COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2015/CLE/gen/01961

BETWEEN

ZAMPA OVERSEAS LTD.

Plaintiff

AND

CBH (BAHAMAS) LTD

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Sean Moree with Vanessa Smith for the Plaintiff

Leif Farquharson QC with John Minns for the Defendant

12, 13 November 2020; 14 January 2021 and 1 June 2021

JUDGMENT

WINDER, J

This is the claim of the Plaintiff (Zampa) for breach of contract and negligence against the Defendant (CBH) arising from alleged unauthorized transactions performed on its account.

Background

[1.] This action emanates from alleged unauthorized payment transactions performed on a bank account in the name of Zampa. The account was opened with CBH, a branch of CBH Geneva upon the recommendation of Leandre Sappino (Sappino) of CBH Geneva. Zampa, of which Andrei Rujnicov (Rujnicov) is the principal and sole beneficial owner, was acquired from CBH Geneva and is incorporated in Saint Vincent. Rujnicov performed payment transactions for his antiques and fine arts business from the account.

[2.] On 26 March 2014 an Account Opening Agreement (AOA) was executed between the parties, which was to define the relationship, obligations and responsibilities of the parties to each other as Bank and Customer. Parts II and III of the AOA provides:

> Part II
> "All correspondence, notification of transactions and statements of account are to be retained by the Bank. In this case, that correspondence will be considered to have been delivered to us on the date stated there and by these presents, the Bank is expressly released from all responsibility in this respect. The Bank is authorized to destroy all correspondence which has not been claimed three years after its issue."
> Part III
> "The purpose of these conditions is to define the general relationship between the Bank and its clients.
> ...
> INSTRUCTIONS GIVEN BY TELEPHONE:
> a) Instructions for withdrawal of funds:
> Kindly accept our telephoned or cabled instructions without a reference code and execute them even if they are not followed by a written confirmation.
> We accept all risks, especially those caused by a transmission error or misunderstanding as a result of this method of communication and including any mistake on your part concerning our identity. We release you from all responsibility in this respect.
> Your Bank may use these instructions as a release from responsibility on your part in relation to us and all representatives who have been or will be appointed by us.
> To protect its client's interests, the Bank may nonetheless, if it considers necessary and without thereby incurring responsibility, request confirmation

of instructions by letter before fulfilling any telephoned instructions for withdrawal of funds:

b) For all other instructions:
Kindly accept our telephoned or cabled instructions without a reference code and execute them even if they are not followed by a written confirmation.
We accept all risks, especially those caused by a transmission error or misunderstanding as a result of this method of communication and including any mistake on your part concerning our identity. We release you from all responsibility in this respect.
Your Bank may use these instructions as a release from responsibility on your part in relation to us and all representatives who have been or will be appointed by us.

...

Article 1/Modification of Instructions given to the Bank

Any commitment made by the Bank to the client, other than those printed in this present document, must be confirmed in writing and signed by two authorized officers (directors, members of the executive Committee, or one of the former together with an authorized officer of the Bank).

For an instruction given by a client to be valid and binding upon the Bank, the Bank must have accepted it by a letter signed by the authorized signatories mentioned above.

Article 2/Right of Disposal

Only those signatories provided in writing to the Bank and evidenced as duly authorized by the account-holder are valid until they are charged or revoked by written notice to the Bank, irrespective of any different entries in the commercial register of other publications.

Article 3/The Bank's Communications

The Bank's communications (statement of accounts, correspondence, circular, etc.) are deemed to have been made when sent to the last address supplied by the client. The date shown on the duplicate copy or on the mailing list held by the Bank is deemed to be the date of mailing. In event of doubt, the mail retained by the Bank to have been delivered on the date shown thereon.

...

Article 5/Complaint Deadline

Unless a complaint is made within one month, the statements of account and the records and positions are deemed approved, even if the Bank has not received in return the client's signed confirmation. Except for specific reservation made by the client, explicit or tacit approval of the statements of accounts and records of positions also implies approval of all individual items shown therein.

Article 6/Verifications of Signatories and Authentication

Any loss caused by the undetected defective authentication or counterfeits is the client's responsibility, except in the event of serious error by the Bank.

...

Article 8/Transmission Errors
Any loss caused by use of post, telegraph, telephone, telex, facsimile or any other means of transmission or transport, especially resulting from delays, losses, misunderstanding, damaged or duplicated mailing, is the client's responsibility, except in the event of serious error by the Bank.
Article 9/Errors in the Executing Orders
In the event of loss caused by non-execution or defective execution of any orders (excluding securities transactions orders), the Bank is liable only for the loss of interest unless, in any particular case, the Bank has been grossly negligent or guilty of willful misconduct.
...
Article 18/Delegation of Management and Administration
Pursuant to the Administration and Management Mandates entered into between CBH (Bahamas) Ltd, and its Parent CBH Compagnie Bancaire Helvetique, Geneva, Switzerland, a substantial part of the management and administration of the account is handled by the Parent notwithstanding that the account itself will be established and maintained in the books of Nassau.
Article 19/Governing law
All legal relations between the client and the Bank are governed by Bahamian law.

[3.] As principal of Zampa, Rujnicov also signed a Power of Attorney (POA) with respect to the account on 11 March 2014. The POA was a document created and used by CBH. The POA provided:

> ZAMPA OVERSEAS LTD. hereby grants pursuant to the applicable laws of St. Vincent a power of attorney to: RUJNICOV ANDREI to perform all legal acts as authorized representative invested with full powers of single signature rights.
>
> This power particularly comprises the following:
> To represent with the right of single signature the above named company in all and every respect, in particular, to sign contracts, to invest, lend and borrow, to accept and make payments, to open and dispose of bank accounts, to pledge assets, to dispose of or to liquidate them, to produce, acquire, develop, manage, let, lease, rent, broke, sell or otherwise dispose of any kind of goods or assets, to participate in other enterprises of any kind, to establish subsidiaries and branch offices, to undertake any kind of commercial, financial, trading activity, which is in the interest of the Company. Copies of all signed documents under this power of attorney shall immediately be sent to the directors of this company.
>
> This Power of Attorney is valid for the period that the above-mentioned Company is in good standing. The issuing Director should be contacted in connection with any questions concerning this Power of Attorney.
>
> The Company bears no responsibility for commitments for whatever nature which the agent enters into without sufficient financial means being available to the Company. In such cases, the Agent is personally liable for those commitments.

> This Power of Attorney cannot be transferred or delegated in any way to third parties and the principal expressly stipulates that no sub-delegated power of attorney may be granted on the basis of this power of attorney.
>
> (Emphasis added)

[4.] On 30 May 2014, Rujnicov attended at the offices of Sappino at CBH Geneva where he participated in a teleconference during which a reference code was established between himself and CBH.

[5.] On 14 April 2014 and 13 October 2014 CBH processed two payment transactions out on the account. These two transactions were directed to the bank via the email of Rujnicov's then personal assistant, Ekaterina Yakushkina (Yakushkina). Yakushkina and Rujnicov are now married. The payment instructions for both of these transactions were forwarded to Sappino at CBH Geneva by Yakushkina on behalf of Rujnicov from her email, yakushkina666@gmail.com. In each case after receiving the instructions Sappino contacted Rujnicov by telephone for confirmation.

[6.] Between 14 October 2014 and 16 October 2014 Yakushkina was the subject of an email hack of her Gmail account. She clicked on a link on an email which turned out to be a phishing email (an email designed to resemble a legitimate email). Yakushkina changed her email password and eventually installed a 2 step verification process. Rujnicov was notified by Yakushkina of the email issues.

[7.] Between 16 October 2014 Sappino and CBH began corresponding with someone purporting to be Yakushkina from the email address yakushkiina666@gmail.com (the fraudulent email address). There is an additional 'i' in this email address. The fraudulent email address was designed to resemble the email address of Yakushkina. CBH failed to recognize that the email address provided was not the email address of Yakushkina.

