COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/CLE/gen/01294

BETWEEN

GLENDON E. ROLLE
(T/A LORD ELLOR & CO)

Plaintiff

-AND-

SCOTIABANK (BAHAMAS) LIMITED

Defendant

Before: The Honourable Madam Justice Indra H. Charles, Senior Justice

Appearances: Mrs. Cathleen N. Hassan with her Mrs. Khadra Hassan-Sawyer of Johnson-Hassan for the Plaintiff
Mr. Leif Farquharson QC with him Mr. Gabriel Brown of Graham Thompson for the Defendant

Hearing Dates: 30, 31 March 2021, 21 July 2021

Banking and finance – Parties bound by pleadings – Requirement for specificity in pleading - Whether the Bank was negligent for crediting account in respect of bank draft before clearing – Effect of fraudulent bank draft on account already credited in respect of same – Nature of bank customer relationship – Whether the Bank owes the customer a fiduciary duty

Practice and procedure –RSC Order 18 Rule 3 – Effects of failure to file a Reply and Defence to Counterclaim – Whether Plaintiff is disentitled from mounting an affirmative Defence – Whether Bank is entitled to have final judgment by Plaintiff's failure to file Defence to Counterclaim - The Supreme Court Practice, 1999, Vol. 1, paras 18/3/3

The Defendant Bank credited the Plaintiff's account in respect of the funds from the bank drafts seven days after being deposited. The Plaintiff withdrew some funds and ordered two wire transfers which the Bank effected. Thereafter, the Bank was advised by its clearing department that the bank drafts were fraudulent. As a

result, the Bank placed the Plaintiff's account into overdraft and applied unrelated funds paid there into to the overdraft balance and demanded repayment.

The Plaintiff sued the Bank alleging that it breached its fiduciary duty owed to him and that it acted negligently by making an assurance that the bank drafts were clear when they had not been cleared.

The Bank denied liability, asserting that it was absolved from liability for the actions complained of by the Plaintiff by the Small Business Financial Services Agreement, by which the Plaintiff was bound. The Bank counter-claimed for the overdraft balance.

HELD: finding that (1) the relationship between the Bank and the Plaintiff was not of a fiduciary nature but was contractual: one of banker and customer and (2) although the Bank was negligent to have released the funds without having cleared the bank drafts, it is protected from liability by the provisions of the Small Business Financial Services Agreement, so it is not liable for overdrafting the Plaintiff's account. The Plaintiff's action is dismissed and Judgment is entered for the Bank on its Counterclaim with interest and costs to be taxed if not agreed.

1. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader: **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018 and **Montague Investments Limited v (1) Westminster College Ltd and (2) Mission Baptist Church** [2015/CLE/gen/00845] applied.

2. RSC Order 18 rule 13(3) appears to be geared towards minimising the mischief created by vague and evasive pleadings. The modern approach to pleadings requires a more structured approach to a proper pleading in order to avoid vague and evasive pleadings.

3. The Plaintiff's failure to file a Reply disentitled him from relying upon an affirmative case of his own in answer to the facts alleged in his opponent's defence: RSC Order 18 rule 3(1) relied upon.

4. In failing to file a Defence to Counterclaim, the Plaintiff is deemed to have admitted every allegation of fact within the Bank's Counterclaim. On this basis, the Bank is entitled to have final judgment entered in its favour in the

terms prayed for in the Counterclaim: The Supreme Court Practice, 1999, Vol. 1, paras 18/3/3 relied upon.

5. The relationship between the parties was contractual: banker and customer. It is well established that banks are not, for their customers, fiduciaries as trustees or quasi-trustees. Money deposited into the bank becomes the property of the bank and the bank can deal with it as it pleases so long as it repays the money it holds for the customer: **Foley v Hill** [1843-60] All ER Rep 16 (HL) applied.

6. By crediting the Account *prior* to conclusively determining whether the bank drafts were valid, the Bank took a risk. It could not, therefore, seek to remedy that negligence, by seeking to recover the money that it negligently made available to the Plaintiff: **Westminster Bank Ltd. v Hilton** 4 LDAB 47 applied.

7. The effect of the Small Business Financial Services Agreement is plain. The Bank is protected from liability for crediting the Account without having cleared the instrument and entitles it to deduct for such a fraudulent instrument.

JUDGMENT

Charles Sr J:

Introduction

[1] By a Writ of Summons filed on 20 November 2017 and Statement of Claim filed on 23 February 2018, Glendon E. Rolle t/a Lord Ellor & Co. ("the Plaintiff") alleged that the Defendant, Scotiabank (Bahamas) Ltd ("the Bank") breached its fiduciary duty and/or had been negligent in its actions thereby causing him loss and damage. As a result, the Plaintiff seeks the following orders:

(i) That the Bank reverses all the charges placed on his USD Account associated with the transaction immediately;

(ii) General Damages;

(iii) Interest pursuant to the Civil Procedure (Award of Interest) Act, 1992; and

(iv) Costs.

[2] The Bank denied that it breached its fiduciary duty (if it owed one) and/or was negligent. It denied having made any assurance that the draft was cleared, but admitted having carried out the wire transfer. The Bank then counterclaimed for the overdrawn balance of $164,726.59 plus interest and costs.

Salient facts

[3] The following salient facts have been admitted by the parties in the Agreed Statement of Facts and Issues filed by the Plaintiff's Attorneys on 15 March 2021.

[4] The Plaintiff is and was, at all material times, an attorney-at-law and the principal of the law firm of Glendon E. Rolle t/a Lord Ellor & Co. On or about 19 January 2016, he submitted a Business Account and Services Application ("the application") to the Bank. The application included, among other things, details as to the nature of the Plaintiff's business which was that of an attorney-at-law and law firm. It also included details as to who was authorised to give instructions with respect to the account, in this case, the Plaintiff. The application, which was signed by the Plaintiff, stated that the Plaintiff agreed to be bound by the terms and conditions in the Bank's "Small Business Financial Services Agreement"("the SBFSA"). The application was approved by the Bank. Thereafter, three accounts, including a USD business checking account number 4002549 ("the Account") was opened in the Plaintiff's name.

