COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2016/CLE/gen/01492

BETWEEN

LARRY A. FERGUSON

Plaintiff

AND

RBC ROYAL BANK (BAHAMAS) LIMITED

Defendant

Before:	**The Hon. Madam Justice G. Diane Stewart**
Appearances:	**Mr. Keod Smith with Mr. Carlton Martin for the Plaintiff**
	Mrs. Tara Archer-Glasgow and Mr. Audley Hanna for the Defendant
Judgment Date:	**24th March, 2023**

JUDGMENT

1. By an Amended Writ of Summons filed 8th November 2016 the Plaintiff, a businessman held a merchant bank account with a point of sale facility with the Defendant/Bank in his name trading as Coastal Winds and a separate account in the name of Store Away Ltd. a company in which he was a shareholder. He sought from the Defendant, damages for their alleged breach of contract after refusing to follow his instructions sent by letter to allow the debit of Twenty Two Million, One Hundred and Nine Thousand, Seven Hundred and Sixty Three dollars and Eighty-Four Cents, $22,109,763.84 **(the "Sum")** which sum had been credited to both accounts cumulatively. By letter dated 18th October 2016 the Plaintiff requested permission from the Defendant to receive the incoming deposit of Three Hundred and Fifty Million Euros.

2. He also sought damages for the defamatory publication of electronic bank statements which inferred by way of innuendo that he committed acts of fraud or was a party to fraudulent activities.

3. By its Defence filed 26th May 2017, the Defendant admitted that the Plaintiff had operated the first account under the trading name Coastal Winds and that he was a signatory on an account owned by Store Away Limited. ("Store Away")

4. The Defendant further relied on terms of the Visa Merchant Agreement / Master Card Merchant Debit Card and Terminal Agreement "The Agreement) as governing the relationship with the Plaintiff.

5. This agreement was entered into by the Plaintiff and the Defendant on the 27th October 2020. Pursuant to the terms of this Agreement the Plaintiff rented or purchase a point of sales machine to utilize in his business which was attached to his account.

6. The Agreement inter alia provided that a Prohibited Transaction was defined as a transaction carried out by a prohibited merchant or in furtherance of a prohibited or illegal activity. The Defendant by the agreement agreed to tell the merchant "from time to time" which transactions were prohibited or which transactions were not authorized to process.

7. By the Agreement, the merchant agreed to pay the Defendant any charges applicable for the services provided inclusive of transaction fees, taxes, and chargeback fees all of which would constitute a debt payable to the Defendant.

8. The Agreement further provided:-

"a. If you default, or if we reasonably suspect you have defaulted, we may immediately and without prior notice:

- **Suspend your rights under this Agreement or end it;**
- **Freeze any of your bank accounts from any financial institution, wherever located and take possession of any funds contained in such frozen bank accounts; and/or take other steps we consider necessary.**

b. Default occurs when:

- **You make a representation in this Agreement that is incorrect in any way;**
- **You participate in the processing of Transactions that you know or ought to have known to be fraudulent; Prohibited Transactions or otherwise unauthorized transactions.**
- **You do not observe or act according to the terms and conditions of the Agreement.**

9. By virtue of the VISA Merchant Agreement the Plaintiff also agreed:-

"1.1 B. You agree that, in addition to the terms and conditions set out herein, you are bound and will comply with our policies and procedures regarding Credit Card processing services including any user manual or quick reference guide or other communication that we provide to you from time to time."

"You acknowledge that any payment made or credit given to you as settlement for a Transaction is an advancing of funds, unless and until the Transaction is not capable of being the subject in whole or in part to a Chargeback or other adjustment.

"2.1 (b)(v) If a Credit Card used for a Remote Transaction or other pre-authorized Transaction is rejected or if the Card issuer cancels a pre-authorization, you are not permitted to accept the Credit Card as a form of payment and agree not to deliver goods or services, unless you negotiate a different

form of payment for goods or services. All Remote Transactions are subject to a Chargeback if the Cardholder disputes the charge."

"2.2 (a) If you do not use a Terminal to process your transactions, you must obtain an Authorization Number for all Transactions, that are greater than your Floor Limit (including taxes). For greater security, you may also request an Authorization Number Transactions that are less than your Floor Limit.

2.2 (b) If you use a Terminal to process Transactions, your Floor Limit is zero and you must obtain an Authorization Number for all Transactions. If you are unable to process transactions manually. If you get a decline response when you request an Authorization from any source, you agree not to continue with the Transaction.

2.3 You have not properly obtained an Authorization Number if you do not act in accordance with this Agreement or if you withhold any information that could influence the decision to issue it."

10. Further the Agreement provided:-

"4.1 Chargebacks

A. We do not decide which Transfers are charged back and we do not control the outcome of a chargeback request. You must respond to our request for information regarding a chargeback within eight days of our request so that we can facilitate a request to reverse a Chargeback from the Card Issuer. From time to time a Cardholder may be able to chargeback a Transaction even though you have provided the goods and services. Even if an Authorization Number has been issued for a transaction, we may refuse to accept any Transaction Record; the Bank may not credit your bank account with the amount of the Transaction; and/or the card Issuer may process a Chargeback if:

- The transaction record is illegible or does not contain all information required buy our procedures;
- The Transaction was not completed according to the terms of this Agreement.
- The amount of the transaction exceeds your floor limit;
- The Cardholder did not authorize the Transactions or you otherwise did not get an authorization Number according to the terms of this Agreement;
- The card used in the transaction is one we told you not to accept;
- The transaction has been disputed by the cardholder;
- The sales slip refers to the merchandise which the Cardholder claims has been returned to you or has not been received by the card holder;
- The cardholder claims the goods or services referred to in the Sales Slip were unsatisfactory.

- **The signature on the sales slip is not reasonably similar to that on the signature panel of the card, or is a claimed to be a forgery;**
- **The transaction was made without the card holder's permission.**
- **In the case of Remote Transactions, you did not have our advance approval to accept Remote Transactions, or a Cardholder disputes a Remote Transaction.**
- **The transaction was illegal, unenforceable, null or invalid;**
- **The card issuer charges back all or part of the amount of a Transaction in accordance with the Card Association Rules and Regulations; or**
- **In any other way, you have not followed the terms of this agreement.**

B. You agree that the amount of any Chargeback is a debt payable to the Bank. We are not responsible for charges back Transactions but you may desire to pursue a claim against the Cardholder directly.

11. The Agreement accordingly provided that transactions made to the first account were subject to a chargeback for varied reasons which included where the transactions was illegal, unenforceable, null or invalid. The Agreement further provided that the Plaintiff agreed not to process transactions which he knew, or ought to know was fraudulent.

12. The transaction was within the scope of the Agreement and the Defendant averred that the Plaintiff ought to have known that it was fraudulent. As a result of that, the Defendant was entitled to decline to act on the instructions.

13. The Defendant denied any defamatory acts as alleged and aver that it has and had in place policies and procedures to deal with improper transactions. The Defendant further denies that the Plaintiff's reputation was injured as a result of any action of the Defendant and puts the Plaintiff to strict proof. There was no publication of any document to any third party and that its actions were justified on the facts.

14. The Plaintiff claimed that the transfer was to have represented a non-obligatory investment in the Plaintiff's aragonite business of sand harvesting and exporting.

15. The Sum was facilitated by 23 force posted transactions from the VISA card of Mr. Boris Plavala who had agreed to provide the Plaintiff with the funds without his having to repay him.

16. Twenty-one of these transactions were in the amount of $990,000.00 each and the twenty-second was in the amount of $168,000.00. A separate transaction was also made to the Store Away's account for $990,000.00

17. On or about 20th October 2016 the sum of Twenty Million Nine Hundred and Fifty Eight Thousand Dollars was credited to the Plaintiff's account by the twenty one VISA credit card transactions, and Nine Hundred and Ninety Thousand Dollars was also credited to the account of Store Away by the same method. The activities were flagged as suspicious and fraudulent and the credits were reversed.

18. By the Agreement the Defendant averred that they had the right to remove the Sum from these accounts.

19. The Plaintiff relied both on his witness statement and the witness statement of Mr. Derek Smith filed 5th November 2021 and their subsequent viva voce evidence given at trial.