[8.] On 17 October 2014 Sappino writes to Ahmad Strachan (Strachan) and Ursula Rolle (Rolle), copying Yakushkina, introducing CBH to Yakushkina as Rujnicov's personal assistant. Rolle and Strachan were instructed that Yakushkina would correspond with CBH in the future in relation to the account.

[9.] On 28 October 2014, CBH requested a letter of authorization from the user of the fraudulent email address. CBH received a letter purportedly signed by Mr. Andre Ruzhnikov, not Mr. Andrei Rujnicov, giving Yakushkina authority "to perform all account activities" relating to Zampa. The letter was received from the fraudulent email address. CBH failed to recognize that the letter was signed by Mr. Andre Ruzhnikov, not Mr. Andrei Rujnicov.

[10.] Following receipt of the letter, CBH received eleven payment instructions from the fraudulent email address and in the name of Andre Ruzhnikov, not Andrei Rujnicov.

[11.] CBH executed these payment instructions on the account of Zampa.

[12.] Zampa claims *inter alia*, reimbursement for the payments carried out by CBH from the account that it says it did not authorize. It says that CBH breached the AOA, was negligent in the way in which the account was handled and breached its duty to Zampa by allowing the unauthorized transactions on the account. The company suffered losses of approximately US$1.6M.

[13.] Zampa's claim was commenced by specially endorsed Writ of Summons (amended), filed on 22 March 2018. The Amended Statement of Claim provides (in part):

1. ...
2. ...
3. On the 26th March, 2014 the Plaintiff entered into the Account Opening Agreement with the Defendant and opened a current account, deposit account and securities account with the Defendant Bank in EURO and USD currency. The account which is the subject of this action is the current account, ... ("the Account"). The Plaintiff also agreed a code word to be used with the Defendant for verbal communications with Mr. Rujnicov.
4. ...
5. ...
6. ...
7. On the 28th October, 2014, the Defendant received a letter purportedly signed by Mr. Andre Ruzhnikov, not Mr. Andrei Rujnicov, giving Ms. Yakushkina authority to "to perform all account activities" relating to the Plaintiff ("the Letter"). The Letter was sent from the email address, yakushkiina666@gmail.com ("the Incorrect

Email Address"). The signature on the Letter is materially different from Mr. Rujnicov's signature as evidenced on the Account Opening Agreement.

8. Following receipt of the Letter, the Defendant received the following purported payment instructions from the Incorrect Email Address and in the name of Mr Andre Ruzhnikov, not Mr Andrei Rujnicov:
    i. On or about 16th October 2014 – US$150,000.00...;
    ii. 29th October 2014 – EUR 149,700 (US$189,175.89)...;
    iii. 29th October 2014 – EUR 140,000 (US$176,834.00)...;
    iv. 4th November 2014 – EUR 151,838 (US$190,608.31)...;
    v. 4th November 2014 – EUR 158,083 (US$290,126.45)...;
    vi. 10th November 2014 – EUR 228,500 (US$290,126.45)...;
    vii. 12th November 2014 – EUR 112,500 (US$140,838.75)...;
    viii. 12th November 2014 – EUR 125,725 (US$157,395.13)...;
    ix. 12th November 2014 – EUR 130,000 (US$162,747.00)...;
    x. 14th November 2014 – EUR 182,000 (US$228,664.80)...;
    xi. 20th November 2014 – EUR 168,000 ($213,964.80)...; and
    xii. 11th December 2014 – EUR 110,418 ...
9. Ignorant of the unauthorized transactions pleaded in paragraph 8 above, the Plaintiff received a refund on the 10th December, 2014 in amount of EUR 151,732 (US$189,407.05).
10. On or about 13th July 2015, the Defendant refunded the sum of EUR 225,450 (US$248,107.72) to the Account, having persuaded Bank of Ireland to refund it in respect of the payment pleaded at paragraph 8 (v) above.
11. Deducting the US$ value of the refunds pleaded in paragraph 9 and 10 above, the total amount paid out of the Account without the Plaintiff's consent is US$1,619,639.10.
12. The actions of the Defendant amount to breach of contract and/or negligence and/or breach of fiduciary duty by the Defendant and/or its agent in that:

    PARTICULARS OF BREACH OF CONTRACT AND/OR NEGLIGENCE AND/OR BREACH OF FIDUCIARY DUTY

    (a) The Defendant and/or its agents failed to use reasonable skill and care to authenticate the requests for payment before executing the same.
    (b) The Defendant and/or its agents failed to properly verify the name and signature on the Letter pursuant to Article 2 of Part III of the Account Opening Agreement.
    (c) The Defendant and/or its agents failed to use reasonable skill and care to follow the protocol agreed to by the Plaintiff for verbal communications and payment instructions and/or confirmation of payment instructions.
    (d) The Defendant and/or its agents committed serious errors by making the unauthorized payments out of the Account pursuant to defective authentication and/or fraud pursuant to Article 6 of Part III of the Account Opening Agreement.
    (e) The Defendant and/or its agents' actions in relation to the payments set out in paragraph 8 hereof amounted to gross negligence and/or willful misconduct pursuant to Article 9 of Part III of the Account Opening Agreement.

...

14. By reason of the Defendant and/or its agents' breach of contractual duty and/or breach of fiduciary duty and/or negligence the Plaintiff suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

(a) The sum of US$1,619,639.10 the total amount paid from the Account by the Defendant, net of refunds, without the Plaintiff's consent.
(b) Loss of profits resulting from the diminution in the Plaintiff's liquidity and cash flow.
(c) Damages for failure of the Defendant and/or its agents to use reasonable skill and care to follow protocol for the authentication of requests for payments before executing the same.

...

[14.] CBH avers that the bank behaved prudently and in accordance with the AOA and banking standards generally. Further, any breach of the account by a person posing as Yakushkina was caused by the bank not being immediately notified that her email account had been compromised in October 2014. It was this inaction that opened the door to the fraudulent email being used to authorize payment transactions from the account. In the circumstances and considering the AOA, CBH should not be held liable for the alleged fraudulent payments from the account.

[15.] CBH's Amended Defence, filed on 27 April 2018, states as follows:

1. The Defendant does not admit or deny paragraph 1 of the Statement of Claim. A person identifying himself as Andrei Rujnicov of the Republic of Moldova with a passport issued on February 4, 2014 by the Republic of Moldova, was introduced to CBH (Bahamas) Ltd. ("CBH Bahamas") by CBH Compagnie Bancaire Helvetique SA ("CBH Geneva") as the beneficial owner of Zampa Overseas Ltd., the Plaintiff. It is averred that the beneficial owner of the Plaintiff is also known as Andre Ruzhnikov (hereinafter referred to as "the Beneficial Owner"). The Plaintiff is put to strict proof of the allegations set out in paragraph 1 of the Statement of Claim.
2. ...
3. With reference to paragraph 3 of the Statement of Claim, it is admitted that on March 26, 2014 the Beneficial Owner opened a current, deposit and securities account in the name of Zampa Overseas Ltd. ("the Account") with the Defendant which remains open and active as at the date of this Defence. It is also averred that when the Account was opened, the Beneficial Owner instructed Leandre Sappino ("Mr. Sappino") of CBH Geneva that he wanted the utmost privacy in relation to the Beneficial Owner's identity and the Account. It is denied that at the time when the Beneficial Owner opened the Account on

March 2, 2014, the Beneficial Owner established a reference code. A reference code was established on May 30, 2014 during a teleconference between CBH Geneva, the Beneficial Owner, the Beneficial Owner's attorney under a Power of Attorney and the Defendant.

