularis'). In that case Daiwa paid out sums from an account used to hold collateral for Singularis' investments and any proceeds of sale of those investments. The payments were made on the instruction of Mr. Al Sanea who was the sole shareholder and the only active director of Singularis. The payment instructions were highly suspicious and Daiwa did make lengthy inquiries as to the purpose of at least some of the payments in order to satisfy itself that they were legitimate. It failed, however, to act upon glaring signs that the purported reasons given by the agent of Mr. Al Sanea for the payments were a sham. On appeal, [2018] EWCA Civ 84, [2018] 1 WLR 2777 the finding that Daiwa had been in breach of the Quincecare duty was not challenged and the appeal focused, broadly, on the availability of defence arising from the fact that the fraudster had been the sole shareholder and a director of the defrauded claimant company. There was no detailed analysis in this Court of the content of the Quincecare duty. The appeal was dismissed'; a further appeal to the Supreme Court on the question of the attribution of Mr. Al Sanea's fraud to the claimant was heard on 23 and 24 July 2019 and judgment is pending.

16. Ms. Phelps appearing for Morgan Chase argued that the judge fell into error by describing the Quincecare duty as a primarily a duty on the part of a bank not to pay out in accordance with the suspicious instruction. At paragraph 28 of his judgment,

Prof Burrows said that the trilogy of cases Quincecare, Lipkin and Singularis:

“... make clear that the core of the Quincecare duty of care is the negative duty on a bank to refrain from making a payment (despite an instruction on behalf of its customer to do so) where it has reasonable grounds for believing that that payment is part of a scheme to defraud the customer. What is not entirely clear is whether, in addition to that core duty, a bank with such reasonable grounds has a duty to make reasonable enquiries so as to ascertain whether or not there is substance to those reasonable grounds. I strongly incline to the view (although, as will become clear ... below, I do not ultimately need to decide this) that Ms. Phelps is correct in her submission that the cases do envisage there as being an additional duty of enquiry.”

- 17. The judge said at paragraph 30 that such a duty of enquiry would be in line with sound policy because in the fight to combat fraud, banks should not sit back and do nothing. The duty of enquiry on banks would not be unduly onerous because it would always be limited by what an ordinary prudent banker would regard as reasonable enquiries. However, even if there were such an additional duty, he said, it would be “potentially misleading” to describe the Quincecare duty as a duty of care to make enquiries or to investigate. The core of the Quincecare duty is the negative duty not to pay and any positive duty of enquiry or investigation would be additional to that.”**

[95] Further in the J.P. Morgan case LADY JUSTICE ROSE says at paragraphs 38 – 41:

“38. Moore-Bick LJ (with whom Lloyd and Ward L. JJ agreed) noted (at 27) that the primary obligation was that under which Seadrill undertook responsibility for the operation of the rig in order to perform the services provided for by the contract. He said: (emphasis added)

“28 ... When para 501 refers to obligations and liabilities which the contractor has “specifically assumed” it must naturally refer to the obligations which arise out of the express terms of the contract *with all the incidents which the law ordinarily attaches to them, since those incidents are inherent in them.* It may, of course, be possible for the parties to agree otherwise, but unless they have done so, they can only be presumed to have accepted that the ordinary incidents apply. To proceed on any other basis would make commercial life impossible. To say, therefore, that under this form of contract the contractor specifically assumes an obligation to operate the rig but does not specifically assume an obligation to do so carefully is to approach the question from the wrong end. Prima facie it assumes the obligation as expressed and all that the law attaches to it, unless there is agreement to the contrary.”

39. Moore-Bick LJ said that the trial judge was right, following the observation of Lord Diplock in Gilbert-Ash to ask himself whether the language of the relevant clauses “demonstrates with sufficient clarity that the parties do intend the operator to give up rights to which he would otherwise be entitled under the general law” (see 29). He described the principle encapsulated in Lord Diplock’s dictum as

essentially one of common sense; “parties do not normally give up valuable rights without making it clear that they intend to do so.” The wording of para 501 was not inconsistent with the existence of an obligation on the part of Seadrill to operate the rig with reasonable skill and care.