[5] On 20 July 2017, before any deposits had been made, the balance on the Account was $3,233.52.

[6] On 20 July 2017, the Plaintiff deposited into the Account a CIBC Bank Draft No. 250359903 in the sum of $196,919.83 ("the First Bank Draft"). On or before 31 July 2017, that sum was credited to the Account.

[7] On 31 July 2017, the Plaintiff instructed the Bank to effect a wire transfer of US$143,773.57 from the Account to a bank account at Mizuho Bank Ltd., Tokyo, Japan for the benefit of Verhenz Japan Co. Ltd. On the same day, the Bank effected the wire transfer and charged $94.06 for the cost of service inclusive of taxes (“the First Wire Transfer”).

[8] Following the First Wire Transfer, the balance of the Account was $55,269.20 as at 31 July 2017.

[9] Between 31 July 2017 and 15 August 2017, the Plaintiff withdrew approximately $33,025.13 by a number of transactions.

[10] On or about 8 August 2017, the Plaintiff deposited into the Account a second CIBC Bank Draft No. 250360358. This draft was for the sum of $231,810.93 (“the Second Bank Draft”).

[11] On 16 August 2017, the Plaintiff instructed the Bank to wire transfer US$164,019.25 from the Account, again to same account at Mizuho Bank Ltd., Tokyo, Japan for the benefit of Verhenz Japan Co. Ltd (“the Second Wire Transfer”). The Bank carried out the wire transfer instruction and again charged $94.06 for the cost of this service inclusive of taxes.

[12] Also, on 16 August 2017, the Bank determined that the First Bank Draft was fraudulent by reason of being a forgery or counterfeit. The Bank successfully rescinded the Second Wire Transfer but the First Wire Transfer of $143,773.57 was never recovered by the Bank.

[13] On 18 August 2017, the Bank advised the Plaintiff that the First Bank Draft was returned on the ground that it was fraudulent.

[14] On 21 August 2017, the Plaintiff met with representatives of the Bank and wrote a letter to Edward Smith, an Investigation Services Officer of the

Bank, requesting that the matter be investigated and further requesting that the wire transfer by stopped immediately.

[15] The Bank subsequently informed the Plaintiff that the Account was overdrawn in the amount of $173,793.66 as of 14 September 2017 and demanded repayment.

[16] On 14 September 2021, the Plaintiff was advised that the Second Bank Draft was rejected.

[17] On 6 February 2018, the sum of $9,164 was deposited into the Account by wire transfer. The Bank applied this sum to the existing overdraft.

[18] At the commencement of this action, the Account was overdrawn in the amount of $164,858.27. An overdrawn fee continued to accrue on this sum at the Bank's monthly interest rate for overdrafts of $15.00. Despite the Bank's demands, the Plaintiff has failed and/or refused to pay the Bank the overdrawn sum.

The pleadings

The Plaintiff's pleaded case

[19] In a nutshell, the Statement of Claim filed on behalf of the Plaintiff, alleges that he was, at all material times, a law firm carrying on the business of legal services and the holder of several accounts with the Bank for over 5 years.

[20] On or before 31 July 2017, the Bank carelessly and/or negligently advised him that the First Bank Draft had cleared and the sum of USD196,919.83 was shown credited on his Account.

[21] The Plaintiff further alleges that, in reliance on the Bank's assurance that the First Bank Draft had cleared and the funds had been deposited into the Account, he withdrew approximately USD32,926.03 from the Account. In further reliance that the First Bank Draft had cleared and the funds

deposited, he instructed the Bank to wire the sum of USD143,773.57 to his client, which it did.

[22] In paragraph 9 of his Statement of Claim, the Plaintiff avers that, on or about 18 August 2017, the Bank advised him that the First Bank Draft had been returned on the ground that it was fraudulent.

[23] In paragraph 12, the Plaintiff further avers that, the Bank subsequently informed him that the Account was overdrawn in the amount of USD173,793.66, despite having no agreed overdraft limit.

[24] Mr. Rolle alleges that he has suffered loss and damage as a result of the Bank's breach of fiduciary duty and/or negligence. The particulars of the alleged breach of fiduciary duty is set out at paragraph 13 of the Statement of Claim as:

i. failing to exercise reasonable skill and care in carrying out the Plaintiff's instructions;
ii. failing to ensure that funds deposited by the Plaintiff pursuant to the First Bank Draft had been cleared before making them available to him;
iii. wilfully and/or recklessly failed to inquire into the validity of the First Bank Draft prior to making the funds referred to therein available to the Plaintiff;
iv. causing or permitting funds which had not yet been cleared into the Account to be released to another banking institution outside The Bahamas and;
v. causing and/or permitting the Plaintiff's Account to go into overdraft in excess of the agreed overdraft limit between the parties.

[25] The Statement of Claim also particularized the Bank's alleged negligence as:

i. failing to ensure that the funds were deposited and cleared through their clearing system before releasing the funds to the Plaintiff;
ii. failing to carry out proper due diligence before making the funds available in the Plaintiff's Account;
iii. wilfully and/or recklessly failing to inquire into the validity of the Bank Draft prior to making the funds available in the Plaintiff's Account;
iv. failing to take reasonable care and skill in making the determination to clear the Bank Draft;
v. allowing the funds purported to have been deposited into the Plaintiff's Account to be remitted by wire transfer to another banking institution;
vi. failing to allow the Bank Draft to clear before releasing the funds into the Account and/or
vii. causing and/or permitting the Plaintiff's Account to go into overdraft in excess of the agreed overdraft limit between the parties.

[26] As Learned Queen's Counsel for the Bank, Mr. Farquharson correctly submitted, there is some overlap and duplication in the particulars for the two causes of action.

[27] The loss and damage alleged to have been suffered by the Plaintiff consisted of:

i. the sum of $3,000, which the Plaintiff was holding in the Account prior to 20 July 2017;
ii. damages for prospective loss of earnings;
iii. damage to the Plaintiff's reputation and
iv. the withholding of other deposits in the Account.