4. ...
5. Paragraph 5 of the Statement of Claim is denied. On May 29, 2014, Mr. Sappino received an email from the Beneficial Owner's assistant Ms. Ekaterina Yakushkina ("Katya") informing Mr. Sappino of incoming funds. When the Beneficial Owner called Mr. Sappino, he confirmed over the phone that Katya was his personal assistant.
6. It is further averred that on May 30, 2014, the Beneficial Owner visited Mr. Sappino at CBH Geneva at which time the Beneficial Owner gave a limited Power of Attorney to Mr. Georges de Bartha. Further, Mr. Georges de Bartha, Mr. Sappino, the Beneficial Owner and the Defendant participated in a teleconference during which a reference code was established between the Beneficial Owner and the Defendant for all future telephone conversations. Notwithstanding this, the Beneficial Owner and his assistant Katya continued to contact Mr. Sappino to execute transactions.
7. It is further averred that the course of dealings were such that Mr. Sappino of CBH Geneva received instructions from either Katya or unrelated parties followed by a telephone call from the Beneficial Owner who confirmed the instructions. Mr. Sappino subsequently forwarded the instructions by email to the Defendant. Through this method, the Plaintiff instructed the Defendant to make the following three payments:
   a. April 14, 2014: Facsimile invoice directly from D.S. Lavender (Antiques) Ltd. in the amount of USD$45,000.00 for a large quantity of jewelry. The invoice was addressed to Zampa Overseas Ltd., dated March 2, 2014 and signed by the apparent Beneficial Owner with the words "Please Execute" ("Payment Out 1").
   b. October 16, 2014: Invoice from Barnes Jewellery Co. emailed from Katya in the amount of USD$900,000.00 for (2) art objects. The request was accompanied by an invoice without an address, undated and unsigned by the apparent Beneficial Owner with the word "Please Execute" ("Payment Out 2");
   c. October 16, 2014: Invoice from Rossi emailed from Katya in the amount of USD$150,000.00 for art objects. The request was accompanied by an invoice addressed to "Mr. Ruzhnikov", dated October 7, 2014 and signed by the apparent Beneficial Owner with the words "Please Execute" ("Payment Out 3").
8. Upon receipt of instructions from Mr. Sappino referenced in Paragraphs 5-7 herein, the Defendant followed internal procedures which included as follows:
   a. Confirmed receipt of supporting documentation;
   b. Verified the signature of the Beneficial Owner;
   c. The Compliance Department certified the validity of transactions in comparison with the Beneficial Owner's profile which stated that the

Beneficial Owner operated as an independent fine arts dealer mainly in Russia.

9. Instructions from the Beneficial Owner had been accepted and confirmed by telephone prior to October 17, 2014, including Payment Out 3 referenced herein and addressed to "Mr. Ruzhnikov".
10. Paragraph 6 of the Statement of Claim is neither admitted or denied. It is averred that the Defendant received an email dated October 17, 2014 from Mr. Sappino introducing the apparent personal assistant of the Beneficial Owner, "Ms. Ekaterina Yakushkina", to the Defendant. Upon introduction of the personal assistant, pursuant to internal procedure, the Defendant took steps to confirm the change of procedure.
11. Paragraph 7 of the Statement of Claim is denied. On October 28, 2014, upon request from the Defendant, the Defendant received an email from Katya, yakushkiina666@gmail.com, attaching a Letter of Authorization purportedly signed by the Beneficial Owner. The letter of authorization confirmed that: "Ekaterina Yakushkina is my personal assistant and on my behalf has my permission to perform all account activities related to our company's account...)."
    Upon receipt of the said Letter of Authorisation, the Defendant verified the signature of the Beneficial Owner. It is further denied that the signature is materially different from the signatures on file for the Beneficial Owner. The Plaintiff is put to strict proof of the allegations set out in paragraph 7 of the Statement of Claim.
12. Paragraph 8 of the Statement of Claim is denied. ...The Plaintiff is put to strict proof that the aforesaid instructions were not authorized by the Beneficial Owner.
13. Paragraph 9 of the Statement of Claim is denied...
14. Paragraph 10 of the Statement of Claim is admitted...
15. Paragraph 11 of the Statement of Claim is denied...
16. Paragraph 12 of the Statement of Claim and its particulars are denied. The Defendant avers that at all times it acted in accordance with the general conditions of the Account Opening contract with the Plaintiff. It is averred that the Defendant conducted a series of checks upon receipt of the documents exhibiting the Beneficial Owner's signature. Further, the Defendant acted in accordance with the course of dealings that had been established with the Beneficial Owner and/or his agent.
17. It is further averred that upon being made aware of the alleged "unauthorized transactions" set out in paragraph 12 herein, the Defendant commenced in January 2015 an internal investigation... It is denied that the Defendant acted contrary to the Account Opening contract with the Plaintiff and further that the actions of the Defendant amounted to serious error on behalf of the Defendant.
18. Further, it is averred that the Defendant acted in accordance with the relevant standard and took reasonable precautions to authenticate the instructions prior to the execution of the instructions provided by the Plaintiff. It is further denied that it amounted to gross negligence and/or willful misconduct. ...

19. Paragraph 14 of the Statement of Claim and its particulars are denied and the Plaintiff is put to strict proof. It is averred that in accordance with Article 6 of the Account Opening documents, any loss that may have been caused due to undetected defective authentication or counterfeits are the responsibility of the Beneficial Owner. Additionally it is averred that the breaches complained of (which in any event are denied) occurred in connection with the performance of the Defendant's duties as banker and did not give rise to any fiduciary duties alleged. It is further denied that the actions of the Bank amount to serious error. The Defendant denies that the Plaintiff is entitled to the relief claimed as against it or to any relief at all.
20. The Defendant further avers, without prejudice to the foregoing, that the Beneficial Owner owed a duty to the Defendant to inform the Defendant that his assistant's email may have been compromised and as a result, the Plaintiff wholly caused or contributed to its own alleged injuries, damages and loss.
    Particulars of Contributory Negligence
    a. In or around January 2015 the Beneficial Owner confirmed to the Defendant that in October 2014 he was aware that Ms. Yakushkina's email had been compromised at that time, but had failed to inform the Defendant in October 2014.
    b. The Plaintiff herein owed a duty to refrain from facilitating an alleged fraud or forgery and to inform the Defendant that the Beneficial Owner's assistant's email had been compromised as soon as it was made aware of the same.
    c. ...
    d. By reason of the Plaintiff's breach of duty owed to the Defendant, the Defendant has suffered injuries, damages and loss.

    ...

[16.] In its Reply, filed on 12 August 2016, prior to the Amended Statement of Claim, Zampa joined issue with CBH's Defence and stated inter alia that 'Andrei Rujnicov' was never referred to as 'Andre Ruzhnikov'. It was also maintained that, CBH received payment instructions from an email address that was not Yakushkina's. In the circumstances, CBH should have recognized this and contacted Zampa immediately. Had CBH done so the fraud perpetrated on Zampa would have been revealed.

[17.] At trial, Counsel for Zampa chose not to pursue the claim for breach of fiduciary duty against CBH.

[18.] The issues which arise for determination in this case are the following:

(1) The efficacy of the reference code established between the parties. Whether or not the call back protocol agreed between the parties required CBH to authenticate ALL transactions by contacting Zampa and/or its representatives.
(2) Whether CBH committed serious errors by making the disputed payments out of Zampa's account pursuant to Article 6 of Part III of the AOA dated 26 March 2014.
(3) Whether CBH's actions, inactions or conduct relating to the authentication of the payment requests amounted to gross negligence and/or willful misconduct pursuant to Article 9 of Part III of the AOA.
(4) Whether the amount of US$1,619,639.10 claimed by Zampa to have been lost is as a direct result of CBH's breaches of contract and/or negligence.
(5) Whether the failure of Zampa to inform CBH that Yakushkina's email may have been compromised wholly caused or contributed to its own alleged injuries, damages and loss.