20. The Defendant relied on the following witness statements and subsequent viva voce evidence of the following witnesses: -
    - Witness Statement of Ms. Tennille Colebrooke (nee Burrows) filed 31st October 2017;
    - Witness Statement of Ms. Christine James filed 31st October 2017;
    - Witness Statement of Ms. Seandra Rampersad filed 31st October 2017;
    - Witness Statement of Ms. Colleen Selman filed 6th December 2021;
    - Witness Statement of Mr. Julian Seymour filed 17th January 2022;
    - Witness Statement of Mr. Abhishek Sahu filed 11th January 2022.

ISSUES

21. The Plaintiff submits that the issues for determination are:-

    21.1 Is there not a factual distinction between a "Debit Card" and a "Credit Card"?

    21.2 When the money lands in the Plaintiff's RBC Palmdale Branch Bank Accounts and had been posted by RBC, does that amount to a "deposit" for the purpose of this case?

    21.3 With the posting of the deposit having been made, would it not have already been deemed to have passed RBC's investigatory "firewall" confirming the legitimacy of the transmissions which entailed both the banking protocols of "Know-Your-Customer" and ensuring that the funds were not for nefarious/criminal purposes?

    21.4 With the landing of the funds on the Plaintiff's said RBC Palmdale Branch Bank Accounts, does it not mean that although RBC is deemed to have borrowed the funds from the Plaintiff, it is only the Plaintiff who is entitled to the return of it on demand?

    21.5 So, by that posting to the Plaintiff's said RBC Palmdale Branch Bank Accounts, does it not give the effect of a contractual relationship "creditor-debtor" between the Plaintiff and RBC?

    21.6 With that contractual relationship being established between the Plaintiff and RBC, does it not obligate RBC to immediately pay out to the Plaintiff or to his order, any amount of those deposited funds that he demands?

    21.7 According to the copy of Mr. Plavala's ZUNO Bank Statement which was handed over to RBC on or about 20th October 2016, is it not that Mr. Plavala's VISA Debit Card No. 4410 6900 5635 4669 is connected to his ZUNO Bank's International Bank Account Number SK6484100000001249764000?

21.8 If the answer to the previous item is "YES", does it mean that RBC then became contractually bound to pay the said posted money over the Plaintiff, or to his order, whenever he so demand?

21.9 As soon as the said funds land in the Plaintiff's said RBC Palmdale Branch Bank Accounts by the posting of it, does RBC retain any right of access to removing the said funds by deleting the posting of it without first getting instructions from the Plaintiff so to do, or an Order from the Supreme Court premised on a formal complaint made by the a person/entity who would have establish themselves, evidentially at the level of the Court being satisfied beyond doubt to be the owner of the funds immediately before the funds had been transmitted to, deposited in and posted to that Plaintiff's said RBC Palmdale Branch Bank Accounts with that person/ entity having claimed that the said funds had been stolen, embezzled, misappropriated or in some way fraudulently taken from that person/entity by the Plaintiff or in some conspiracy involving him?

21.10 Can RBC show that there was such a complaint made by any other person as owner of the funds, other than Mr. Plavala?

21.11 Although RBC pleads that it was of the view that the funds had been fraudulently transmitted, is the legal onus not on RBC to give full particulars of the alleged fraud with every element of the fraud proven at the level of the Supreme Court being satisfied beyond reasonable doubt?

21.12 Assuming that the legal standard of proof for fraud is the criminal standard of proof, is it not that RBC would have to specifically show that level of proven evidence that the money in question belonged to ZUNO and not that of Mr. Plavala immediately or prior to it being transmitted?

21.13 Does RBC breach that said creditor/debtor contract when it refused to pay the funds out to the Plaintiff when he demanded it personally as well as when it was subsequently demanded by his Attorney, Damian Gomez QC, on 1st November 2016?

21.14 After RBC had deposited the transmitted funds of the Plaintiff evidenced by it being posted to the Plaintiff's said RBC Palmdale Branch Bank Accounts, is it not that the funds passed RBC's investigative firewall making the entitlement to the said funds exclusively that of the Plaintiff?

21.15 Beyond that point, can RBC, on its own initiative and without the Plaintiff's express written permission, remove any record of the funds having been posted on the Plaintiff's said RBC Palmdale Branch Bank Accounts thereby permanently depriving the Plaintiff of those funds by sending them to a Third-Party person or entity whether inside or outside of the country for them to then investigate to see if the funds had been fraudulently transmitted in the first place?

21.16 Does removing record of the posting of the said funds to the Plaintiff's said RBC Palmdale Branch Bank Accounts amount to the RBC permanently depriving the Plaintiff of the said funds?

21.17 Can RBC, on the premise of its own belief that it is the consecutive trustee of a ZUNO without confirmation of that belief from the Supreme Court of the Bahamas based on a filed complaint made against the Plaintiff by the person/entity, legitimately permanently deprive the Plaintiff of those funds by sending them to a Third-Party whether ZUNO or another?

21.18 On the facts of this case, can a Third-Party such as ZUNO be the owner of the funds if it had not been proven in the Supreme Court of the Bahamas beyond reasonable doubt to have been the owner immediately prior to the funds having been transmitted to the Plaintiff who is subject of a filed complaint before that said Court?

21.19 Isn't a POS Debit Card Offline transmission a legitimate and legal way of money being transmitted from the Owner of the bank account that it is connected to?

21.20 As the monies were paid by the "Debit Card" as opposed to a "Credit Card" and RBC alleges fraud, is it not that RBC must have a Supreme Court Order to show, at the said criminal standard of being beyond reasonable doubt, that the monies in question did not belong to the said Account holder (Mr. Plavala) or that he was a trustee under beneficiary of that said Trust and had made a formal complaint to the Supreme Court?

21.21 In RBC's allegation of fraud, does it show to the criminal legal standard that the money was that of ZUNO as opposed to being that of Mr. Plavala?

21.22 Even if RBC had evidence that it believes, beyond reasonable doubt, and it either does not disclose the particulars of their alleged fraud before a court of competent jurisdiction to address such inquiries, does it have a right to simply go into the person's bank account and remove any record of it in his account, at will and without written notification of such determination by the Supreme Court?

21.23 Does any such removal amount to a breach of contract and reaches a level of criminality on the part of RBC for having removed any record of it and not being able to retrieve it form wherever it would have sent it.

21.24 Assuming the Plaintiff can show that RBC could not have been a constructive trustee for ZUNO in relation to the funds in question, does acting on that belief amount to theft and/ embezzlement seeing that RBC would have treated the funds in a manner inconsistent with the Plaintiff's ownership of it?

21.25 Alternatively, even if the funds have been paid by Credit Card as opposed to Debit Card, is it not that Mr. Pavala would still have a contractual right to draw down on his Credit Card right up to the limit of that card?

21.26 As ZUNO has not been able to show that it was the owner of the said money immediately prior to it being transmitted and not Mr. Plavala, does ZUNO have the proper legal foundation to claim, as it has through RBC, that it had been defrauded of those funds by the Plaintiff?

21.27 Can RBC go into the Plaintiff's said RBC Palmdale Branch Bank Accounts and delete any record of the said money after it had passed their firewall of investigation and posted by them in the Plaintiff's said RBC Palmdale Branch Bank Accounts?