The Bank's Pleaded Case (Defence and Counterclaim)

[28] By its Defence filed on 7 May 2018, the Bank alleges that:

i. The relationship between the Plaintiff and the Bank was at all material times one of customer and banker and was based on contract.

ii. The parties' relationship was at all material times governed by the common law and by the terms of the SBFSA. To this end, no admission is made that it owed the alleged or any fiduciary duties to the Plaintiff.

iii. On or about 20 July 2017, the Plaintiff presented the First Bank Draft to the Bank and deposited the same to the Account.

iv. On 31 July 2017, the Plaintiff instructed the Bank to make a wire transfer of USD143,773.57 from the Account to Account No. 531-1103468, held at Mizuho Bank Ltd. in Tokyo, Japan. The Bank complied with the Plaintiff's instruction and made the said transfer on or about the 31 July 2017.

v. Between 31 July 2017 and 15 August 2017, the Plaintiff withdrew an additional approximately $33,025.13 from the Account by a series of further transactions.

vi. On or about 16 August 2017, the Bank was subsequently notified that the First Bank Draft was a fraudulent or counterfeit item, after its normal hold period for instruments of the nature of the First Bank Draft had already expired.

vii. Pursuant to the terms of the SBFSA, amongst other things:

   1. the Bank at its option could have settled an instruction given by the Plaintiff even if sufficient cleared funds were not then available within the Account;

2. the reported balances for the Account may have included amounts which were not cleared funds;

3. ultimately, the Plaintiff bore responsibility to the Bank for any cheque, item or instrument he deposited to the Account which was returned to the Bank;

4. the Plaintiff agreed to pay, and that the Bank could deduct, from the Account any fees, service charges, debt, liability or obligation associated with the Account or owed by him to the Bank;

5. The Plaintiff agreed that the Bank could deduct from the Account, the amount he asked the Bank to pay in any instruction, the amount of any instruction the Bank paid or credited to the Account and for which the Bank did not receive settlement (including by reason of insufficient funds, account closed, funds not cleared, irregular signature, fraud or endorsement error), together with all related costs, and the amount of any counterfeit or otherwise invalid currency deposited or transferred to the Account, even if this created or increased any overdraft;

6. The Plaintiff in any event, was responsible for settling payment of all instructions given by him.

viii. In the premises, the Bank cannot be liable to the Plaintiff for the alleged loss. Further, under the terms of the SBFSA, under no circumstances, could the Bank be liable for any indirect, special, consequential, exemplary or punitive damages or losses in connection with the Account or the provision of any service.

[29] The Bank has also counterclaimed for the funds it would otherwise stand to lose arising out of the fraudulent or counterfeit bank draft presented by the Plaintiff and deposited to the Account. The Counterclaim is also based on the express terms of the SBFSA and the common law. The sum claimed, as at the date of trial, stood at $164,858.27 (which continues to accrue a $15.00 monthly fee).

Effect of no Reply or Defence to Counterclaim

[30] Interestingly, the Plaintiff did not file a Reply or a Defence to Counterclaim.

[31] RSC Order 18 rule 3 deals with service of reply and defence to counterclaim. It provides:

> **"(1) A plaintiff on whom a defendant serves a defence must serve a reply on that defendant is it is needed for compliance with Rule 8; if no reply is served, rule 14(1) will apply".**

[32] While it is not obligatory to file and serve a reply, the necessity to do so in order to mount an affirmative case in answer to a defence was discussed in the following passage in **The Supreme Court Practice 1999, Vol.1, at para.18/3/1-2:**

> **"<u>Effect of rule</u> - <u>This rule distinguishes sharply between a "reply" and a "defence to counterclaim", and at the same time it defines the circumstances in which a reply is necessary</u>. Both are pleadings which it is for the plaintiff to serve, the reply in answer to the defence, and the defence to counterclaim in answer to the counterclaim. If, as is more often the case, the plaintiff desires to answer both the defence and the counterclaim, he must serve only one document incorporating both the reply and the defence to the counterclaim (para. (3). The practice is to entitle the whole pleading, "reply and defence to counterclaim," but to divide it into two sections, the first headed "reply" and the second headed "defence to counterclaim," but with a continuous numbering of the paragraphs in both sections.**
>
> **<u>Where reply necessary</u> - <u>It is unnecessary to serve a reply if the plaintiff only wishes to deny the allegations contained in the defence, since if no reply is served, all material facts alleged in the defence are put in issue (r. 14 (1))</u>. A reply merely**

"joining issue" is therefore unnecessary, and the Court may order the costs to be disallowed on taxation (O 62 rr. 3 (3) and 10 (1).

On the other hand, it is frequently necessary for the plaintiff to set up some affirmative case of his own in answer to the facts alleged by the defendant. Thus, a reply is necessary if it is required to comply with r. 8, i.e. the plaintiff must serve a reply and plead specifically any matter for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality which he alleges makes the defence not available or which might otherwise take the defendant by surprise or raises issues of fact not arising out of the defence (r.8. (1)." [Emphasis added]

[33] Mr. Farquharson QC submitted that the effect of the Plaintiff's failure to file a Reply disentitles him from relying upon an affirmative case of his own in answer the facts alleged in his opponent's defence; that is, as opposed to merely *"joining issue"* with the facts alleged: see RSC Order 18, rule 3(1).

[34] With respect to the filing of a defence to counterclaim, RSC Order 18 rule 3(2) is applicable and provides that:

(2) A plaintiff on whom a defendant serves a counterclaim must, if he intends to defend it, serve on that defendant a defence to counterclaim."

[35] In explaining the operation of the rule, the learned authors of **The Supreme Court Practice 1999, Vol.1, at para.18/3/3** on Defence to counterclaim explicitly state:

"The defence to counterclaim must be pleaded in accordance with the rules applicable to the defence to a statement of claim, see r.18. The plaintiff therefore cannot simply join issue on a counterclaim (*Benbow v Low* (1880) 13 Ch. D. 553; *Green v Sevin* (1879) 13 Ch.D.589, p. 595. Unless the plaintiff serves a defence to counterclaim, and specifically traverses every allegation of fact which he does not intend to admit, he will be deemed to admit them (r.13)." [Emphasis added]

[36] In my judgment, the Plaintiff is precluded from seeking to mount an affirmative case in answer to the Bank's Defence and has merely impliedly

joined issue thereon. And, in failing to file a Defence to Counterclaim, the Plaintiff is deemed to have admitted every allegation of fact within the Bank's Counterclaim. I therefore agree with the submissions advanced by Mr. Farquharson that the Bank is entitled to have final judgment entered in its favour in the terms prayed for in the Counterclaim. I shall make this Order. In the event that I am wrong, I shall carry on.