40. Applying those principles to the present appeal, the Quincecare duty is one aspect of a bank’s overall duty to exercise reasonable skill and care in the services it provides. It can therefore properly be described as one of the incidents which the law ordinarily attaches to the relationship between the bank and the client and it is a duty which is inherent in that relationship. It is not therefore negated by the existence of a clause which narrows down the obligations of the bank to the basic obligation of holding the money and executing instructions received because the obligation to perform those functions with reasonable skill and care is part and parcel of that basic obligation – indeed to use the wording of clause 5.1, it is an obligation which is “determined” by the express provisions of the depository agreement. It is not, of course, impossible for a bank and its client to agree that the Quincecare duty would not arise and that the bank should be entitled to pay out on instruction of the authorized signatory even if it suspects the payment is in furtherance of a fraud which that signatory is seeking to perpetrate on its client. But the first sentence of clause 5.1 is nowhere near clear enough to indicate that the FRN and Morgan Chase intended that to be the case in relation to the depository cash.
41. I further agree with the judge that other clauses in the depository agreement indicate that the parties recognized that tortious duties and other terms implied by law still applied to their relationship even if they were not express provisions of the depository agreement itself.”

[96] In sections 8 and 9 of the PFSA it says;

“8. Lost, Stolen, Authorised Or Unauthorised Use Of The Card:

You will notify us immediately, by telephone and in writing, of the loss, theft or any unauthorised use of your Card or Electronic Signature. Your liability will cease only when we receive notice of such loss, theft or unauthorised use.

You are responsible for the care and safety of your Card and your Electronic Signature. You will keep your Electronic Signature strictly confidential, secure from all persons without exception and apart from the Card at all times.

You must not disclose any other security codes, such as passwords, access codes and account numbers that may be used or required for Automated Banking Services, the ABB Service or any other Service transactions. You are liable for all Card transactions incurred using your Electronic Signature.

If you require a replacement card in these situations, or if your card is retained by an ATM, immediately visit or call your nearest Scotiabank branch.

9. Limitation For Authorised And Unauthorised Use Of The Card

You are liable for all debts, withdrawals and account activity resulting from:

- **Use of the Card by you or by persons to whom you have made your Card and/or Electronic Signature available or who received possession of the Card and/or Electronic Signature with your consent;**
- **Unauthorised use of the Card and /or Electronic Signature, where you have made available for use your Card and Electronic Signature by keeping them together or in such a manner as to make them available for use, including, without limitation, using the “Save My Card” feature on a public access computer until we have received notice of loss, theft or unauthorised use;**
- **Any failure to comply with the terms of this Agreement. You would not be liable for losses in the following circumstances:**
- **Technical problems and other system malfunctions;**
- **Unauthorised use of your Card and Electronic Signature, including your PIN, PAC, password or access code after the Card has been reported to us as lost or stolen;**

- **Your Card is cancelled or expired; or**
- **You have reported another person knows your Electronic Signature, including your PIN, PAC, password or access code.**

You will be considered as contributing to the unauthorised use of your Card and/or Electronic Signature and will be fully liable for all debts, withdrawals and account activity where:

- **The Electronic Signature you have selected is the same as or similar to an obvious number combination such as your date of birth, bank account numbers or telephone numbers; or**
- **You write your Electronic Signature down or keep a poorly disguised written record of your Electronic Signature, such that it is available for use with your Card; or**
- **You otherwise reveal your Electronic Signature to anyone, resulting in the subsequent unauthorized use of your Card and Electronic Signature together.**

Until such time as you notify us of the loss, theft, or unauthorised use of your Card and Electronic Signature, you will be liable for all withdrawals from or other transactions on your accounts up to the maximum daily and weekly permitted withdrawal limits through ATMs which we

establish from time to time. You will also be liable for all purchases/withdrawals up to the maximum daily and weekly limit for POS transactions which we establish from time to time and for all transfers and payments completed via the Scotia OnLine* Internet Banking and TeleScotia Telephone Banking Service, if these apply. The limit for POS transactions is over and above the maximum daily and weekly ATM withdrawal limit.”