21.28 As the issue of fraud is germane to the Defendant's Defence it is imperative that they provide the particulars of the fraud that they alleged, the following factual issues related to what RBC pled, must be determined by the Court:

20.28.i.. Of the allegations in **paragraph 3 of the Defence** that "Rather, the Defendant avers that the transaction was flagged in October 2016 as a possible fraudulent transaction. The fact that the transaction(s) was fraudulent was never cooperated by ZUNO in its communications with the Defendant" the Court must determine:

a. What characteristics of the transaction are relied upon by RBC in its assertion that the transaction(s) was either possibly fraudulent or actually fraudulent; and

b. Whether RBC has identified and pleaded to the relevant element(s) of the transaction which it relies upon to prove that the transaction(s) was either fraudulent or illegal; and

c. Whether RBC has identified and pleaded to relevant facts it has relied upon to establish that the transaction(s) was fraudulent; and

d. Whether RBC has identified and pleaded to relevant facts that were relied upon by ZUNO in these communications with RBC to ground its assertion that the transaction(s) were fraudulent; and

e. Whether RBC has identified and pleaded to relevant communication with ZUNO in respect of each transaction, by giving the name or identity of the market thereof as well as the relevant date thereof; and

f. Whether RBC has identified and pleaded to relevant evidence which it relies upon for corroboration of its opinion that the transaction(s) was fraudulent and

ii. Of the allegation in **paragraph 4 of the Defence** that "the Defendant became a constructive trustee for ZUNO" the Court must determine specifically what facts and circumstances RBC relied upon and pleaded which led to a court of competent jurisdiction determining that there was a constructive trust as alleged in the existence for the benefit of ZUNO with RBC being the constructive trustee; and

iii. Of the allegation in **paragraph 7 of the Defence** that "the transaction was a transaction within the scope of the agreement which the Plaintiff knew or ought to have known was fraudulent" the Court must determine: and set out in paragraphs

a. Whether RBC had identified and pleaded specifically to relevant facts and circumstances that it relied upon in coming to the actionable conclusion that the Plaintiff had actual knowledge of the alleged fraud proven before the Supreme Court such that the court was satisfied beyond reasonable doubt as to the date and time which the Plaintiff is alleged to have acquired actual knowledge if the alleged fraud relied upon by RBC for its allegations; and

b. Whether RBC has identified and pleaded specifically to relevant facts and circumstances that it relied upon in the establishing that the Plaintiff ought reasonably to have known that the transaction(s) was fraudulent as alleged by RBC; and

c. Whether RBC as identified and pleaded specifically to relevant facts and circumstances that it relied upon in justifying its reliance on the Visa Merchant/Agreement/MasterCard Merchant Agreement/Discover Card Agreement/Debit/Card and Terminal Agreement dated 27th October 2010 to prove the alleged fraud to the level of the Court being satisfied beyond reasonable doubt; and

iv. Of the allegation in **paragraph 8 of the Defence** that "the Plaintiff was expressly in default of the agreement where he participated in the processing of transactions which he knew or ought to have knoen were fraudulent, prohibited or otherwise unauthorized. Accordingly, as the transaction was a fraudulent transaction...", the Plaintiff repeats the issues that the Court must determine and set out hereinbefore in paragraphs 28 (i) and 28 (ii). hereof mutatis mutandis and;

v. Of the allegations set out in **paragraph 13 of the Defence** that "the transaction was... flagged as a fraudulent transaction and this was later corroborated by ZUNO. During the trial... the Defendant demonstrated that the transaction was fraudulent... therefore, any transaction arising from the transaction was likewise fraudulent..." The Plaintiff repeats the points that the Court must determine and set out hereinbefore in paragraphs 28 (i) and 28 (ii) hereof mutatis mutandis; and

vi. Of the allegations of fraud set out in the particulars pleaded in **paragraphs 19 (i) through (v) of the Defence,** the court must determine whether, considering that the monies had passed RBC's

firewall of investigation and posted by RBC to the Plaintiff's said RBC Palmdale Branch Bank Accounts, it was sufficient that RBC could simply go with its own internal belief of fraud and not first get the Supreme Court to test that belief of fraud to see if it stands up.

21.29 With there not being any report to by RBC to the Central Bank of The Bahamas, Royal Bahamas Police Force ("*RBPF*"), Financial Intelligence Unit, or Financial Crime Investigation Branch ("FCIB") of the RBPF, does it have the effect of cancelling RBC's assertion of fraud?

21.30 As it is that FCIB by letter dated 4th March 2021 over the signature of Chief Superintendent, Mr. Matthew Edgecombe concluded that "*... **no criminality of any kind was found in this matter, we are of the opinion that this is a civil matter"***, does it not definitively stand to mean that it could not be proven beyond reasonable doubt in the Supreme Court that the Plaintiff's actions or inactions could be deemed as fraudulence perpetrated against RBC and/or ZUNO?

21.31 Upon considering the issues set out above, particularly where the Defendant did not provide any particulars of the fraud that they allege the Plaintiff perpetrated, does the court have the power at this stage of this action pursuant to its inherent jurisdiction to exercise of its discretion and its powers under Order 18 Rule 19 (1) (C) and or (d) of the Rules of the Supreme Court ("RSC) and Order 31A Rule 20 (1) (b) – RSC and/or 31A Rule 20 (1)(c) – RSC to strike out the following pleadings in the Defence on the grounds that the said pleadings in the Defence were frivolous, vexatious, and tend to prejudice the fair trial of the action herein or otherwise an abuse of the process of the court:

i. The 3rd and 4th sentences of paragraph 3 of the Defence; and

ii. Paragraph 4 of the Defence; and

iii. Paragraph 7 of the Defence; and

iv. Paragraph 8 of the Defence; and

v. The final sentence of paragraph 13 of the Defence; and

vi. Paragraph 14 of the Defence; and

vii. Paragraph 15(3) of the Defence; and

viii. Paragraph 19 of the Defence.

21.32 If the Court were to accede to the Plaintiff's belief as is set out above, does it mean that the Plaintiff has no real Defence and the Court constrained to order RBC to immediately pay the said transmitted funds over to the Plaintiff with interest thereon as well as damages for losses sustained and reputational injury to be determined by the Court?

21.33 All things considered, would the Plaintiff be entitled to 10% interest compounded on the transmitted funds held by or otherwise unlawfully disposed of by RBC?

22. The Defendant maintains that the issues for determination are:-

i. Has the Plaintiff proven that he was entitled to receive the sum of $21,949,478.00 credited to the accounts on 20th October, 2016?

ii. What were the terms and conditions that governed the contractual relationship between the Plaintiff and the Defendant?

iii. Did the Plaintiff's actions in force-posting the 23 transactions in question constitute a breach of the terms and conditions of the contract between the Plaintiff and the Defendant?

iv. Upon the issuance of the return notifications by Visa, was the Plaintiff entitled to the funds in question?

v. Was the notification of fraud from the Bank which issued the credit card in question sufficient to evidence that the Plaintiff had breached the agreement with the Defendant Bank, and thereby justify a restriction being placed on the accounts?

vi. Did the Defendant's reference and designation on the Plaintiff's Bank Statements to fraudulent transactions amount to a publication, such as could be considered defamation of the Plaintiff's character?

vii. Did the Defendant's reference and designation on the Plaintiff's Bank Statements to fraudulent transactions amount to libel or malicious falsehood?

viii. Has the Plaintiff proven that he has suffered any loss and damage as a result of any lawful action or inaction by the Defendant?

23. Despite the myriad of issues as set out by the parties separate statements, the primary issue is whether the Defendant breached any contractual duty owed to the Plaintiff based on the particular facts of this case and if so how and what remedies will be available to the Plaintiff inclusive of damages if any. The secondary issue would be whether the actions of the Defendant defamed the Plaintiff and if so, how.

24. The Plaintiff in essence submits that the court must determine whether the bank could remove his deposited money without first getting his permission or having a complaint lodged by Mr. Plavale or some authorized party on his behalf and without a complaint being made to the appropriate authorities as to any alleged fraud.

25. The only other party who could claim ownership of the funds is ZUNO AG bank as a trustee of these funds for some other party from whom Mr. Plavale misappropriated the funds. Zuno did not make any such claim nor was it called to give evidence.

SUBMISSIONS

Plaintiff's Submissions

26. The Plaintiff's pleaded case is that of breach of contract by the Defendant upon its refusal to transfer the Sum to his account after it had been credited to his account by force posted VISA transactions which the bank subsequently debited without giving a reason for its refusal. He submitted that if the Defendant was under a liability in respect of the said Sum because a party other than the Plaintiff had claimed it, the Defendant ought to have commenced an Interpleader action inviting the third party to appear in order to show cause why that third party should have access to some or all of the Sum.

27. To satisfy this claim the Defendant would have to show a prima facie case that the claim to the deposited money by that third party was actual and not merely anticipated as held in **Doherty v Scotiabank (Bahamas) Ltd 2014/SCCivApp/42**. The Defendant did not provide any evidence that any third party had made a claim to the Courts or law enforcement in Slovakia or The Bahamas. If Mr. Plavala or ZUNO, in its own right or ZUNO on Mr. Plavala's behalf made a complaint against him, only then could the Defendant, as the acquiring bank have been entitled to bring an Interpleader Action.