Preliminary objection:
Pleadings: Parties bound by pleadings and requirement for specificity

[37] A preliminary issue raised by the Bank is that the parties are bound by their pleadings and therefore, the Plaintiff cannot generally seek to advance a case that is not expressly raised in his pleadings.

[38] It is therefore necessary for me to say something on pleadings. The purpose of pleadings in civil cases is to identify the issue or issues that will arise at trial. This is in order to avoid the opposing parties and the court taken by surprise. The pleadings must be precise and disclose a cause or causes of action. Evidence need not be pleaded because that will come from the affidavits and cross-examination thereon or by oral evidence.

[39] In **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018, our Court of Appeal held that the starting point must always be the pleadings. At paras. 29-33 and 37-39 of the judgment, Sir Michael Barnett JA (as he then was) stated:

> **"29. The real difficulty in the judgement of the court below is that the finding of negligence was not one that was pleaded by the respondent. This is ground 10 of the appellant's grounds of appeal.**
>
> **30. <u>The trial judge rejected the particulars of negligence pleaded and founded liability on a ground not pleaded in the statement of claim</u>.**
>
> **31. <u>In our judgment this is not proper and manifestly unfair to the appellant</u>.**

32. Negligence was clearly pleaded and particularised as set out in paragraph 6 above.

33. That was the case the appellant had to meet. There was no assertion that it was negligent in failing to delay boarding because of the rain. If that had been the case the appellant may have been able to lead evidence explaining why it did not delay further the boarding process or stop the respondent from attempting to board.

…..

37. This is not an arid pleading point.

38. In Nada Fadil Al Medenni vs. Mars UK Limited [2005] EWCA Civ 1041 Dyson LJ giving the decision of the English Court of Appeal said:

> **"It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by each other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting then in certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."**

39. The starting point must always be the pleadings. In Loveridge and Loveridge v Healey [2004] EWCA Civ. 173, Lord Phillips MR said at paragraph 23:

> **"In *Mcphilemy vs Times Newspapers Ltd. [1999] 3 ALL ER 775* Lord Woolf MR observed at 792-793:**
>
> > **'<u>Pleadings are still required to mark out the parameters of the case that is being advanced by each party</u>. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings**

> **should make clear the general nature of the case of the pleader.'"** [Emphasis added]

[40] At paragraph 40 of the Judgment, Sir Michael went on to state:

> **"It is on the basis of pleadings that the party's decide what evidence they will need to place before the court and what preparations are necessary for trial."**

[41] In **Montague Investments Limited v Westminster College Ltd & Another** [2015/CLE/gen/00845] – Judgment delivered on 31 March 2020 (Reported on BahamasJudiciary.com Website), this Court applied the principles emanating from **Bahamas Ferries Limited** and emphasized the necessity for proper pleadings. Pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear **the general nature** of the case of the pleader and the court is obligated to look at the witness statements to see what the issues between the parties are.

[42] Shortly put, parties are bound by their pleadings and a party cannot generally seek to advance a case that is not expressly raised in his (her) pleadings.

[43] The Bank also raised the issue that allegations involving dishonesty, misconduct or impropriety must be distinctly pleaded and distinctly proved. In **Three Rivers District Council v. Bank of England (No. 3)** [2001] 2 All ER 513, 529 (HL), Lord Hope of Craighead summarised the position thus:

> **"On the other hand it is clear that as a general rule, the more serious the allegation of misconduct, the greater the need for particulars to be given which explain the basis of the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud."**

[44] Although governed by the civil standard of proof, allegations based on fraud or other dishonesty must be proved by cogent evidence.

[45] In the UK as in The Bahamas, the standard of proof for civil fraud will depend very much on the nature of the issue before the Court. An increasingly serious charge will necessitate a higher standard of proof. For example, in **Hornal v. Neuberger Products Ltd.** [1957] 1 QB 247, a case involving a claim of fraudulent misrepresentation, the English Court of Appeal held that, in all cases, the degree of probability must be commensurate with the occasion and proportionate to the subject-matter.

[46] Denning LJ had this to say at p. 258:

> **"Nevertheless, the judge having set the problem to himself, he answered it, I think, correctly. He reviewed all the cases and held rightly that the standard of proof depends on the nature of the issue. <u>The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law</u>.**

[47] Morris LJ also stated, at p. 266:

> **"Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, <u>the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities</u>."**

[48] Hodson LJ added (at pp.260 and 264):

> **"No responsible counsel undertakes to prove a serious accusation without admitting that cogent evidence is required, and judges approach serious accusations in the same way without necessarily considering in every case whether or not there is a criminal issue involved."**
>
> **"So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. <u>A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of</u>**

probability than that which it would require when asking if negligence is established." [Emphasis added]

[49] **Hornal** has been applied by the Court of Appeal in **R v Hampshire County Council, ex p Ellerton** [1985] 1 All ER 599 and considered by Morgan J in **IT Human Resources v Land** [2014] All ER(D) 182 (Nov). From the above, it may be seen that the UK has a protean standard of proof. The more serious the allegation of fraud, the higher the standard of proof.

[50] Further, as the Bank correctly contended, a party seeking to resist a claim or defence in reliance upon a statute or upon grounds of illegality must generally specifically plead the relevant statute of limitation or facts or matters showing illegality. This is provided for in RSC Order 18, rule 8 which states:

> "**8. (1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —**
>
> **(a) which he alleges makes any claim or defence of the opposite party not maintainable; or**
>
> **(b) which, if not specifically pleaded, might take the opposite party by surprise; or**
>
> **(c) which raises issues of fact not arising out of the preceding pleading.**
>
> **(2) …**
>
> **(3) A claim for exemplary damages must be specifically pleaded together with the facts on which the party pleading relies."** [Emphasis added]

[51] In addition, the Bank also relies on RSC Order 18, rule 3 which specifies that a plaintiff must file a reply and a defence to counterclaim in specified circumstances - neither of which, very notably, was filed in the present case.