[19.] At the trial of this matter Zampa called Rujnicov, Georges De Bartha, Yakushkina, Dianne Flores (Handwriting Expert) and Fareda Sands (Compliance Expert). CBH called Sappino, Strachan and Rolle. The witnesses were all subject to cross examination on their evidence in chief as contained in their filed witness statements.

Zampa's Case

[20.] Zampa submits that a code word was established between the parties to be used during the call back procedure with CBH in order to authenticate instructions sent via fax or email regarding the account from Zampa. Zampa pleads that the code word was originally established on 26 March 2014. Zampa also submits that a reference code was agreed on 30 May 2014. The first and second payment transactions performed on the account on 14 April 2014 and 13 October 2014, were authenticated by Sappino via the call back protocol established between the parties.

[21.] On 28 October 2014, CBH requested and received a letter from the user of the incorrect email address. The letter was signed – 'Andre Ruzhnikov' – not 'Andrei Rujnicov'. The letter authorized Yakushkina to be able to perform all account activities. Counsel for Zampa, submits that the request in the letter was contrary to the POA used to establish control of the account, which was only for the use of Rujnicov.

[22.] Following on the receipt of the 28 October 2014 letter, CBH received 11 payment instructions from the incorrect email address authorized by 'Andre Ruzhnikov'. These instructions spanned six weeks, from 29 October 2014 through 11 December 2014. During this period CBH also spoke by phone with a woman purporting to be Yakushkina. Further, at no time before any of the 11 payment instructions were approved did anyone from CBH perform a call back with Rujnicov, submits Zampa. Rujnicov, they submit, did not become aware of the fraudulent transactions carried out on his account until December 2014 when there was insufficient funds to perform the eleventh payment instruction.

[23.] Of the payment instructions that were carried out, two refunds were received by Zampa, on the 10 December 2014 and 13 July 2015, respectively.

[24.] In consideration of the above, Zampa submits that the conduct of CBH amounts to breach of contract. Reliance is placed on the case of ***Foley v Hill and others [1843-60] All ER Rep 16*** and the dicta of Chancellor Cottenham as follows:

> "...Money, when paid into a bank, ceases altogether to be money of the customer; it is then the money of **the banker**, who is **bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it**. The money paid into the banker's is money known by the customer to be placed there for the purpose of being under the control of the banker. It is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is to all intents and purposes the money of the banker, to do with it as he pleases. He is guilty of no breach of trust in employing it; he is not answerable to the customer if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of the customer, but **he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the customer, when demanded, a sum equivalent to that paid into his hands. That has been the subject of the discussion in various cases, and that has been established to be the relative situation of banker and customer.** That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor..."
>
> (Emphasis added)

[25.] In furtherance of its claim that the payments in question were unauthorised, Zampa relies on the Privy Council case of ***Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd. and others [1986] A.C. 80***:

> "...offer a service, which is to honour their customer's cheques when drawn upon an account in credit or within an agreed overdraft limit. If they payout upon cheques which are not his, they are acting outside their mandate and cannot plead his authority in justification of their debit to his account. This is the risk of service which it is their business to offer."

[26.] Finally, Zampa submits that its position is supported by the learned authors of **Paget's Law of Banking** which provide that the written standard terms and conditions of the bank govern the bank account and provide for and inform on the implications of those express duties and obligations. Specifically the AOA Article 2 provides that "...only those signatures provided in writing to the Bank and evidence as duly authorized by the account-holder are valid, until they are changed or revoked by written notice to the Bank, irrespective of any different entries in the commercial register or other publications."

[27.] In respect of the claim of CBH, that the 30 May 2014 agreement for a code is invalid, Zampa relies on the doctrine of promissory estoppel. They contended that CBH cannot now renege on its promise (***Combe v Combe [1951] 2 KB 215***), by reverting to previous legal relations. Reliance is also placed on the decision in ***Rock Advertising Limited (Respondent) v MWB Business Exchange Centres Limited [2018] UKSC 24.***

[28.] Zampa says that even if the court does not find that a code was validly established there are nonetheless serious breaches of the AOA as:

(i) CBH improperly corresponded with the fraudulent email address;

(ii) CBH accepted invoices and other instructions addressed to and coming from a person unknown to the Account (Mr. Andre Rujnicov);

(iii) CBH failed to consider the authorizations under the POA; and

(iv) CBH conducted "call back" conversations (calls in and calls out) with a female when even the genuine Yakushkina had no authority to verify the transactions.

CBH, Zampa says, paid no attention to the disparities written in the invoices that were produced for the payment transactions that they approved.

[29.] Zampa says that Article 6 Part III of the AOA provides no support to CBH as their actions amount to serious errors. Article 6 provides:

> "Any loss caused by undetected defective authentication or counterfeits is the client's responsibility, except in the event of serious error by the Bank."

Zampa submits that a mistake by the bank to recognize a forgery or material alteration is fundamental. Reliance is placed on ***Ellinger's Modern Banking Law by Ellinger, Lomnicka, Hare [2011] page 546*** and ***Papp v Gottard Bank International Ltd. [1993] BHS J. No.111.***

[30.] Zampa also says that there was gross negligence by CBH, as CBH breached its duty of reasonable care and skill when dealing with the account, by allowing fraudulent transactions to be conducted (***Selangor United Rubber Estates Ltd v Cardock (No.3) [1968] 1 WLR 1555***). The bank had a duty to confirm and verify all payments as per (***Lipkin Gorman v Karpnale & Co [1989] 1 WLR 1340 (CA)***). The test therein being, *'whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious possibility albeit not amounting to a probability that its customer was being defrauded.'*

[31.] CBH, Zampa says, did not act as a reasonable banker in the circumstances. Two (2) negligent acts on the part of CBH were:

(i) the failure to identify the difference in the email address which is fundamental and uncontroverted;
(ii) the failure to complete the proper verifying due diligence of the imposter transactions.

CBH's case

[32.] CBH accepts that the relationship between the parties is a contractual one. It also relies on the dicta of Lord Scarman in ***Tai Hing Cotton Mill Ltd v Chong Hing Bank Ltd***. CBH draws a comparison to the Scottish case of ***Pebbles Media Group Ltd v Patricia Reilly [2019] CSOH 89, [2021] CSIH 23***:

"20 In approaching this issue I remind myself that the unfamiliarity of the payee's name did not prevent CC from processing the transaction. Although she suffered from the issues set out in paragraph 5 I do not have any evidence to indicate that they diminished her ability to discern suspicious features in a transaction. I am therefore mindful that features of the transaction that with the benefit of hindsight seem suspicious were not so interpreted by CC. I consider I should take this into account in assessing the defender's culpability.

21 The pursuers rely on the misspellings and inept wording of the emails on Friday 9 October 2015 as indicative of the work of a fraudster. I do not consider however that this is so. Yvonne Bremner gave evidence that the word "swiftly" (email on 9 October 2015 at 11.50am) was not a word she would use. But the word itself is not unusual. Nor do I have any evidence that the defendant was so well versed in Yvonne Bremner's vocabulary that she should have recognised it as suspicious. The pursuers submitted that because they were signed "Yvonne Bremner" as opposed to "Y" or "Yvonne" the defender ought to have been suspicious. They relied on evidence from Yvonne Bremner and CC that Yvonne Bremner was not in the habit of using her full name when signing emails. In the absence of evidence in the form of prior communications between Yvonne Bremner and the defender demonstrating that this was a fixed habit it is difficult for me to accept that the defender ought to have noticed the difference in designation or attached any weight to it. Hindsight is a wonderful thing, I consider that the pursuers are reading the emails in light of the knowledge that a fraud was perpetrated. The tenor of the defender's evidence was that she did not notice anything suspicious. As far as the defender was concerned Yvonne Bremner was either in transit to Tenerife or on holiday and making use of a mobile phone. If there were anomalies in her emails they could be ascribed to these factors. She stated that she thought that iPhones inserted the sender's name in auto text at the foot of email messages. She would not have thought it suspicious if Yvonne Bremner's full name appeared at the foot of the email.