28. The particulars of fraud as alleged by the Defendant were never provided and further the Defendant did not deny that the funds were deposited. The fact that the transaction was fraudulent was never corroborated by ZUNO in its communications with the Defendant. The Defendant did not identify which aspect of the transaction was fraudulent.

29. The Plaintiff submitted that he had always been a good customer of the Defendant and that there was never any allegation of fraud against him. The stellar relationship was no doubt the reason he maintained a business relationship with the Defendant for upwards of 30 years and what led the Defendant's Compliance Department to quickly approve the change of his profile for him to receive the Sum.

30. As soon as the Sum passed the investigative firewall and credited to his account, although deemed to have been borrowed by the Defendant to use as it saw fit, it conferred a contractual right on the Plaintiff to be entitled to the sum upon his demand for it. The receipt of the Sum confirmed that a contract was established and there was an implied term for the Plaintiff to be paid the Sum or any part of it demanded.

31. In **Joachimson v Swiss Bank Corporation [1921] 3 KB 110** the English Court of Appeal established that the deposited money became that of the bank which undertakes to pay it back when it is demanded by the depositor. Atkin LJ stated: -

> **""I think that there is only one contract 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 the money and to collect bills for its customer's account. The proceeds so received are not 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 with 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 address to the bank at the branch, and as such written orders maybe outstanding in the ordinary course of business for two or three days, it is a**

term of the contract 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 orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which a current account is kept."

32. The Plaintiff submitted that **Joachimson** was the leading authority for the proposition that a demand for repayment of the money must be paid by the bank at the branch where the account is kept. Both the Plaintiff and his Attorney made the demand for the money at his branch and even without this demand, the issuance of the Amended Writ in this action was sufficient of a demand to receive his deposited funds.

33. **Joachimson** along with **Foley v Hill (1848) 2 HLC 28** support the submission that the banker/customer relationship is contractual as debtor and creditor. In **Royal Bank of Scotland v Skinner [1931]** Lord Mackay issued a restatement of Foley v Hill having considered Joachimson: -

> **"After some fluctuation of opinion, it is now well settled that the relationship of customer and banker is neither a relation of principal and agent nor a relation of a fiduciary nature, trust, or the like, but a simple relation – it may be one sided, or it may be two-sided – of creditor–debtor. The banker is not, in the general case, the custodian of money. When money is paid in, despite the popular belief, it is simply consumed by the banker, who gives an obligation of equivalent amount".**

34. The Defendant was not the custodian of the Sum and there was no fiduciary relationship, only one of debtor and creditor with an implied term to repay the money whenever it was demanded by the Plaintiff. It could only refuse to do so if it could show that it was a constructive trustee for a third party who was the beneficiary of an existing trust, the property of which were the funds transmitted.

35. In **Barnes v. Addy (1874) 9 Ch App 244 at 251**, Lord Selborne LC addressed the liability of a stranger to a trust as constructive trustee: -

> **"Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees. That is a distinction to be borne in mind throughout the case. Those who create a trust clothed the trustee with a legal power on control over the trust property, imposing on him a corresponding responsibility. That responsibility [sc., the responsibility of a trustee] may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actually participating in any fraudulent conduct of the trustee to injury of the *cestui que trust*.**
>
> **But, on the other hand, strangers are not to be made constructive trustees merely because they act as agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."**

36. The Defendant would have to prove and plead that it was a trustee de son tort or that the Plaintiff was knowingly in receipt of the sum which was the property of a trust or that the Plaintiff had dishonestly assisted some known trustee or scammer in dealing with trust

funds in such a manner that it amounted to accessory liability. In the instant case, neither of those possibilities were applicable. Although the Defendant alleges that Mr. Rudolf Zarybnicky, the overseer of ZUNO's fraud department, stated that the Sum was the subject of fraud, it did not provide any proof or particulars of the fraud and they did not call him to give viva voce evidence at trial. As such the allegations of fraud must fail.

37. On the issue of personal fraud, Lord Westbury in **McCormich v Gordon (1869) LR 4 HL 82** stated: -

> **""...it is a jurisdiction by which a Court of Equity, proceeding on the grounds of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. Now being a jurisdiction founded on personal fraud, it is incumbent on the Court to see that a fraud, a malus animus, is indisputable evidence. It is impossible to supply presumption in the place of proof, nor are you warranted in deriving those conditions in the absence of direct proof, for the purpose of the criminal character of fraud, which you might be possibly derive in the case of simple contract".**

38. The facts required a careful examination of why the Defendant refused to pay the funds and whether it was acceptable to do and whether the refusal could stand as proof of the personal fraud of the Plaintiff. It was Mr. Plavala's money to transfer which made it an innocent and honest transaction. The VISA Company which acted as a processor and terminal operator for the Defendant approved the transmission. Its innocence was also confirmed by the Defendant allowing its IT Supervisor to assist the Plaintiff in making sure that the 23 POS transmissions went through.

39. The Defendant could have only dealt with the sum after it was deposited if it had received an injunctive order to do so. In the leading authority of **Three Rivers District Council v. Governor and Company of The Bank of England**58, Lord Millett succinctly stated that: -

> **"184. It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see *Kerr on Fraud and Mistake* 7th ed (1952), p 644; *Davy v Garrett* (1878) 7 Ch D 473, 489; *Bullivant v Attorney Genera; for Victoria* [1901] AC 196; Armitage v Nurse [1998] Ch 241, 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.**
>
> **185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort.**
>
> **186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to trial the court will not normally allow proof of primary facts which have not been pleaded and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or**

from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved...
189. It is not, therefore, correct to say that *if there is no specific allegations of dishonesty* it is not open to the court to make a finding of dishonesty if the facts pleaded are consistent with honesty. If the particulars of dishonesty are insufficient, the defect cannot be cured by an unequivocal allegation of dishonesty. Such an allegation is effectively an unparticularised allegation of fraud..."

40. The Sum originated from the existing bank account of Mr. Plavala who had given written authority for it to be transmitted to the Plaintiff's account. There was no evidence by the Defendant to suggest that any third party was the beneficiary of a trust or a similar entity to suggest that it had to act as a constructive trustee or that the Sum should be paid out to the Plaintiff's order. The Defendant's claim that the Plaintiff ought to have reasonably known that what was going on was fraudulent in nature was not in adherence with the well-established principles enunciated in **Baden Societe General pour Favoriser le Development du Commerce et de Industrie en France** where Peter Gibson J. stated: -

> **"What types of knowledge are relevant for the purposes of constructive trusteeship? Mr. Price submits that knowledge can comprise any one of five different mental states which he described as follows: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry."**

41. The Plaintiff submitted that there was no direct evidence from ZUNO under its seal which showed that it lodged a complaint. There was no transmission that the Sum was the property of a trust in respect of which a beneficiary would have made a complaint as a customer of ZUNO. The allegations by the Defendant were hearsay. The Defendant's witnesses referred to a 'Report' was never produced by its maker.

42. The Plaintiff submitted that he was entitled to the sum and entitled to access to it for a commercial purpose. In addition he is entitled to compound interest on the Sum, the money the Defendant made from the transmission/deposit, compensatory damages based on his deprivation of the opportunity to use the Sum for his sand harvesting business which could have led to tens of millions of dollars over the course of five years and exemplary damages because of the breach and loss of commercial opportunity.

43. The Plaintiff asserted that clauses 1.1, 1.21, 1.21(b), 1.3(a), 1.3(b), 1.21 and 4.1 of the 2010 Visa Merchant Agreement/MasterCard Merchant Agreement/Discover Card Agreement/Debit Card and Terminal Agreement between himself and the Defendant did not apply to this case and to allow the Defendant to go into his bank account and take out the money. There had been no determination by the Court before the money was moved and he knew or ought to have known that the transaction was fraudulent and unauthorized by the cardholder. Further the agreement does not advance the Defendant's allegations of fraud as pleaded in its defence.