Banks' objection: Plaintiff did not plead Consumer Protection Act and non-applicability of the SBFSA

[52] Learned Counsel Mrs. Hassan submitted that the Bank had a duty to verify the bank drafts before making the funds available and certainly before effecting wire transfers therefrom. Mr. Farquharson QC submitted that the Bank was entitled to charge the Account for the funds it would otherwise stand to lose by honouring the First Bank Draft and effecting the wire transfer and allowing the other withdrawals. According to Mr. Farquharson, this position is almost entirely proven by the SBFSA, which he says, makes it clear that the Bank was entitled to make the deduction regardless of whether the Bank received settlement in respect of the instruction and regardless of whether the funds in question were cleared.

[53] Mrs. Hassan, however, contended that the SBFSA is subject to all other laws in The Bahamas and, in particular, the requirement in the Consumer Protection Act that the agreement be reasonable, which she submits the provisions of the SBFSA relied on by the Bank, are not.

[54] Mr. Farquharson raised the preliminary point that since the Plaintiff did not object to the applicability of the SBFSA in its pleadings, he is precluded from affirmatively challenging the application of the SBFSA. He argued that parties are bound by their pleadings and the Plaintiff's failure to file a Reply and/or a Defence to Counterclaim disentitles him from raising an affirmative case in answer to the facts alleged in the Defence filed by the Bank.

[55] It is true that the Plaintiff did not file a Reply or a Defence to Counterclaim, which is unusual where the Bank files a Counterclaim.

[56] RSC Order 18 rule 3 provides that where a counterclaim is served on the plaintiff, the plaintiff is required to file a defence to counterclaim if he wishes to defend the assertions made therein.

[57] RSC Order 18 rule 8 provides that pleadings subsequent to a Statement of Claim must specifically plead any matter, including performance, release, any relevant statute of limitation, fraud or any fact showing illegality in certain circumstances.

[58] Further, the Plaintiff's reference in his Skeleton Argument (not his pleaded case) to the Consumer Protection Act, 2006 ("the Act") appears to be misplaced. First of all, the Act has not been pleaded and second, the Plaintiff falls outside the class of persons intended to be protected by the Act. Notably, the Act, by its long title, prescribes that it is intended "*to make provision for the greater protection of consumers."*

[59] Section 2(1)(b) of the Act defines "consumer" in relation to any services of facilities (such as presumably banking services or facilities) as:

> **"any person who employs or wishes to be provided with the services or facilities (otherwise than for the purposes of any business of his…)."**

[60] To be succinct, the definition of consumer expressly excludes persons who use services for their business (es).

[61] In the present case, the Plaintiff, in both his pleaded case and his evidence, maintained that he opened the Account in connection with his business as a law firm or provider of legal services.

[62] Accordingly, the Plaintiff is not considered a consumer under the Act and the application of the SBFSA to the Account is not subject to the Act. Further, the Clearing Banks Code of Conduct does not speak to the manner in which banks should clear instruments.

The evidence

[63] The Plaintiff was the sole witness to testify on his behalf and Lauryn Cartwright was the only witness to testify for the Bank.

Glendon Rolle

[64] The Plaintiff, Glendon Rolle, filed a Witness Statement on 2 December 2020 which stood as his evidence in chief at trial. His evidence (both in chief and cross-examination) was focused on his due diligence as counsel & attorney-at-law of the clients who sent the bank drafts. However, this evidence was unhelpful to determine the issues before the Court. The two critical issues as identified by the parties are (i) whether the Bank owes a fiduciary duty to the Plaintiff and (ii) whether the Bank was negligent for crediting the Account (and executing wire transfers and allowing withdrawals) from an instrument which had not been settled.

[65] It is true that under the Financial Transactions Reporting Act, Ch, 368 lawyers, as non-designated financial institutions, are required to carry out Know Your Customer information with a view to preventing money laundering and other illegal funding. However, verifying the identity and source of funds as an attorney-at-law is for the purpose of ensuring the legitimacy of funds. Its purpose is not to verify the legitimacy of the paying instrument. The Plaintiff's duty to verify identities and sources of funds is not related to the Bank's process of verifying the validity of the bank draft. I therefore agree with the Plaintiff that a more thorough due diligence of the clients whose bank drafts are the subject of this action would not have equipped him to determine the veracity of the cheque, which he was not required to do.

Lauryn Cartwright

[66] Ms. Cartwright filed a Witness Statement on 12 February 2021 which stood as her evidence in chief at trial. She is the Assistant Manager of Service and Support at the Bank and, in her position, she is responsible for the supervision of branch operations and service.

[67] She said that the Plaintiff submitted a Business Account and Services Application to the Bank. The Application detailed, among other things, the

nature of the Plaintiff's business, the nature of the banking services required and the accounts to be opened. It also included details as to who was authorised to give instructions. She stated that the Plaintiff signed it and he agreed to be bound by the terms and conditions of the SBFSA.

[68] Under cross-examination by Mrs. Hassan, Ms. Cartwright said that the Bank's clearing process is to release funds from cheques after being held for 15 working days so long as no notification that the cheque is defective is received from the clearing department. She said that they only receive notifications from the clearing department if something is wrong with the cheque.

[69] Ms. Cartwright admitted that, contrary to the Bank's policy, the first and second bank drafts were credited to the Account in seven working days and that the holds should have still been in place. She also admitted that the First Wire Transfer was effected in less than 15 working days and that the hold should have been in place at the time off the transfer.

[70] In re-examination, Mr. Farquharson sought to establish the absence of a causal link between the Bank's failure to comply with its own policy of holding the funds for the period and the fraudulence of the cheque. He suggested that the failure to hold the funds for the entire period was non-consequential. Ms. Cartwright confirmed that the Bank was notified of the fraud on 16 August 2017, which was, in any event, after the 15 day hold period.