22 Evidence was adduced to show that Yvonne Bremner was not a habitual user of a mobile phone. The emails are marked "sent from my iPhone". But I do not consider this was suspicious. The defender knew that Yvonne Bremner owned a mobile phone. Even if Yvonne Bremner was known to be a technophobe, I do not consider her (apparent) use of the mobile phone while on holiday was a matter that should have excited the defender's suspicions.

23 The pursuers also ask me to notice that the first fraudulent email posed a question to which the Yvonne Bremner already knew the answer. Yvonne Bremner would have known that the defender would be at the office at the time susceptible to logical analysis. To bring to bear this level of scrutiny on these emails does not in my opinion furnish the means of demonstrating a breach of the defender's obligation of reasonable skill and care.

24 The pursuers argue that the defender should have appreciated that something was amiss when the defender replied to Yvonne Bremner. On doing so it was said a different address appeared in the field for the recipient's email address. The email address visible was ceoreply@writeme.com as opposed to Yvonnebremner@peeblesmedia.com. It would appear that the fraudster's email

address showed in the email when a reply was sent but the cloned email address was visible when an email was incoming. Yvonne Bremner stated in evidence that on her return to Glasgow she checked the defender's emails and noticed this discrepancy.

25 A scrutiny of the print outs reveals a varied picture. Sometimes the cloned email address appears (Yvnee.bremner@peeblesmedia.com) and sometime the fraudster's false address (ceoreply@writeme.com). The emails eg of 9 October 2015 at 5.29am, 5.53am and 6.31am and 12 October 2015 at 5.12am and 6.14am pass from the defender to Yvonne Bremner but do not show the ceoreply@writeme.com email address. The pursuers' counsel pointed out that the defender sent two emails (6/3/11 and 6/3/9) to two different email addresses. These emails were presumably responses to two separate "chains". One leading back to the true address (to which she would have received an "out of office" reply) and one to the fraudster's cloned email address. The defender said she sent the follow-up to prompt a reply. It was not suggested that the defender knew that she was in communication with a fraudster and no sinister reason was assigned to her use of a different chain leading to a different address. While she was unable to explain why she had chosen a separate chain in order to elicit a reply it does not follow that the defender knew that there were two email addresses. I asked whether the email address was visible on screen at the time of the reply or whether the cursor had to be "hovered" over the email for the email name and extension to appear. I have no note of this query being answered. The fact that the email addresses appear on the email print outs does not mean that the full addresses were visible on screen at the time. I am not satisfied on the evidence adduced that I can draw this inference. The defender stated she had not noticed that there were two email addresses. Given her ignorance of any other features of the transaction that suggested that a fraud was being practised on her and the apparently innocuous nature of the spurious email address, I am not convinced that this evidence demonstrate a breach of her implied obligation.

26 It was submitted that the defendant should have been suspicious due to the fact that the timings of the emails sent to the fraudster were out of kilter with UK timings. But there was no evidence that the defender appreciated that this might be significant. Electronic devices may have date stamps that vary from local time for a variety of reasons. It should also be remembered that Yvonne Bremner was overseas. The defender was not asked whether she knew what time zone Tenerife was in nor if she appreciated that the time zone appearing on her email replies had time stamps at variance with both the UK and Tenerife time zone. Nothing turns on this."

[33.] CBH rejects the submission that there was a subsequent agreement made in May 2014 between the parties for use of a reference code, saying that it is invalid. They point to Article 1/Modification of Instructions given to the Bank

> Any commitment made by the Bank to the client, other than those printed in this present document, must be confirmed in writing and signed by two authorized

officers (directors, members of the executive Committee, or one of the former together with an authorized officer of the Bank).

CBH says that the AOA was not varied or modified in accordance with its terms and as such there was no need to utilize a reference code or any other form of callback protocol before processing any transaction relative to the account.

[34.] CBH acknowledges that Rolle was on the call with Rujnicov on 30 May 2014. However, contrary to the submissions of Zampa, CBH says Rolle's evidence was that the reference code was only to be used as a means of verifying Rujnicov's identity in the event that there was a need to speak to him. The code, CBH says, was not a prerequisite to processing instructions for the account. They say that Strachan identified and carried out the verification procedure from his end.

[35.] CBH says that the testimony of the handwriting expert, Flores, says that there was no way for an untrained eye to detect that the signature on the transactions in question was not authentic. In reliance on this evidence, CBH says that it cannot be held at fault for executing the payment transactions. The only possible fault, they say would be having not detected the additional 'i' in the email used for Yakushkina.

[36.] CBH submits that Article 9 Part III of the AOA (supra) as relied on by Zampa, is irrelevant in the circumstances of this case as it is clearly resting on there being an order whose genesis was from the client. While, Rujnicov's case is that none of the transactions began with him.

[37.] CBH argues that Zampa has not met its burden of establishing negligence. They submit that as the person with the responsibility for processing the transactions complained of, Strachan, followed the process established by CBH. Strachan's evidence was:

> "Upon receiving each of the said instructions, I followed the Bank's Internal Procedures. Firstly, I printed the invoices and provided them to Senior Management for their acknowledgement as having being received by the Bank. The invoices were then returned to me at which point I ensured that (i) the purchases were consistent with the client's profile, (ii) the signatories corresponded with a signature on file for the client; and (iii) that the account had sufficient funds to cover the transaction. The invoices were then forwarded to Compliance before being returned to me."

[38.] CBH relies on Article 6 of the AOA. They say that this clause shows that failure to detect every error on the part of the bank does not amount to serious error. They contend that the burden is on Zampa to establish that any error was 'serious'. Just as there is a distinction between negligence and gross negligence there is a distinction between error and serious error.

[39.] In the circumstances, if negligence is found, contributory negligence should certainly be considered between the parties, submits Counsel for CBH. In the event that contributory fault is found on the part of Zampa by this court, CBH submits that the loss should be apportioned as it was in the case of ***Tennant Radiant Heat Ltd v Warrington Development Corporation [1988] 1 EGLR 41***.

[40.] CBH argues that had the bank been made aware that Yakushkina's email was compromised, according to the evidence of Rolle "this would have undoubtedly" caused the Bank to revisit the manner in which instructions were received and processed relative to Zampa. The bank would have been placed on higher alert for suspicious activity and it is likely that the disputed transactions would not have been processed. Notwithstanding the preceding, CBH also submits that it is wholly Zampa's fault that it suffered loss for not informing the bank of Yakushkina's compromised email account. In the circumstances they contend that Zampa's claim should be dismissed.

Analysis and Disposition

[41.] Having heard the evidence of the parties, observed their demeanor as they gave their evidence, on balance, I preferred the evidence of Zampa in this matter. I find that

there is no evidence that Rujnicov, the beneficial owner of Zampa, is also known as Andre Ruzhnikov in the Bank's account documents as pleaded by the Defendant. I am also satisfied that neither Rujnicov nor Yakushkina issued, or were aware of, the 11 transactions which CBH executed on Zampa's account and which originated with the fraudulent email. CBH and Rujnicov orally agreed a reference code to verify the identity of Rujnicov on 30 May 2014. The call back procedure had been in place prior to oral agreement for a specific code which was made in May 2014. I am satisfied that the mandate provided to CBH by the fraudster and upon which it acted were forgeries and not genuine. The account belongs to Zampa not Rujnicov and as such the POA over the account was given to Rujnicov by Zampa. The powers under the POA was not his to assign or transfer. This POA was a document created by CBH and as such CBH was aware that Rujnicov could not, by the terms of the POA empower Yakushkina over the account. The specific clause in the POA states:

> "This Power of Attorney cannot be transferred or delegated in any way to third parties and the principal expressly stipulates that no sub-delegated power of attorney may be granted on the basis of this power of attorney."