44. The Merchant Agreement would not have come into effect unless and until the Cardholder made a complaint or the Court determined that the action complained of was fraudulent. The Sum was transmitted by the Plaintiff and an associate with the permission of Mr. Plavala. It was not proven that 23 Debit Card transmissions amounted to what the Defendant referred to as force-posting.

45. The only party that could have initiated a return of the sum was Mr. Plavala or his agent. There was no pleading or particulars that there was a credit card issued by ZUNO only a debit card. The Defendant's claim was illogical and also offensive and even criminal. While the Sum was large and gave rise to suspicion, its Fraud Investigation Department did not know that its Compliance Department had approved of the deposit of the Sum thus imputing approval to all parts of RBC the Defendant bank. Based on VISANET Edit Packages there was no floor limit assigned and as the Defendant's evidence suggested, its system at that time allowed for a merchant to select offline sales to input a card number, expiry date and the amount of the authorization code.

46. He further outlined the relationship of banker and customer in law.

DEFENDANT'S SUBMISSIONS

47. The Defendant contended that the Plaintiff had failed to meet the standard of proof in relation to his claims against it, specifically that it had the Sum held to or for his account, that the Defendant was indebted to him and he required compensation, that the Defendant made any profit from the Sum, that it took any inappropriate steps in relation to any of the Plaintiff's account- and that the Defendant was obliged to provide restitution or that it made any libellous or maliciously false statements about the Plaintiff.

48. The Plaintiff and his associates lacked a fundamental understanding of the contractual terms of their relationship with the Defendant, the nature of VISA transactions, the nature of general banking practices and that the Sum was never actually received by the Defendant to the Plaintiff's account.

49. The Defendant raised a preliminary issue of whether the Plaintiff had the requisite standing to advance a claim with respect to sums deposited in the account of Store Away Limited. The Plaintiff filed and later withdraw and application to amend his pleadings to address this issue and at trial attempt to make the application "on his feet".

50. In relation to the substantive issue the Plaintiff's witness Mr. Smith sought to suggest that he had an unsupported vast and detailed knowledge of international banking systems and practices. However, his evidence was entirely debunked by the Defendant's witnesses who were more knowledgeable in this field. The Plaintiff did not seek to introduce any expert evidence or at the very least anyone within the banking or financial industry. Mr. Plavala, the alleged sender of the Sum to the Plaintiff was not called to give evidence despite standing to lose in excess of $20 million dollars.

51. Whether the card used was a debit card or credit card was irrelevant, despite the emphasis by the Plaintiff that it was a debit card which fact would cure all the issues in his case. Due to the fact that the transactions were conducted offline, the cardholder's issuing bank was not contacted at the time that the Plaintiff initially sought to process the payment. Further as it was a VISA issued card, the transaction setting was not bank to

bank but facilitated through VISA as an intermediary and its merchant clients were advanced funds prior to receiving them from VISA. VISA never provided the Defendant with the funds from ZUNO as it recorded the transactions as exceeding the limit which could be posted from the card in any given transaction.

52. The Defendant advanced funds to the Plaintiff in anticipation that VISA would reimburse those funds once they had obtained them from ZUNO bank. However, VISA declined to reimburse the funds. The Defendant never received the funds to conclude the transaction which required the Defendant to reverse the credit advance. The Defendant was not engaged in any internal conspiracy with VISA to hide funds and to hide it so poorly that it actually produced written bank statements illustrating its process to the Plaintiff.

53. The Plaintiff had advanced a somewhat bizarre case that he elected to obtain an investment of over $20 million by virtue of a credit card transaction using the credit card of a person whom he had never met before to be deposited to an account which was not designated for such a purpose. It was perplexing that such an investment would be accepted by credit card. Merchant transactions attract significant credit card fees, in this case the fees would have amounted to $838,320.00 if the transactions had cleared. A wire transfer would have cost a fraction of that sum. The Plaintiff had also been advised of a more efficient method of transferring the funds.

54. The Plaintiff was out of his depth and had little knowledge of the nature of the alleged investments or of the individual who was to provide the funding. He stated that he had never met Mr. Plavala and relied almost exclusively on Mr. Smith to facilitate the transaction and the interaction. His evidence should not be given any weight. His account under the name Coastal Winds was for a vacation rental business and there was no indication that he utilized the account for investment purposes.

55. Instead, the Plaintiff suggested that he was a shareholder in an entity known as Nassau Island Company and that his account was utilized for the benefit of this company. There were also references to Tarmax Investments and Sigma Management Limited but little evidence adduced in relation to them. Overall, there was no corroborative evidence adduced in support of his contention as to the purpose of the funds. He admitted that he utilized the account outside of the scope of its purpose and as such the transaction in question represented unusual activity surrounding the Account. The only person seeking relief in this action is the Plaintiff, and not any of these companies referenced by him.

56. The evidence of Mr. Smith was entirely unreliable and he was not a credible witness and was also sometimes hostile. His evidence revealed that he had no firm understanding of the digital banking transactional process or any first-hand experience with it. Mr. Smith could be described as the point person for the transaction. His evidence however provided no account of how he initially connected with Mr. Plavala or any details as to the terms of the agreement which he had facilitated between Mr. Plavala and the Plaintiff.

57. While Mr. Smith suggested that his area of expertise was his knowledge of cost-effective international banking transactions, his suggestion that a wire transfer would have attracted similar costs was not plausible. Likewise, rather than accepting that he had no

actual knowledge of the Bank's firewalls, he refused to concede the point. There was no real basis upon which Mr. Smith could speak about the Bank's firewalls.

58. Moreover, instead of admitting that he did not know what Base I and Base II processes were, he provided an incoherent explanation. The processes were later described by the Defendant's witness Mr. Sahu. Base I and Base II actually refer to the manner in which card transactions are processed and have nothing to do with "VIP" or non-VIP cards as suggested by Mr. Smith.

59. Mr. Smith's position that Central Bank approval was not required in relation to the sum was clearly wrong in law. Pursuant to the Exchange Control Regulations, a non-Bahamian required the approval of the Central Bank of The Bahamas to make investments whether it related to, *inter alia*, the purchase or securities or the purchase of land. Mr. Smith's attempt to distinguish between the funds being provided as an investment as opposed to a loan was ineffectual. The Plaintiff would have required approval to accept a large foreign investment.

60. When considering the credibility of Mr. Smith, the words or Lord Pearce in **Onassis and Calogeropoulos v Vergottis (1968) 2 Lloyd's Rep. 403** were apt: -

> **"Credibility' involves wider problems than mere "demeanour" which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a thoughtful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable."**

61. The Defendant explained that its witnesses' evidence were based on distinct areas of professional specialty. Mr. Sahu was credible and independent as he had no material affiliation with either party. He is an employee of VISA the issuer of the card used in the instant action which he described as a VISA Classic card with a limit of $249, 999.99. It did not matter whether it was a debit or credit card, because of the classification of the card no one would be able to charge $300,000.00 per transaction as their systems would prevent it from being processed. His evidence established that the Sum could not be charged because it exceeded the card's individual transaction limit in relation to 22 of the 23 transactions.

62. The fact that VISA itself did not process the transactions was all that was required to dispose of the case. The card limit prevented the transactions from being processed and not the Bank and it could be concluded that it had no control over the fact that the funds were not ultimately credited to the Plaintiff's Account. Visa controlled the processing of the transactions and not the Defendant.

63. Ms. Colleen Selman's corroborated this fact by her evidence that the Defendant had received notification from VISA's system that the transactions were declined because they exceeded the card's maximum per transaction. It was common ground between the Defendant and VISA that the funds were never received by the Defendant. The only controversy arose from the Plaintiff's failure to appreciate the nature of merchant card system which was set out in the terms and conditions which governed the relationship between the parties.

64. Ms. Selman explained that transaction. If a merchant has a point of sale device and he puts through a transaction for one hundred dollars his account is automatically credited with the hundred dollars but there was a process going on behind the scenes. VISA would then have to reimburse the Bank for the hundred dollars they credited to the merchant's account. If you check the VISA network and it is one hundred dollars short it is not a true credit and it is then removed.