The issues arising

[71] The parties have identified the following issues which arise for determination namely:

1. Whether the Bank owed a fiduciary duty to the Plaintiff?

2. If the answer is in the affirmative, did the Bank breach that duty to the Plaintiff?

3. Did the Bank owe the Plaintiff a duty of care in tort in its clearing, verification and/or remittance processes and if so, was the Bank negligent and in breach of such duty?

4. Under the terms of the SBFSA, is the Plaintiff liable to repay the Bank the overdrawn sum on the Account?

Issues 1 and 2: Whether the Bank owed a fiduciary duty to the Plaintiff and whether there was a breach?

[72] Learned Counsel Mrs. Hassan, appearing as Counsel for the Plaintiff, submitted that the very nature of a clearing bank's relationship with its customer is trust and confidence. According to her, by acting in a position of clearing funds on behalf of the Plaintiff as a client, the parties formed a fiduciary relationship and owed a fiduciary duty to ensure that all actions associated with clearing the drafts were performed properly. Mrs. Hassan stated that the fiduciary nature of the relationship was exacerbated by the Plaintiff's reliance on crediting the Account in respect of the drafts before making any action such as withdrawing or instructing a wire transfer.

[73] On the other hand, Learned Queen's Counsel Mr. Farquharson contended that the relationship between the parties is not a fiduciary one but one in contract of debtor/creditor. In support, he cited the seminal case of **Foley v Hill** [1843-60] All ER Rep 16 (HL) where Lord Cottenham LC stated at pp.19-20:

> **"Money, when paid into a bank, ceases altogether to be the 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; be 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 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. Then the analogy between that case and those that have been referred to entirely fails, and the ground upon which those cases have, by analogy to the doctrine of trusteeship, been held to be the subject of the jurisdiction of a court of equity, has no application here, as it appears to me.**
>
> **There is nothing in the relative situations of banker and customer which gives, per se, the right to sue in equity. That is proved, I apprehend, by the consideration of the question whether, if there had been no money drawn out at all and simply a sum of money had been deposited with the banker – I will not say deposited, but paid to the banker – on account of the customer, the customer could file a bill to get that money back again. The learned counsel judiciously avoided giving an answer to that question. But that tries the principle, because, if it is merely a sum of money paid to a factor or an agent, the party has a right to recall it. He has a right to deal with the factor or agent in his fiduciary character. But the banker does not hold that fiduciary character, and, therefore, there is no such original jurisdiction; and if there be no original jurisdiction growing out of the relative situations of the parties to see if the account is of such a nature that it cannot be taken at law .... The principle upon which my opinion is formed is that there is nothing to bring the demand within the precincts of a court of equity. Upon that ground I think the decree was right in dismissing the bill.”** [Emphasis added]

[74] Palpably, the relationship between banker and customer is **a legal relationship that starts after the formation of a contract**. When a person who opens a bank account in the bank and banker gives his acceptance for

the account, it binds the banker and the customer in the contractual relationship.

[75] In the present case, the relationship between the Plaintiff and the Bank was a contractual one of banker and customer. It is also well established that banks are not, for their customers, fiduciaries as trustees or quasi-trustees. Money deposited into the bank becomes the property of the bank and the bank can deal with it as it pleases so long as it repays the money it holds for the customer. Accordingly, contrary to what Mrs. Hassan submitted, the bank owed no fiduciary duty to the Plaintiff to act in his best interest.

[76] Further, as already alluded to, the Plaintiff's Statement of Claim fails to expressly identify the special fiduciary position held by the Bank in relation to him. It also fails to identify the nature of the specific fiduciary duty owed to him by reason of such position. As pointed out by Mr. Farquharson, the Plaintiff's pleaded case for breach of fiduciary duty is technically defective.

Issue 3: Whether the Bank was negligent? Whether it had an obligation to settle the bank drafts before making the funds available?

[77] Learned Counsel Mrs. Hassan asserted that the Bank was negligent in deducting the amount credited by the bank drafts because (i) it was obligated to verify, clear and/or settle the drafts before making the funds available and (ii) the Plaintiff never agreed to an overdraft facility.

[78] In **Marfani & Co. Ltd. v Midland Bank** [1968] 2 All ER 573, the Plaintiff company's former office manager, Mr. Kureshy visited the defendant bank, opened an account and held himself out as Eliaszade, a firm to which a cheque was made out to by the managing director. Mr. Kureshy sought to deposit the cheque into the account and it was accepted and cleared by the bank. As the bank had paid the funds to Mr. Kureshy, the Plaintiff company brought an action for conversion of the cheque against the bank.

[79] The exact issue in **Marfani** was slightly different but in determining the issue, the Court considered the nature of a cheque and the obligation of the bank presented with the cheque to make certain inquiries before making the funds available. The Court considered whether the bank had been sufficiently diligent in verifying the identity of the owner of the cheque. The standard applied was that of a "careful banker" and against that backdrop, the Court considered the evidence of the practice of bankers at the defendant bank, which was that the defendant bank ought to have required the man to produce some document to identify himself and inquired the name of his previous employer and previous bank accounts held by him. In deciding whether the bank was negligent, the Court gave considerable weight to how carefully prepared Mr. Kureshy's scheme was. The Court observed that, well in advance of the actual drawing of the cheque, Mr. Kureshy had taken steps to establish a false identity as Eliaszade, with Mr. Ali, who he planned to use as a reference for the bank since Mr. Ali was already a customer of the bank.

[80] The Court determined that the defendant bank, in acting without further probing on the information given to them by Mr. Ali (who was a familiar customer of the bank) as to their customer's trustworthiness, were not in breach of their duty to the plaintiff company to take reasonable care in relation to the plaintiff company's cheque which Mr. Kureshy had delivered to them for collection. One of the main reasons for the Court deciding that the bank had taken all the reasonable steps was because the evidence of the bank manager was that the steps taken were in accordance with the general practice of the bank. The Court also gave considerable weight to the reason for establishing the identity of the owner of the cheque.

[81] In **Marfani**, the nature of the inquiry of the bank was different from the instant case. The question in **Marfani** was the extent of investigation required to verify that the person cashing the cheque was entitled to the cheque. However, the case is useful in that it speaks to the considerations

to which the Court ought to have regard when determining whether the bank acted reasonably.