[42.] The evidence of Rolle and Strachan was that the email and letter (which letter was signed 'Andre Ruzhnikov' and also sent from the incorrect/ fraudulent email address) sent to CBH to introduce Yakushkina, did not bestow any authority on her to conduct transactions on the account. Both Rolle and Strachan agree however that the incorrect spelling 'Ruzhnikov' as well as the incorrect email address should have been noticed. The purported letter of authority, dated 28 October 2014 was settled as follows:

> CBH (Bahamas) Ltd.
> CBH House, East Bay Street,
> P.O. Box N-1724
> Nassau Bahamas
>
> RE: ZAMPA OVERSEAS (579438)
> Dear Ahmad,
> This is to confirm that Ekaterina Yakushkina is my personal assistant and on my behalf has my permission to perform all account activities related to the company's account: (ZAMPAS OVERSEAS 579438)

Thank you for your cooperation.
Sincerely,
(signed)
Andre Ruzhnikov

According to the handwriting expert the signature affixed to the letter was essentially a cut and paste replica of Rujnicov's signature.

[43.] Upon receiving this purported letter of authorization, signed in a name other than that of the beneficial owner, Strachan asked the person posing as Yakushkina (rather than Rujnicov) to confirm the extent of their authority over the account. The initial response to his request was that "the letter covers all account activities including the giving of instructions and sharing of information". Again, rather than confirm this startling suggestion that Yakushkina could give CBH instructions on the account, with Rujnicov, Strachan communicates by phone with the fraudster seeking the clarification. Strachan had absolutely no way of knowing who he was talking to and as it turns out he was communicating with the fraudster.

[44.] CBH started performing call backs after the transactions were discovered and stamped all transactions afterward accordingly. After January 2015 the verification on the account changed and Rolle confirmed that CBH amended its policies because of the fraud. She also confirmed that a reference code was in place since May 2014. I am satisfied that CBH and Rujnicov orally agreed a reference code to verify the identity of Rujnicov on 30 May 2014. The call back procedure had been in place prior to the oral agreement for a specific code which was made in May 2014.

[45.] There was also inconsistent evidence on the part of CBH's witnesses relative to the reference code agreed with Rujnicov. Rolle in her evidence acknowledged that a code was agreed. However, Strachan's evidence was that he did not become aware of a code until the dispute arose. Further, there were no call backs to the person who purported to be Yakushkina. There was no KYC documentation on Yakushkina held by CBH in any event and the bank was not authorized to conduct business with her. The female that CBH employees spoke with was not Yakushkina. Rolle's evidence was that she was

alerted to the fraud by the large amounts of money being moved in a short period of time from Zampa's account.

[46.] It is accepted that the relationship between the parties in this matter is contractual. The statement of legal principle in the case of ***Joachimson v Swiss Bank Corporation*** **[1921] 3 KB 110, 127** remains useful:

> "I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written order so as not to mislead the bank or to facilitate forgery."

[47.] Section 24 of the Bills Exchange Act 1882 provides that:

> "Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:
>
> Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery."

[48.] The governing document is the AOA. Under cross examination both Strachan and Rolle admitted that no documentation on file had the spelling – 'Andre Ruzhnikov'. Strachan's evidence was that he did not notice that the spelling contained in the message from the incorrect email was different to that on file. While, Rolle averred that the different spellings should have been questioned, she also admitted that the transfer of funds from the account should be from the client or signed by the client who holds the POA.

[49.] Article 6 and Article 9 of the AOA seek to limit the exposure of CBH for acts done by it which may cause loss to Zampa. I reproduce them both again for convenience:

> Article 6:
> "Any loss caused by the undetected defective authentication or counterfeits is the client's responsibility, except in the event of serious error by the Bank."
>
> Article 9:
> "In the event of loss caused by non-execution or defective execution of any orders (excluding securities transactions orders), the Bank is liable only for the loss of interest unless, in any particular case, the Bank has been grossly negligent or guilty of willful misconduct."

[50.] I accept the submissions that Article 9 does not apply to the circumstances of this case. Zampa says at paragraph 3.17 of its submissions:

> Further, Article 9 of Part III of the Agreement protects the Defendant for 'nonexecution or defective execution' of 'orders'. In this case, the request for a payment was executed, but the signature was a forgery and transmitted via the Incorrect Email Address. This is not a case where an 'order' was either not executed or executed defectively. Accordingly Article 9 of Part IIII of the Agreement is irrelevant to the present circumstances.

CBH says at paragraph 35 of its submissions:

> The Defendant submits that Article 9 of the Account Opening Agreement has no bearing on the present case, as it is on its face clearly predicated on there being an order originating with the client/customer. The Plaintiff's case in the present action is that none of the disputed transactions originated with the Plaintiff.

Article 9 seeks to limit the liability of CBH to only instances where it would have been grossly negligent or would have misconducted itself in the course of improperly executing or failing to execute orders with respect to the account. Clearly this must relate to orders made by the account holder. (See ***Papp and Gotthard Bank and Trust***). Having found that neither Rujnicov nor Yakushkina initiated or were aware of the several transactions made through the fraudulent email, it cannot be said that any loss was *"caused by non-execution or defective execution of any orders (excluding securities transactions orders)"*. Any loss occasioned by the diminution of the balance on Zampa's account was caused

by CBH accepting and executing upon orders or instructions given through the fraudulent email address and from strangers to Zampa's account.

[51.] Accordingly therefore, the extensive discussions by the parties on gross negligence and willful misconduct were entirely unnecessary.

[52.] Article 6 seeks to limit the liability of CBH in cases where the loss to Zampa is caused by the undetected defective authentication or counterfeits. In such a case, CBH is not liable except in the event of serious error by the Bank. As Article 6 seems to apply, Zampa must demonstrate that CBH was guilty of a serious error.

[53.] I am satisfied that CBH was indeed guilty of serious error. In the case of ***Smith v Wemyss Coal Co 1928 SC 180***, the Court stated the following with regard to the degree of misconduct:

> "As regards the "serious" quality of the "misconduct," it is clear that to leave a burning cigarette end lying about at a place in a mine where the person who has so left it immediately proceeds to bring and open a box of explosive powder is behaviour fraught with grave danger to such person and others; and, in my opinion, that is enough to make it "serious" within the meaning of the Act."

[54.] It cannot seriously be disputed that CBH was in breach of its mandate with Zampa. The sum of US$1,619,639.10 was paid from the account by CBH, net of refunds, without Zampa's consent. CBH had paid out almost the entirety of the sums standing to Zampa's account in 10 transactions before realizing that it had no consent from Zampa to do so. In fact, it was only because nearly all of the funds had been depleted, and the fraudster was seeking additional funds, in excess of the balance, that CBH appreciated that a fraud had been conducted and CBH then sought to attempt to recover the moneys paid out. In the course of the fraud, CBH accepted correspondence, which was flawed on its face (executed by someone called Andre Ruzhnikov) and sent by the fraudulent email to amend the account mandate.

[55.] At the meeting on 30 May 2014 there was an oral agreement to implement a reference code. CBH admits this in paragraph 3 of its Defence. I am satisfied on my assessment of the evidence that the oral agreement at the meeting of 30 May 2014

extended to the use of the code during the call back procedure for the verification of all transactions. It cannot be disputed that up to the point that CBH began accepting instructions from the fraudulent email, the call back procedure being utilized. No real explanation is advanced for the deviation from the previously established procedure of contacting Rujnicov directly for verification of transactions.