65. The funds which showed up on the Plaintiff's account was not a true credit but merely an advance which had to be reversed once VISA did not honour the transactions. The Sum did not come to the Bank from VISA as it did not settle the transactions. She explained that the Defendant had a system set up to capture those transactions performed at their merchant's terminal. They would then amalgamate all the transactions for the jurisdiction and upload the file to VISA's website. Once it was successfully uploaded VISA would run their program to filter out the good transactions from the bad transactions.

66. In advance of the funds coming to the Bank from Visa, the Bank had a system set up to post transactions to a merchants operating account in an overnight processing. It would be processed before they actually get the settlement from VISA. In the event funds are posted by the Bank but the funds are not sent from VISA, they would rely on the reports to confirm why VISA did not honor the transaction. They would then have to debit the merchant's operating account in order to post the transactions back to the Bank's internal suspense accounts. The process applied to both debit and credit cards.

67. Ms. Seandra Rampersad of the Card Fraud Activity Monitoring Department of the Defendant stated that the Sum was never received by VISA therefore it was necessary to reverse the advanced posting. The transaction was at its core suspicious in any event. The transaction would have caused an alert as it would have been processed based on a number of criteria including dollar value, type of transaction, the count of cards, the count of BIN. Protocol dictated that a hold be placed on the merchant operating account.

68. The Defendant submitted that another factor which made the transactions suspicious was that they were being conducted by an offline transaction. There was nothing from the established nature of the Plaintiff's account or previous transactions which suggested that 22 transactions of nearly one million dollars each was normal which made it quite reasonable for the Defendant to treat such activities as suspicious.

69. The Defendant's suspicions were valid and confirmed by the email from ZUNO Bank. The email was a confirmed as coming from ZUNO Bank as they had an Interchange Directory which contained information regarding all participating members and the various units within the banking operation which supported card operations. The telephone contact as well as the e-mail correspondence matched the contact data for the VISA Interchange Directory for Zuno Bank. The e-mail correspondence stated that the transactions were "definitely fraudulent."

70. Mr. Julian Seymour's area of expertise related to merchant services. Based on the e-mail and report which popped up from the fraud investigations team, they suspected that the activities on the Plaintiff's account were not normal so they wanted them to protect the Bank and have the account suspended until they could further investigate. The transactions in question were unusual as they were force posted while the Plaintiff's credit card machine was offline.

71. As the transactions were entered manually the point of sale terminal accepted them but they then popped up on the back end. Although the point of sale machine might have produced receipts which read approved, 'approved' in that context did not mean it was authorized from the cardholder's bank end. Because the POS was offline, the nature of the transaction made it incapable of communicating with VISA so that a message could be routed to the cardholder's bank.

72. The Plaintiff circumvented the normal authorization process by using his POS machine in an offline mode which prevented authorization being requested from the cardholder's bank and triggered the Bank into making an advance to the Plaintiff's account pending settlement from VISA which never came.

73. Ms. Burrows testified that between charges and Value Added Tax, the Plaintiff would have had to pay more than $900,000.00 in bank charges to fulfill the transactions. Therefore, any assertion by the Plaintiff that it was more cost effective to facilitate a large investment by credit card rather than by wire transfer was not credible.

74. The Defendant acted entirely reasonably in the circumstances. In **FirstRand Bank Limited v The Spar Group Limited (334/2019) [2021] ZASCA 20** there was very useful guidance with respect to various matters related to funds incorrectly deposited to a bank account: -

> **"Summary: A bank which is aware that funds deposited by a third party into its client's bank account to which the client has no legitimate claim may not appropriate such funds on the premise that the client has a claim to the funds and sue them by way of set off to discharge the client's debt to the bank – A bank which is aware that a third party has deposited funds into it's client bank account and is aware that the client has no legitimate claim to the funds is under a duty to take steps to prevent harm to the third party by way of the misappropriation of those funds by its client – the bank's failure to prevent harm to the third party renders it a co-wrongdoer with the client for the theft"**

75. The Defendant submitted that it had an unquestioned duty to prevent the use of funds deposited to an account of a customer where it was aware that that customer had no legitimate claim to those funds. The funds in question, being an advance, were the

Defendant's own funds but if that were not the case, as the Defendant became aware of a report of a suspicious transaction and potential fraud it was under an obligation to take steps to prevent harm to third parties.

76. In **FirstRand** the banker/customer relationship and obligations owed to third parties was also summed up: -

> **"[37] FNB's professed entitlement to claim set off is the appropriate starting point of the analysis. It is durable proposition of our law that when the customer of a bank deposits money into their account, the money becomes the property of the bank. The bank enjoys a real right of ownership. In the usual case, the deposit gives rise to a credit balance in the account of the customer and a personal obligation owed by the bank to its customer to pay the credit balance, together with interest, if agreed.**
>
> **[38] The ownership by the bank of deposits made into an account by a customer is of systemic importance to the banking system. Deposits made into the accounts of customers are pooled so as to permit the bank, in turn, to grant credit and make loans. The bank is the economic intermediary that secures savings and enables borrowing. Central to this function is the recognition of the bank's ownership of the deposits made with it and the bank's right to extend loans without reference to the customers who made such deposits. Were it otherwise, absent customer consent, the bank's loans would be akin to theft.**
>
> **[86]In summary, the law is as follows:**
>
> > **(1) Where a deposit, to the knowledge of the bank, is made into the bank account of a customer to which the customer has no entitlement, the bank cannot set off its customer's indebtedness to the bank against the credit in the customer's account deriving from such deposit. The third party whose moneys were deposited enjoys a claim against the bank for the amount so credited.**
> >
> > **(2) A customer, with no entitlement to moneys deposited into their account, who knows that they enjoy no such entitlement, may not make disbursements from the account in respect of credits deriving from these moneys. To do so amounts to theft. A bank that knows its customer enjoys no such entitlement and nevertheless permits its customer to make disbursements in these circumstances renders itself a joint wrongdoer. As such the bank owes a legal duty to the third party who was entitled to the moneys deposited and suffers loss as a result of the customer's disbursements,"**

77. **FirstRand** is in accord with the common law position established in **Foley v Hill [1843-60] ALL ER Rep 16** which stated: -

> **"The money paid into the banker' 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 is 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 customs of bankers in other places."**

78. Having knowledge that the transactions in question were not going to be honoured by VISA and that they were deemed suspicious and requested not to be honoured by ZUNO bank, the Defendant was on notice that the Plaintiff did not enjoy an entitlement to the funds. If the Defendant permitted the Plaintiff to make the withdrawals or disbursements from the Account, it would have rendered itself as a joint wrong doer and acted in contravention to its duties to the third party ZUNO Bank.

79. In **Barclays Bank plc v Quincecare Ltd [1992] 4 ALL ER 363** it was established that a bank had a duty to refrain from executing a customer's order if and for so long as the bank is put on inquiry. The Quincecare duty was an application of the bank's wider contractual and tortious duty to exercise reasonable care when providing its services. The same was confirmed in **Royal Bank of Scotland International Ltd v JP SPC 4 [2022] UKPC 18** where Lords Hamblen and Burrows stated: -

> **"The Quincecare duty of care is an aspect of the bank's duty of reasonable skill and care in and about executing the customer's orders and arises by reason of an implied term of the contract and under a co-extensive duty of care in the tort of negligence."**

80. In **Philipp v Barclays Bank UK plc (Consumers' Association Intervening) [2022] EWCA Civ 318**, the English Court of Appeal held that the Quincecare duty could apply in the context of authorized push payment fraud. It was clear that the funds the Plaintiff sought to access were never credited by VISA and there were numerous circumstances which suggested that the transactions were objectively suspicious.

81. In relation to the Plaintiff's claim of libel and malicious falsehood, this cause of action was not properly pleaded. The general principles relative to a claim of defamation, which libel was associated, were stated by Adderley J (as he then was) in **Cambridge v Lockhart [2012] 1 BHS J. No. 24**. The words must have been defamatory, the words must have related to the claimant and the words had to have been published to at least one person other than the claimant. The Plaintiff failed on all three limbs. The Bank's Statement of Account could in no way contain any material which would be considered defamatory. While the account history related to the Plaintiff's account, the words in question related to the transaction and not the Plaintiff himself. The account statement was addressed to the Plaintiff and not to any third party. In the absence of any publication to a party other than the Plaintiff there could be no sustainable claim for libel.