[82] It cannot be disputed that a bank presented with a cheque to be paid out of the payee's account at another bank is obligated to take reasonable steps to determine that it is not fraudulent.

[83] The relation between bank and customer with respect to a cheque was explained in **Westminster Bank Ltd. v Hilton** 4 LDAB 47 as principal and agent. The cheque is the principal's instruction to the agent to pay out of his money in the agent's hands the amount of the cheque to the payee. In carrying out that instruction, (especially where the account of which the money to be paid is at another bank) the bank will want to satisfy itself that the payor actually has the funds since it is paying the payee on behalf of the payor. It is merely the intermediary. It seems, therefore, that it is in the bank's interest (although that interest is common with that of the payee) to satisfy itself as to the validity of the cheque.

[84] In the present case, as the party paying the Plaintiff (subsequently to be reimbursed by the payor's bank), it was incumbent on the Bank to satisfy itself that the payor had money from which they could pay to the Plaintiff. So, the Bank takes a risk, as it did in this case, to pay the Plaintiff prior to assuring itself that it would be paid by the payer's bank.

[85] It is true that, by its very nature, the level of suspicion with which a bank looks at a bank draft is less than that of a cheque. A bank draft is a type of cheque issued by the payer's bank that verifies that the payer has sufficient funds to pay. As such, the bank is not as concerned with whether the payer has sufficient funds. However, the presentation of that type of instrument eliminates only one of many concerns that a bank presented with a bank draft would have; fraud being chief among them. Accordingly, there are still

several contingencies against which a reasonable bank would protect itself, especially where the payer's bank was a foreign bank.

[86] Applied to the facts of the present case, I agree with the Plaintiff that the Bank was negligent in crediting the Account before having cleared the instrument. This is distinct from negligence in failing to comply with the Bank's policy of not crediting the funds until 15 working days from the date of deposit. In cross-examining Ms. Cartwright, Mr. Farquharson sought to persuade the Court that the outcome would have been the same even if the Bank had complied with its 15-day hold period since it was not advised of the fraudulence of the draft until after the period. In this regard, Mr. Farquharson seems to have conflated the issue of whether the Bank complied with its own policy/practice for holds on unsettled instruments with the issue of whether the Bank was negligent in crediting the sums of the bank drafts before clearing them. The negligence alleged by the Plaintiff is not of the Bank failing to comply with their hold period. If that was the negligence complained of, Mr. Farquharson would be correct that there was no causal link between the failure to hold the funds for the full period since, in any event, the notice of fraudulence did not come until the period had expired.

[87] However, the relevant question is different: whether it was negligent for the Bank to have released the funds to the Account and effected the wire transfers without having cleared the bank drafts. The Bank's policy on holding the funds from the cheque for 15 working days is merely their way of seeking to protect their interest with a view to ensuring that money they pay pursuant to an instruction. Whether that policy adequately protects that interest is a relevant question to determine the ultimate issue, but whether the Bank complied with its own policy is not, as Mr. Farquharson intimated, the pivotal question for determining the issue of whether they were negligent in securing their own interests which is a broader question. Although the failure to comply with their own procedure is evidence put forward by the

Plaintiff to show exacerbation of the alleged negligence, the relevant question is not whether the Bank complied with its own policy but whether the Bank acted reasonably.

[88] The Bank's policy is that it will release funds pursuant to an instrument after 15 business days provided no issue is communicated before the lapse of same period. I do not think that this adequately secures the Bank's interest of ensuring that money they pay pursuant to an instruction will be received by them and, as stated hereinbefore, the Bank takes a risk by not ensuring before they release the funds that the payer will pay them. Accordingly, I agree with Mrs. Hassan that the Bank's actions were negligent.

Issue 4: Material terms of the SBFSA and its effects

[89] The Bank defends its actions by asserting that pursuant to the SBFSA, it was entitled to deduct the funds credited to the Account despite the funds not having been cleared. Mr. Farquharson submitted that the terms of the SBFSA are dispositive of the question of negligence because they make it clear that the Bank is entitled to deduct funds credited pursuant to the customer's instruction where such instruction is related to a fraudulent item and where the Bank would otherwise suffer loss if the payment or credit is not reversed. He further argued that this entitlement obtains regardless of whether the funds were cleared.

[90] The Bank relied on several clauses, specifically, "*How We Will Accept Instructions From You"*, an excerpt from page 16 of the SBFSA which provides:

> **"You are responsible for settling payment of your instructions. Unless you have made specific arrangements with us, you will ensure that your Business Account(s) have sufficient cleared funds to settle any instructions at the time that you give your instruction. <u>We may, but are not required to settle an instruction, if sufficient cleared funds are not available in your Business Account. The reported balances for your Business Account may include amounts which are not cleared funds.</u> Cleared funds mean cash or any funds from any deposit which**

have been finally settled through the clearing system.” [Emphasis added]

[91] This provision speaks to the Bank carrying out the customer’s payment instructions which is relevant to the Plaintiff’s wire transfer instructions. The funds from the First Bank Draft were released into the Plaintiff’s account in 7 working days and his first wire transfer request was made also within the 15 working day period from the date of the deposit. The funds having been credited to the Plaintiff’s Account, it appeared that the funds *were* cleared. It follows that the Bank cannot take issue with the Plaintiff’s wire transfer request.