[56.] I accept that this oral agreement appears to modify the terms of the AOA in a manner not in accordance with Article 1 of the AOA. Article 1 provides:

> Article 1/ Modification of Instructions given to the Bank
>
> Any commitment made by the Bank to the client, other than those printed in this present document, must be confirmed in writing and signed by two authorized officers (directors, members of the executive Committee, or one of the former together with an authorized officer of the Bank).
>
> For an instruction given by a client to be valid and binding upon the Bank, the Bank must have accepted it by a letter signed by the authorized signatories mentioned above.

CBH says that the attempt to modify the AOA in this manner was invalid and states at paragraph 52 of its submissions as follows:

> There is no written evidence of the Account Opening Agreement being modified. The Bank submits that this is because the Account Opening Agreement was never modified. In the circumstances, the Defendant submits that there was no requirement to utilize a reference code or any other form of callback protocol before processing any transaction relative to the account.

Zampa says that CBH is estopped from denying the oral agreement and its modification of the AOA. The learned authors of Halsbury's Laws of England at Volume 47 of 2014, paragraph 308 provides a useful definition of the type of estoppel suggested by Zampa:

> **"Promissory estoppel may prevent a party to a contract from going back on a concession he has made to the other party and so may modify contracts in the sense of suspending or even extinguishing contractual rights but it cannot stand alone as giving a cause of action in itself** and has not therefore made any general inroads into the doctrine of consideration."

[57.] Whilst in the case of ***Rock Advertising Limited (Respondent) v MWB Business Exchange Centres Limited [2018] UKSC 24***, the UK Supreme Court found that verbal

variation of such a clause was found to be unenforceable, it nonetheless confirmed that the doctrine of estoppel remained available to litigants. The essential factors giving rise to an estoppel are: (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made; (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; and (3) Detriment to such person as a consequence of the act or omission.

[58.] There were no monthly bank statements for the account to enable Zampa to monitor transactions and therefore the reference code was particularly important for performing transactions. It would also be important in detecting unauthorized activity on the account. It would be reasonable to infer a reliance on the call back protocol and the use of the reference code in these circumstances. It was not until 21 January 2015 that Rujnicov was asked to verify a transaction using the reference code. The failure to perform the call back feature has proven detrimental to the management of Zampa's account.

[59.] In ***Papp v Gottard Bank International Ltd. [1993] BHS J. No.111*** a decision of Gonsalves-Sabola, CJ (as he then was) fraudulent documents were submitted to Gottard Bank on an account that necessitated the signature, account number and password be presented for transactions to be approved. The fraudulent documents only contained a signature, which was a forgery. Gonsalves-Sabola CJ concluded in accordance with the client's agreement with the bank that this amounted to the bank being 'seriously at fault.', as the bank did not confirm the signature of the account holder, absent the account number and password being presented. At paragraphs [13]- [18] of the judgment Gonsalves-Sabola CJ provides an examination of the authorities relative to forgery of a customer's signature, on reliance on which a bank has acted:

> **[13]**I will examine briefly the state of the law relative to forgery of a customer's signature, on reliance on which a bank has acted. The cases speak in harmony and thus only illustrative reference to some of them is called for. Pride of place goes to Tai Hing Cotton Mill Ltd. v Lui Chong Hing Bank Ltd. and Others (1986] 1 AC 80 where the Privy Council examined the duty of the customer to his bank

when issuing his mandates. At page 101, Lord Scarman who delivered the judgment of the Board, said on the question of general principle:

> "The question can be framed in two ways. If put in terms of the law's development, it is whether two House of Lords' decisions, one in 1918 and the other one in 1933, represent the existing law. If put in terms of principle, the question is whether English law recognises today any duty of care owed by the customer to his bank in the operation of a current account beyond, first, a duty to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery, and, secondly, a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as he, the customer, becomes aware of it. The first duty was clearly enunciated by the House of Lords in London Joint Stock Bank Ltd. v Macmillan [1918] AC 777, and the second was laid down, also by the House of Lords, in Greenwood v Martins Bank Ltd. [1933] AC 51.
>
> The banks accept, of course, that both duties exist and have been recognised for many years to be part of English law. Their case is that English law recognises today, even if it did not in 1918 or 1933, an altogether wider duty of care. This is, they submit, a duty upon the customer to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented to it for payment. Further, and whether or not they establish the existence of this wider duty, they contend that the customer owes a duty to take such steps to take his periodic (in this case monthly) bank statements as a reasonable customer in his position would take to enable him to notify the bank of any debit items in the account which he has not authorised. They submit that, given the relationship of banker and customer and the practice of rendering periodic bank statements, the two duties for which they contend are necessary incidents' of the relationship."

[14]At page 103, Lord Scarman continued:

> "First, it is necessary to determine what Macmillan's case [1918] AC 777 decided. Upon this point their Lordships are in no doubt. The House held that the customer owes his bank a duty in drawing a cheque to take reasonable and ordinary precautions against forgery.
>
> The duty ... is to draw the cheques with reasonable care to prevent forgery, and if, owing to neglect of this duty, forgery take place, the customer is liable to the bank for the loss': per Lord Finlay, LC, at page 793.
>
> In so formulating the duty the House excluded as a necessary incident of the banker-customer relationship any wider duty, though of course it is open to a banker to refuse to do business save upon express terms including such a duty. Lord Finlay, LC, expressly excluded any such duty saying, at page 795: Of course the negligence must be in the transaction itself, that is, in the manner in which the cheque is drawn. It would be no defence to the banker, if the forgery had been that of a clerk of a customer, that the latter had taken the clerk into his service without sufficient inquiry as to his character.'

> And the House approved the judgment of Bray, J, in Kepitigalla Rubber Estate Ltd. v National Bank of India Ltd. [1909] 2 KB 1010. In that case the judge held that, while it is the duty of a customer in issuing his mandates (i.e., his cheques) to his bank to take reasonable care not to mislead the bank, there is no duty on the part of the customer to take precautions in the general course of carrying on his business to prevent forgeries on the part of his servants."

[15]At page 105, Lord Scarman quoted the classic analysis by Atkin, Li, of the incidents of the contractual relationship between banker and customer in Joachimson v Swiss Bank Corporation [1921] 3 KB 110, 227 in which Atkin, LJ set down the duty of the customer in these words:

> "The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery."

[16]Lord Scarman rounded off the reference to Joachimson by saying that:

> "Atkin LJ clearly felt no difficulty in analysing the relationship upon the basis of the limited duty enunciated in Macmillan's case. And in Macmillan's case itself the protracted discussion, which is now only of historical interest, as to the true ratio decidendi of Young v Grote (1827) 4 BING 253 reveals vividly that the House was aware of the possibility of a wider duty but rejected it."

[17]At page 106 Lord Scarman deals with the question of the protection of banks in reciprocation of the obligations placed upon them in the management of a customer's account. He said with reference to a sympathetic observation on the subject made in the court below:

> "One can fully understand the comment of Cons, JA, that the banks must today look for protection. So be it. They can increase the severity of their terms of business, and they can use their influence, as they have in the past, to seek to persuade the legislature that they should be granted by statute further protection. But it does not follow that because they may need protection as their business expands the necessary incidents of their relationship with their customer must also change. The business of banking is the business not of the customer but of the bank. They offer a service, which is to honour their customer's cheques when drawn upon an account in credit or within an agreed overdraft limit. If they pay out upon cheques which are not his, they are acting outside their mandate and cannot plead his authority and justification of their debit to his account. This is a risk of the service which it is their business to offer. The limits set to the risk in the Macmillan [1918] AC 777 and Greenwood [1933] AC 51 cases can be seen to be plainly necessary incidents of the relationship. Offered such a service, a customer must obviously take care in the way he draws his cheque, and must obviously warn his bank as soon as he knows that a forger is operating the account."