[97] The Defendant by way of the above seeks to avoid liability. However, Lady Justice Rose has stated the position in the J. P Morgan case (supra) that the Quincecare duty as one aspect of the bank’s overall duty to exercise reasonable skill and care in the services it provides. It is one of the incidents which the law ordinarily attaches to the relationship between the bank and the client and it is a duty WHICH IS INHERENT IN THAT RELATIONSHIP. She went on to say:

“It is therefore not negated by the existence of a clause which narrows down the obligations of the bank to the basic obligation of holding the money and executing instructions received.”

[98] The Defendant seeks to rely on a conclusive clause among others which provides:

“ACCEPTING OUR RECORDS:

Our records as to whether an automated banking service or an ABB Service transaction has been performed and our

determination of the details of that transaction, will be considered correct and binding on you, unless you provide us with evidence to the contrary within thirty (30) days of the date of a disputed transaction.”

[99] At paragraph 16 of the Plaintiff's WS she state:

16. “I was perplexed by the 2015 Statement, given the fact that I never used an ATM machine to withdraw monies off of the account. I was even the more perplexed by the 2015 Statement wherein it recorded that:

i) During the dates of 23rd, 28th, 29th and 30th December 2015, there were several withdrawals conducted in the Bahamas. During these dates in particular, my family and I travelled to New York. I used my card in New York during this time of travel. I had my card, the only authorized card, in my possession;

ii) Additionally on the 21st December 2015 and the 4th January 2016, there were two debits of One Thousand Dollars (\$1,000.00) on each day. This ought not to have occurred as the Account had a daily ATM withdrawal limit of One Thousand Dollars (\$1,000.00).”

[100] The Defendant took away the opportunity for the Plaintiff to keep abreast and monitor unauthorized transactions on her account. Despite the PFSA containing a clause which placed an obligation on the Defendant to NOTIFY the Plaintiff of any additions, or changes to the terms and conditions of the PFSA. No evidence was lead by the Defendant which demonstrated that any reasonable notice was given to the Plaintiff notifying her that it was no longer possible to update her passbook which was the only way she would have discovered the unauthorized transactions.

[101] There were transactions on the ATM card from September 2015, to February 2016 not carried out by the Plaintiff.

[102] In the case of **PERTAMINA ENERGY TRADING Ltd v. CREDIT SUISSE [2007] 3 LRC 253 V K RAJAN J** gave some instructive points on conclusive clauses. He opined at paragraphs 61 and 65:

“[61] It bears emphasis that in holding that conclusive evidence clauses if and when properly and reasonably defined are enforceable, we restrict such a conclusion to cases where the customers are commercial entities. In the context of banks on the one hand (which would otherwise bear the onerous, if not near impossible task of detecting forgeries given the advent of modern technology) and commercial entities on the other (which only have to check their own records), we do not find it onerous or unreasonable to place the risk of loss on the latter if this has already been agreed upon. However, we are not required to express a general opinion as to the reasonableness of conclusive evidence clauses as and when applied to individuals and non-corporate customers since the issue does

not arise in the present context. Each case will entail a careful examination of its own peculiar factual matrix starting with a careful scrutiny of the conclusive evidence clause that is being questioned.”

“[65] It should also be pointed out that a conclusive evidence clause would come into operation only if the statements have been effectively dispatched. The bank bears the burden of proving this: *Ri Jong Son v Development Bank of Singapore* [1998] 3 SLR 64 at [53].”

[103] The bank having taken away the updating of the passbook and no statements having been provided to the Plaintiff must necessarily accept responsibility for the Plaintiff not being aware of the unauthorized transactions on her account. No evidence was lead to even suggest that any such statements were “effectively dispatched” to the Plaintiff.

[104] The Defendant’s witness Mr. Pratt himself confirmed that the passbook was discontinued in 2016. Once it was discovered by the Plaintiff that something was going on with her account, she immediately notified the Defendant.

[105] In this regard I would be hard pressed not to accede to the Plaintiff’s claim of breach of contract. The Defendant says that the Plaintiff was negligent. However, he who asserts must prove is the cardinal principle.