82. The Defendant submitted that where funds were advanced, the party receiving the advance was under an obligation to repay the advance subject to the terms of any agreement between the parties. In **Burnes v. Trade Credits Ltd 1 WLR [1981] 805** the nature of an advance was considered: -

> **"In my opinion 'further advance' as used in clause 14 should be held to include the subsequent transaction. I do not think that 'advance' according to its ordinary meaning is limited to transactions under which money or goods are, as part of the particular transaction, handed over or delivered to the debtor. The term is, in my opinion wide enough to include a transaction under which, money being already available to a debtor, he becomes entitled to retain it for a period beyond that for which otherwise it would have been available to him. According to ordinary**

parlance, it would be proper to describe that money as having been 'advanced for a further term'."

83. Advanced funds created a creditor/debtor relationship and the debtor is only entitled to retain the advance for a prescribed period and purpose. The terms and conditions of advances provided to the Plaintiff by the Bank were expressly considered and referred clause 1.1 of the Merchant Agreement which provided: -

> **"1.1 Financial Accommodation**
>
> **You acknowledge that any payment made or credit given to you as a settlement for a Transaction is an advance of funds, unless and until the Transaction is not capable of being the subject in whole or in part to a Chargeback or other adjustment."**

84. The transactions in question were not settled by VISA and the Plaintiff became obligated to repay the advance once the transactions had not been settled. The Plaintiff admitted that he was bound to the aforementioned provision.

85. As for force posted transactions, criminal cases in the United States of America have discussed the same which the Defendant invite the Court to take judicial notice of. In **United States of America v Sharron Laverne Parrish Jr. 8:14-cr-380-T-26MAP** a detailed account was given of the nature of offline forced post transactions and the manner in which they may be utilized to circumvent the usual settlement system related to cards: -

> **"Typically, when a person attempts to use a bank or debit card to make an electronic purchase, the store merchant swipes the person's card at a point of sale terminal. A bank authorization code is then generated by the issuing institution of the credit or debit card. This code signals the vendor that the account is active, that funds or credit is available, and it allows the vendor to accept payment using that card. Conversely, if the financial institution determines that the swipe card is affiliated with a closed account, or that funds or credit are insufficient to cover the purchase, no bank authorization code is generated. Rather, the merchant receives a declination.**
>
> **Parrish had at least three Chase debit cards and one SunTrust debit card, all of which were associated with closed bank accounts. Thus, if used properly, the cards would have been declined by merchants when swiped at point of sale terminals. According to court documents, Parrish employed a scheme whereby he continued to use the canceled debit cards. He primarily used the cards to purchase extensive electronics, rent cars, and stay at hotels. When his canceled debit cards were declined by a merchant, he would pretend to call his financial institution and obtain an authorization code. He would then provide the cashier with a fraudulent bank authorization code, represent to the merchant that his debit cards and accounts were still active, and instruct the cashier to manually enter the authorization code. This would cause the merchant to override the declination and allow the transaction to be completed. This practice is commonly referred to as "force posting". In one instance in January 2013, Parrish entered the Apple store at Brandon Town Center Mall and purchased $7,753.22 in merchandise using this scheme."**

Further, in the **United States of America v Latoya Robinson** et al; it also dealt with force posting. It stated:-

> **"When a customer presents a debit card to purchase merchandise at a store and the card is swiped at an electronic card reader maintained by the merchant, electronic signals are routed from the merchant to the brand of the customer's debit card, and then routed to the underlying bank that issued the debit card. The bank then verifies whether the customer has sufficient funds in the account to cover the requested transaction, which is then relayed back to the merchant. When there are insufficient funds on the debit card presented by the customer, the card will display a message that the transaction request was denied.**
>
> **Many card readers have a functionality, though, that allows someone to input a code that serves to take the card reader offline, overriding the denial message and verifying the transaction. Malign actors can take advantage of this functionality by inputting a fictitious code not provided by the issuing bank under the guise of entering a pin code or authorization code, which could cause the card reader to show that the transaction was authorized. The merchant may then let the customer leave with any merchandise the customer attempted to purchase; the merchant would not learn that the code was fictitious and the transaction invalid until days or even months later. The process by which a customer could take advantage of the functionality is called "force posting" or "forcing the off."**

86. The card used was a debit card which illustrated that there was no actual distinction between credit and debit cards in the context of such transactions as the issuing bank is not actually contacted in the process in any event.

DECISION

87. The primary relevant facts established are:-

    i. The Plaintiff has, since on or about 27th October, 2010, maintained a Bahamian Dollar denominated business account with the Defendant.

    ii. As a part of the relationship between the Defendant and the Plaintiff, the Defendant agreed to service a point-of-sale ("POS") facility in order to allow the Plaintiff to process debit and credit card transactions in connection with his business. This arrangement was governed by the terms of the Agreement.

    iii. On or about 18th October, 2016, the Plaintiff delivered a letter to the Defendant claiming that funds in the amount of Three Hundred and Fifty Million Euros (€350,000,000.00) would be immediately transferred to his account and to request permission to receive these funds.

    iv. On or about 20th October, 2016, the sum of Twenty Million Nine Hundred and Fifty-Eight Thousand Dollars ($20,958,000.00) was credited to the Plaintiff's account arising from a VISA card transaction. Additionally, the sum of Nine Hundred and Ninety Thousand Dollars ($990,000.00) was credited to an account maintained by Store Away also using the same card.

v. The transactions were facilitated by virtue of force-posted transactions which occur where a merchant processes a credit card or debit card offline normally by use of a code obtained from the merchant's bank. This enables the merchant to bypass the normal authorization process. The code used for all of the transactions was not obtained from the Defendant.

vi. The transactions to the Plaintiff's account (and to the account of Store Away) were flagged by RBC Financial (Caribbean) Limited's Fraud Monitoring Unit in Trinidad and Tobago which monitors merchant accounts operated within all RBC Caribbean jurisdictions including the Bahamas for suspicious activity. An alert was generated on the internal network to be dealt with by the appropriate officers of the Defendant.

vii. A hold was then placed on the Plaintiff's account (as well as on Store Away's Account). Thereafter, on or about 20th October, 2016, the Plaintiff attempted to access his account and was informed of the hold placed on the account.

viii. In addition to the Plaintiff's account being flagged for suspicious activity, VISA also declined to settle the transactions related to the Sum which had been credited to the Plaintiff's Account (and Store Away's Account) on the basis that the amounts of the transactions exceeded the card's limit for individual transactions. RBC was never put into funds to settle the transactions. RBC was later contacted by the credit card issuer ZUNO Bank and informed that the transactions were fraudulent.

ix. The Defendant reversed the credit to the Plaintiff's account. The funds to settle the transactions from VISA were never received. It was confirmed by ZUNO Bank by email that the transactions were fraudulent.

x. The Defendant had authorized its IT Supervisor, Mr. Julian Seymour, to provide assistance initially to the Plaintiff with the said 23 transmissions.

88. There was a shortfall of $742,628.86 between the total Sum and the amount of the funds deposited. The Defendant maintained this represented fees and VAT and the Plaintiff did not accept this. The Plaintiff claims that the Defendant breached its contractual obligation to hand over funds which were deposited to his account. He claims that the Defendant was not a constructive trustee to hold funds for a third party beneficiary and that he and the Defendant's relationship was that of debtor and creditor. As such, the Bank was obligated to give him the money that was sent to his account upon his demand.

89. **In re Spectrum Plus Ltd (in liquidation) - [2004] Ch 337** the relationship of banker and customer was discussed: -

> **"88 The starting point is the classic exposition by Lord Cottenham LC of the relationship of banker and customer in *Foley v Hill* (1848) 2 HL Cas 28, 36-37:**
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> > **"Money, when paid into a bank, ceases altogether to be the money of the principal (see *Parker v Marchant* (1843) 1 Ph 356, 360); 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 principal 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 principal 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 his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands."
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> 89 Thus, where the proceeds of book debts owed to the customer of a bank are paid into that customer's account with the bank, title to those proceeds passes absolutely to the bank. The obligations that the bank comes under to the customer as a result of receiving those proceeds depend upon the terms of the contract between the customer and the bank. In so far as the customer is entitled to call upon the bank to pay over the amount of the proceeds received, the right will be contractual, not proprietary. There is no reason why the customer's right to call for such payment should not be restricted by contract."