[18]Lord Scarman rejected decisively the existence of an implied term in the contract between banker and customer that a duty was owed to the banker by the

customer to check periodic bank statements in order to be able to advise the bank of any items which were not or might not have been authorized.

[60.] Banks are expected to be more than mere automatons. The evidence of Zampa's expert witness emphasizes that in providing service to customers, particularly in the digital age, requires banks to rise beyond the strict execution of payment instructions without pause for inquiry. The bank must, as a rule, interrogate the instructions given by clients. The rapid succession in which the payment requests came, in some cases 2 and 3 times in one day, ought to have created a cause for some concern.

[61.] The additional step, of engaging in a call back protocol, to verify that these were in fact Zampa's payment instructions, is the tool of the reasonable and prudent banker and the norm in general banking activities of this nature. That CBH mandated the use of the procedure after the fraud was unfurled is not surprising. In any event, as I have indicated, I am persuaded that the call back protocol was a feature of the relationship from the outset. Sappino, at the outset, prudently performed as if this were the standard. Rujnicov certainly had the expectation that this would be the norm.

[62.] Even in the absence of any variation of the AOA, to mandate a call back protocol, the evidence is clear that CBH committed a serious error. This is so if only for the simple fact that it paid out in multiple transactions almost the entirety of Zampa's account without proper authority. There were just too many missed opportunities on the part of CBH to intercept and discover the fraud. The spelling of Rujnicov's name, the additional 'i' in the email that was passed off as Yakushkina, the lack of due diligence and follow up were all confirmed in the testimony of the compliance expert Sands. These all point to a breach of the AOA on the part of CBH. In particular, Sands spoke to protocols in general in the offshore banking sector and that had these general protocols been followed, they could have averted the fraud.

[63.] Perhaps the most striking error or omission, was the failure of Sappino to detect that he must have been corresponding with an imposter or at the very least something was awry. On 17 October 2014 he had introduced Yakushkina to Rolle and Strachan, yet

on 20 October he received a request from the imposter, posing as Yakushkina, to be introduced to CBH. Sappino's response was to do nothing and simply re-send the introduction.

[64.] Sappino's evidence on this is instructive:

> Q. ...First of all, why would she be asking you to introduce her on the 20th if you had already introduced her on the 17th?
> A. Yes, it seemed weird but I guess because she had problem with her inbox as she said.

I fully accept Zampa's submission that had Sappino, being alerted that something was amiss with Yakushkina's email, checked the email address in the correspondence with the person purporting to be Yakushkina, he would have discovered the fraud.

[65.] The fraudulent payments were successful as a result of CBH's failure to:

(i) distinguish between Yakushkina's e-mail address and the fraudulent email address;

(ii) verify the correct name and signature on the payment invoices for execution;

(iii) verify who they were speaking to on the telephone about Zampa's account

(iv) use the reference code for a call back to complete a verification procedure that ought to have been in use;

(v) take notice of the uptick in account activity over a short period – specifically instructions to transfer funds out of the Account and requests for refunds which were immediately followed by a payment request; and

(vi) appreciate that the POA did not allow Zampa's authority to be transferred and/or used by anyone other than Rujnicov, which necessarily means that no authority could have been bestowed on Yakushkina at all.

[66.] I am satisfied on the facts of this case that CBH was put on inquiry that there were reasonable grounds to believe –if not proof – that the payment instructions were an attempt to misappropriate the money in Zampa's account. Article 6 of the AOA cannot be

used as a shield for CBH in the circumstances. CBH's errors were serious errors. In addition to the email exchanges, CBH actually spoke to the fraudster in relation to Zampa's private and confidential account information and the status of payment requests. All the while, not seeking to verify who they were actually speaking to. In the circumstances, I am not persuaded that the Scottish case of ***Pebbles Media Group Ltd v Patricia Reilly,*** advanced by CBH, provides an answer to the many red flags which were missed by CBH in this case. In my view the case is distinguishable on the facts.

[67.] CBH's actions amount not only to a serious error but a failure to exercise the requisite due care and skill expected of CBH. Such failure to exercise due care and skill was the cause of loss to Zampa and amounts to negligence.

[68.] CBH claims that the losses were occasioned by or contributed to as a result of Zampa's failure to notify it of Yakushkina's hacked email. CBH says in its submission:

> It is abundantly clear on the weight of the evidence that the unfortunate chain of events were triggered by the hack of Ms. Yakushkina's email account and her subsequent failure to advise the Bank of the same. Accordingly, the Defendant submits that any losses sustained by the Plaintiff were as a result of the Plaintiff's failure to take reasonable steps to guard against the risks associated with the hacking of Ms. Yakushkina's email account, inclusive of advising the Defendant of the hack and fraudulent email that had been created."

CBH submits that Yakushkina knew as early as 14 October 2014 and at the latest 16 October 2014 that her email had been compromised. At the time the email was compromised she was communicating instructions signed by Rujnicov to Sappino. Even after changing her password she saw that there were additional attempts to access her email account by the imposter. Having this knowledge they say that Yakushkina did not alert CBH that this happened.

[69.] To some extent there is merit in this submission. There is no dispute that the information which the fraudster utilized to pursue and succeed with the fraud was obtained from Yakushkina's email account. She became aware that not only was her email account hacked but that the culprit was still able to bypass her new password and was filtering her email to a sub-folder. The correspondences produced to the Court indicates that this email hack was a considerable issue in Yakushkina's and Rujnicov's

circle. This occurred at the very moments she was corresponding with CBH on behalf of Zampa and sharing its private data. Indeed it was her persona that was assumed to perpetrate the fraud. She, quite properly, notified Rujnicov as she was aware that she was dealing with his sensitive banking information and it became at risk. CBH however was not notified. Whilst the risk was low, there was some risk that the information could be manipulated by the hacker. Indeed this was likely the purpose of the hack. Whilst Zampa could not have expected CBH's due diligence and security systems to have collapsed in the way it did, it ought nonetheless to have permitted CBH to prepare for the possibility of the information being used to access the account.

[70.] I accept therefore that if advised of the hack CBH would have had the opportunity to revisit the manner in which instructions were received and processed relative to Zampa. It would have been placed on higher alert for suspicious activity and it is likely that the disputed transactions could not have been processed. Zampa had an obligation to warn CBH as its banker as soon as it became aware or suspected that a forger/fraudster may seek to gain access to the account.

[71.] Undoubtedly however, the most proximate cause of Zampa's loss is CBH's error and negligence. CBH not only exchanged email correspondence with the fraudster but communicated via telephone with the fraudster. As Yakushkina could not authorize any payments out of the account Zampa would not have reasonably considered that there was a considerable risk in relation to the account as a consequence of the hack. In these circumstances I assess this risk at 20% and will so reduce the loss occasioned by Zampa.

[72.] Zampa's claim for loss of profits resulting in the diminution of Rujnicov's liquidity was not supported by any evidence or legal authority and in all the circumstances is unsustainable. Respectfully, this loss was not proven. To assign a speculative quantum to such a claim would not be prudent or fair. The recovery of the money removed as a result of the unauthorized transactions along with the interest awarded in this action will be an adequate remedy.

[73.] Judgment is hereby granted to Zampa for the recovery of the sums debited from the account in relation to the disputed transactions, less the amounts recovered by CBH. This judgement sum is to be reduced by 20%.

[74.] The final judgment sum shall bear interest at a rate of 3% per annum from the date of the filing of the Writ of Summons.

[75.] I propose to award Zampa 80% of its costs in the action, such costs to be taxed in default of agreement. Should some other costs order be contended for, written submissions in respect thereof should be laid over within 21 days.

Dated this 12th day of May 2022

Ian R. Winder
Justice