[106] Sections 82 (1) and (2), 83 and 84 of the Evidence Act Chapter 65 provide:

“The Burden of Proof:

82. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact the burden of proof shall lie on that person.

83. The burden of proof in any proceeding at the commencement thereof lies on that person who would fail if no evidence at all were given on either side, regard being had to the pleadings and other documents filed therein; but at any time in the course of any proceeding the burden of proof may be shifted to the person who would fail, if no further evidence were given on either side.

84. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

[107] The Defendant has not lead any evidence to support its defence of negligence on the part of the Plaintiff. In light of the above that defence must necessarily fail.

[108] In the case of **GREENWOOD v. MARTINS BANK LIMITED [1933] A.C. 51**, an appeal to the House of Lords from the English Court of Appeal, the House of Lords affirmed the decision of the Court of Appeal.

[109] The brief facts are:

“A husband and wife had a joint account with bankers who undertook to honour cheques signed by both customers. Afterwards, that account was closed and an account was opened in the sole name of the husband, the wife having no authority to draw cheques upon it. During the currency of both accounts the wife repeatedly forged her husband’s signature to cheques, and drew out money, which she applied to her own uses. During the currency of the sole account the husband became aware of the forgeries, but, being persuaded by his wife to say nothing about this, he kept silence for eight months. When he finally determined to disclose the forgeries to the bank, the wife committed suicide. In an action by the husband against the bankers to recover the sums paid out of the sole account on cheques to which his signature had been forged as aforesaid.

The husband’s claim failed on appeal.

Scutton LJ, in the Court of Appeal, set out the following:

“This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking

to set up the estoppel are not privy; and these distinctions make in the present case all the difference.”

This, in my view, involves a continuing duty on either side to act with reasonable care to ensure the proper working of the account. It seems to me that the banker, if a cheque was presented to him which he rejected as forged, would be under a duty to report this to the customer to enable him to inquire into and protect himself against the circumstances of the forgery. This, I think, would involve a corresponding duty on the customer, if he became aware that forged cheques were being presented to his banker, to inform his banker in order that the banker might avoid loss in the future. If this is correct there was in the present case silence, a breach of a duty to disclose, which may give rise to an estoppel.

The same position is stated by Parke B. in giving the unanimous answer of the judges to the House of Lords in *Bank of Ireland v. Evans' Trustees (2)* (where the negligence complained of was negligent keeping of the seal, a negligence similar to neglect in custody of the passbook), in these words: “The present case is entirely different. If there was negligence in the custody of the seal, it was very remotely connected with the act of transfer. The transfer was not the necessary or ordinary or likely result of that negligence. It never would have been, but for the occurrence of a very extraordinary event, that persons should be found either so dishonest or so careless as to testify on the face of the instrument that they had seen the seal duly affixed. It is quite impossible that the bankers could have maintained an action for the negligence of the trustees, and recovered the damages they had sustained by reason of their having made the transfer. If such negligence could disentitle the plaintiffs, to what extent is it to go? If a man should lose his cheque book, or neglect to lock the desk in which it is kept, and a servant or stranger should take

it up, it is impossible in our opinion to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal? It is clear, we think, that the negligence in the present case, if there be any, is much too remote to affect the transfer itself, and to cause the trustees to be parties to misleading the Bank in making the transfer on the forged power of attorney.”

Now in the present case, applying these principles, if the Bank were simply relying on the respondent’s silence as having induced them to honour the forged cheques, it is obvious that the silence of the customer was not “the proximate cause of leading the Bank into the mistake.” What the Bank must rely on is that the silence or failure to disclose prevented the Bank from suing the forger, for when the truth was disclosed the forger was dead. The Bank has by the silence lost its opportunity of suing the forger and her husband.”

[110] Lord Tomlin delivered the speech in the House of Lords with his brothers Lord Thanketon and Lord Macullan agreeing said:

“The appellant’s silence, therefore, was deliberate and intended to produce the effect which it in fact produced - namely, the leaving of the respondents in ignorance of the true facts so that no action might be taken by them against the appellant’s wife. The deliberate abstention from speaking in those circumstances seems to me to amount to a representation to the respondents that the forged

cheques were in fact in order, and assuming that detriment to the respondents followed there were, it seems to me, present all the elements essential to estoppel.