[92] The other provision on which the Bank relied is under the subheading “*Your Payment Obligations to Us*” at page 19, which speaks to the Bank’s entitlement to deduct amounts paid to the account which turn out to be fraudulent, even where the Bank has not received settlement of the payment instrument:

> **“In return for our opening and keeping the Business Account(s), you agree to pay (and we can deduct from this Business Account) any fee(s) (including monthly fees), service charges and additional service charges for the Business Account, Certificate of Deposit, Term Deposit or Services.**
>
> **You also agree that we can deduct from the Business Account, Certificate of Deposit or Term Deposit account you maintain with us:**
> **…**
>
> **<u>the amount you ask us to pay in any instruction</u>**
>
> **...**
>
> **<u>the amount credited to your Business Account, Certificate of Deposit or Term Deposit or paid to you pursuant to any instruction, regardless of whether or not we have received settlement in respect of such instruction, if in our sole and absolute discretion such instruction is in any way whatsoever related to a fraudulent item, forged endorsement, or an item with an endorsement error, insufficient funds, account closed, funds not cleared, irregular signature or an item for which we may incur a loss if the payment or credit thereof is not reversed,</u>**

together with all related costs associated with such a charge to your Business Account;

If any of the foregoing deductions create or increase an overdraft, in your Business Account you are still responsible for each charge, debit or liability until you pay us the amount owed in full. You promise to pay us immediately on request, the amount of any overdraft along with your overdraft charges then currently due.” [Emphasis added]

[93] Mr. Farquharson QC correctly submitted that the effect of this provision excuses the Bank's actions that the Plaintiff asserts was negligent – crediting the account without having settled the bank draft.

[94] The Bank also relied on a section of the SBFSA that limits the liability and indemnity at pp 25-26 which provides:

“10. Limitation of Liability and Indemnity

We and our officers, directors, employees and agents are not liable for any loss, damage or inconvenience you suffer in connection with your Business Account(s), Certificate(s) of Deposit(s) or the provision of any product or Service, or the refusal to provide any product or Service, except if it was caused by our gross negligence or willful misconduct (and then our liability is subject to the other provisions of this Agreement and other legal rights we have) or unless applicable laws or an industry code to which we have publicly committed requires otherwise. You acknowledge that this means, among other things, that we and our officers, directors, employees and agents are not liable for the following specific matters:

- **Honouring or refusing to honour or cancel a cheque or instruction, for any reason;**
- **Any delay in completing or failing to provide a product or Service for any reason even if this means you are unable to access funds in your Business Account, Certificate of Deposit or your Term Deposit Account;**
- **Any matter arising from your actions or your failure to perform your obligations properly under this Agreement even if you are not at fault; and**

- **<u>A forged, unauthorised or fraudulent use of Services, cheque or instruction</u>, or material alteration to a cheque or an instruction, even if you or we did or did not verify the signature, cheque or instruction or authorization."**

[95] The Bank further relied on some more paragraphs of the SBFSA generally limiting liability, which limit to the Bank's liability to direct loss (as opposed to consequential loss). At pp. 26-27, it provides:

> **"If we are found to be liable for failing to perform a Service properly or if we are found liable for any loss or damage you suffer for any reason whatsoever, <u>our liability will not be more than the direct cost to you of any loss of funds you suffered.</u> This loss will be calculated from the time we should have made the funds available to you until the time we did make them available or until you should reasonably have discovered their loss, whichever is earlier.**
>
> **<u>UNDER NO CIRCUMSTANCES WILL WE OR ANY OF OUR OFFICERS, DIRECTORS, EMPLOYEES OR AGENTS BE LIABLE FOR AN INDIRECT, SPECIAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES OR LOSSES IN CONNECTION WITH YOUR BUSINESS ACCOUNT(S),</u> CERTIFICATE(S) OF DEPOSIT, TERM DEPOSIT(S) OR THE PROVISION OF ANY SERVICE OR OUR REFUSAL TO PROVIDE ANY SERVICE, <u>EVEN IF WE KNEW THAT ANY SUCH DAMAGE OR LOSS WAS LIKELY AS A RESULT OF OUR NEGLIGENCE (SUBJECT TO APPLICABLE LAW) OR THE NEGLIGENCE (SUBJECT TO APPLICABLE LAW) OF OUR EMPLOYEES, OFFICERS, DIRECTORS, AGENTS OR REPRESENTATIVES.</u>"**

[96] However, the loss complained of by the Plaintiff is not consequential to the negligence he avers by the Bank, which is the failure to settle the bank drafts before crediting the sum to the account and thereafter, effecting two wire transfers. The Plaintiff's case is that the Bank was negligent to have done so without having first settled or cleared the draft. The loss of being charged the amounts credited to the account from those very bank drafts is, therefore, a direct loss to the negligence alleged.

[97] As stated above, the Bank was negligent. Absent the SBFSA, the Bank would be prevented from remedying its own negligence by seeking to

recover the funds paid pursuant to the fraudulent bank drafts. As I reiterated, the Bank took a risk by making the funds available before conclusively determining the validity of the bank drafts. However, the SBFSA is plain. There can be no liability on the part of the Bank to its customer arising from any action taken pursuant to an instruction to the customer. This is expressly so where the instruction or payment in reliance thereon relates to a fraudulent item.

[98] However, as Mr. Farquharson QC correctly stated, the Bank is entitled to credit the Account without having clearing the instrument and it follows that the Bank cannot be liable and to deduct amounts paid that turn out to be fraudulent even if they have not settled the instrument purporting to pay same. Accordingly, the Bank is entitled to recover the overdraft sum from the Plaintiff.

Conclusion

[99] The Bank does not owe a fiduciary duty to the Plaintiff as the relationship was contractual: banker and customer. With respect to the negligence cause of action, the Bank was negligent in failing to protect its own interest as the intermediary paying pursuant to an instrument. By not conclusively determining the validity of the bank draft *before* crediting the Account, the Bank took a risk, as it could not be sure that it would be paid the sum by the payers of the drafts that it had paid to the Plaintiff. The Bank could not, therefore, seek to remedy its own negligence by claiming the funds from the Plaintiff.

[100] However, since the Plaintiff agreed to the terms and conditions of the SBFSA, he is bound by the provisions therein which clearly entitle the Bank to deduct sums credited to accounts even where the instrument has not yet been settled.

[101] I will therefore dismiss the Plaintiff's claim and enter judgment for the Bank on the Counterclaim in the sum of $164,858 (as at the date of trial) which sum continues to accrue at a monthly fee of $15.00. The Bank is also entitled to interest at the statutory rate of 6.25% per annum from the date of judgment to the date of payment.

[102] The Bank, being the successful party, is entitled to its costs to be taxed if not agreed. This Court will taxed costs on 18 August 2022 at 12:15 in the afternoon.

Dated this 22nd day of July 2022

Indra H, Charles
Senior Justice