Further, I do not think that it is any answer to say that if the respondents had not been negligent initially the detriment would not have occurred. The course of conduct relied upon as founding the estoppel was adopted in order to leave the respondents in the condition of ignorance in which the appellant knew they were. It was the duty of the appellant to remove that condition however caused. It is the existence of this duty, coupled with the appellant's deliberate intention to maintain the respondents in their condition of ignorance, that gives its significance to the appellant's silence. What difference can it make that the condition of ignorance was primarily induced by the respondents' own negligence? In my judgment it can make none. For the purposes of the estoppel, which is a procedural matter, the cause of the ignorance is an irrelevant consideration."

[111] In the instant case, the Plaintiff notified the Defendant as soon as she became aware that funds were being withdrawn from her account. What is even more egregious is that even after notifying the Defendant, further transactions took place. Therefore in my view it is the Defendant who was seriously negligent. The Defendant's claim of negligence on the part of the Plaintiff is wholly unsustainable.

[112] The Plaintiff claims breach of contract by the Defendant. A breach of contract occurs when one party to a contract fails to carry out his obligation under the contract. Steyn LJ puts it thus in: **SURREY COUNTY COUNCIL V BREDERO HOMES Ltd. [1993] 1 W.L.R. 1361, 1369** where he stated:-

“An award of compensation for breach of contract serves to protect three separate interests. The starting principle is that the aggrieved party ought to be compensated for loss of his positive or expectation interests. In other words, the object is to put the aggrieved party in the same financial position as if the contract had been fully performed. But the law also protects the negative interest of the aggrieved party. If the aggrieved party is unable to establish the value of a loss of bargain he may seek compensation in respect of his reliance losses. The object of such award is to compensate the aggrieved party for expenses incurred and losses suffered in reliance on the contract. These two complimentary principles share one feature. Both are pure compensatory principles. If the aggrieved party has suffered no loss he is not entitled to be compensated by invoking these principles. The application of these principles to the present case would result in an award of nominal damages only.”

[113] Unlike the above situation, in the instant matter loss has been suffered by the Plaintiff. In recent times the courts have shown a willingness to award damages against banks for breach of contract.

[114] In the case of **GLINTON & CO. V SCOTIABANK (BAHAMAS) LIMITED 2017/CLE/gen/00689**, Mr. Justice Ian Winder said at paragraph 29:

“29. I am satisfied that, given all the circumstances, I award MG the sum of \$10,000.00 in damages against Scotiabank for FAILING TO GIVE REASONABLE NOTICE (my emphasis) of the account closures, AND FOR BREACH OF CONTRACT (my emphasis) as

well as damages for any professional injury as a result of Scotiabank's pre-emptory and improper closure of either the US \$ and B\$ client account."

[115] In the instant case, Scotiabank (Bahamas) Limited took away the updating of the passbook which had allowed the Plaintiff to monitor her account without reasonable notification to her.

[116] I take special note that neither counsel cited the case of **BARCLAY'S BANK PLC V. QUINCECARE Ltd. [1992] 4 All ER 363** in which Steyn J set out the following:-

- **"The relationship of customer and banker is primarily that of debtor and creditor. However, in addition to that, the banker acts as the customer's agent in paying the customer's cheques against the customer's money in the banker's hands.**
- **The same relationship applies where the banker acts on the customer's order to make an immediate money transfer.**
- **An agent owes a principal a duty to exercise reasonable skill and care in carrying out the principal's instructions;**

Therefore, a banker owes a customer a duty of care in tort to take reasonable care when making such a payment. This duty is implied in the contract between the banker and the customer."

[117] Having set out the relevant evidence and the authorities and in consideration of all the circumstances, I find that the Plaintiff is entitled to:

1. The sum of B\$27,500.00;
2. Interest thereon pursuant to the Civil Procedure (Award of Interest) Act 1992.
3. Damages to be assessed.
4. Costs to the Plaintiff to be taxed if not agreed.

I so order.

Dated this 20th day of April, A.D., 2021.



Keith H. Thompson

Justice