90. The relationship between a banker and its customer is that of debtor and creditor. It is contractual and does not vest the customer with any automatic rights to any money that it may place on account or that may be transferred to it. In this case the Plaintiff admits that the relationship is contractual and that the Defendant was obligated to release the Sum to his account for his benefit, however, he failed to consider his contractual obligation/right to be subject to the conditions and terms of any contract he may have had with the Defendant.

91. The Plaintiff's account was a merchant account and he was provided with a point of sale machine to facilitate payments by credit or debit cards. His account was said to be for the business of rental and vacation homes and at no time did his balance exceed $16,000.00. More importantly, by opening his merchant account and receiving the point of sale machine, he became bound by the Agreement which was an agreement subject inter alia to the control of VISA which issued the various cards being used by customers of the merchant in his point of sale machine. Therefore his right to call for any payment made via the credit card machine was subject to the terms of the Agreement.

92. I accept that no claim has been brought by Store Away, a separate legal entity from the Plaintiff and no evidence of any consent by Store Away to allow the Plaintiff to maintain its claim has been produced. As stated in **Mills v First Caribbean International (Bahamas) Bank Limited and others [2010] 3BHS JN24:-**

> **"An action for breach of contract can only be maintained by the parties to the contract and they can only recover damages suffered by them as a party to the contract. The Plaintiff is not bringing this action on behalf of the Association and he is not claiming any loss suffered by the Association as a result of the breach of contract."**

The Plaintiff is not bringing this action on behalf of Store Away, but only for himself personally, accordingly no relief can be obtained for any loss if any of Store Away.

93. One of the issues raised by the Defendant was whether Mr. Plavala's card was a credit card or a debit card and whether there was a factual distinction which impacted the rights and obligations of the parties. Based on the evidence led, I accept that the card was a VISA debit card. Obviously a debit card is a device which allows the owner to access or debit funds sitting on his account whereas a credit card is a device which allows the user to borrow funds from the issuing bank subject to agreed terms. Based also on the facts of this case, there was no material or relevant difference as it relates to the right and obligations of the Plaintiff to utilize the same in the manner in which he did. I accept that the debit card was subject to the limits imposed on it by VISA the issuer of the card and the issuing bank ZUNO.

94. The Plaintiff claims that the Sum was sent from ZUNO Bank by Mr. Plavala as an investment for his sand mining business. He has provided corporate documents of an unrelated company in support of this of which he is an officer. The funds however, were deposited in his personal account. Mr. Plavala was not called as a witness to support the Plaintiff's contention that he had in fact sent the sum as a non-obligatory investment. No documents to this effect were admitted or agreed by the Defendant. Not much was explained about the sand mining business. Further Central Bank confirmed by letter that no approval was obtained by Mr. Plavala to invest in the Bahamas and no approval was obtained by the Plaintiff to borrow in a foreign currency.

95. If the relationship between the Plaintiff and Mr. Plavala were ongoing and established it would have certainly been beneficial to the Plaintiff's case to set out any agreements between the two. Further it would have resolved the issue of the concern that these transactions were suspicious. Likewise, the transactions would not have been a "one off" and there would have been not only attempts to have the money successfully transferred but other avenues could have also been explored. I am also cognizant of the fact as stated previously that no Central Bank approval had been obtained by Mr. Plavala for this investment which would have been necessary for a non-Bahamian to invest in the Bahamas. All of these omissions supported the finding of the Defendant that the transactions were suspicious which I accept as reasonable.

96. The Plaintiff attempts to buttress his claim on the ground that the transactions could not have been fraudulent because the Defendant did not report the transactions to the Financial Intelligence Unit, an omission which I acknowledge should have been considered by the Defendant but this is not dispositive of the issue. The Plaintiff also claims that it was telling that the Defendant did not call anyone from ZUNO Bank as a witness in support of its fraud claim. I am satisfied that the omission to contact the Financial Intelligence Unit does not mean that the Defendant accepted that the transaction was not fraudulent. Further I am satisfied that the onus was on the Plaintiff in the face of the sequence of events to produce the direct evidence of Mr. Plavala to directly counter any concerns of the Defendant and Visa. He did not.

97. While the Plaintiff provides a case that the transactions were innocent and honest based primarily on the fact that the Defendant made no reports to the relevant

authorities it is clear that the Bank took the necessary steps it was required to, falling short only of its obligation to make the required reports to the relevant statutory bodies. The Plaintiff however in its detailed complaint to the police claiming that the Defendant had stolen and or embezzled his funds received, a response from the Police Department stated that they "found no criminality of any kind" after a thorough review of the complaint. Based on this, the applicable authorities knew of the matter and had opined that it was a civil matter.

98. It is true that any party claiming loss from fraud must prove the same. Upon a review of the defence, I am satisfied that the Defendant pleaded that the transactions were flagged as possible fraudulent transactions which was later corroborated by the issuing bank ZUNO. This is simply a statement of the sequence of events. I am satisfied that the Defendant was relying on the findings of ZUNO Bank the issuing bank of the card used and the fraud department of the Defendant for making the statement that the transactions were fraudulent. I also accept that the Defendant was not pursuing a claim for damages for fraud but simply explaining how and why the sequence of events unfolded. Despite this, the Defendant by virtue of Order 18, Rule 12 is precluded from relying on any allegation of fraud in its defence unless it had provided particulars. No particulars were provided, therefore they cannot rely on the fraud defence. I note that no claim is being made for damages for fraud as stated above and as such I am able to determine whether there are other reasons for the reversal of the Sum.

99. I accept the Defendant's evidence that it had followed protocols put in place when it froze the Plaintiff's account and reversed the transfer to the VISA card on the account of the 23 force posted transactions being suspicious. The email from ZUNO bank is dispositive of this issue. ZUNO Bank did not authorize these transactions.

100. The Plaintiff and the Defendant were parties to the Agreement. By virtue of this Agreement the Plaintiff agreed the terms as set out in paragraphs 6 through 8 above, particularly the Defendant agreed.

    i. By virtue of clause 1.3(a) and (b) of the Agreement, the Plaintiff agreed to pay to the Defendant, inter alia, transaction fees, taxes, certification fees, chargeback fees, and agreed that the Defendant may debit his bank account without prior notice to recover the same.

    ii. By virtue of clause 1.21 of the Agreement, the Plaintiff agreed that where he defaulted on the agreement or was reasonably suspected by the Defendant to have defaulted, the Defendant was entitled to, inter alia, immediately and without prior notice, suspend his rights under the agreement or end it, freeze any of his bank accounts, take possession of any funds in such frozen accounts or take any other steps the Defendant deemed necessary. An occurrence of default is defined in clause 1.21(b) as, inter alia, when "you participate in the processing of Transactions that you know or ought to have known to be fraudulent, Prohibited Transactions or otherwise unauthorized transactions" or where "you do not observe or act according to the terms and conditions of this Agreement.

The Plaintiff agreed to be bound by these terms which allowed the Defendant to freeze his accounts or take possession of funds if he participated in unauthorized or prohibited transactions.

101. Upon a review of the evidence I accept the evidence of the Defendant's witnesses as to the protocols in place to address transactions such as these which transpired in this matter.

102. I accept that there was an agreement in place between the Defendant and its merchant customers who utilize point of sale machines for business purposes. I accept that there was an initial advance of funds to the Plaintiff pending the processing and repayment by VISA of the Sum comprising the transactions. VISA was the ultimate decision maker as the debit card was a card issued by VISA through ZUNO Bank. The card was subject to the terms and conditions imposed by VISA. I find that the evidence of Mr. Saku of VISA highly persuasive and determinative of the issues. The card whether credit or debit was subject to a transaction limit of US $249,999.99 per transaction. Once the transaction exceeded that amount the transaction would not be cleared. Each transaction exceeded the transaction limit in this case and so whether or not the transactions were suspicious to the Defendant, VISA was within its rights to refuse to honor or clear the transactions. Once the transactions were not cleared, the Defendant was not given the funds by VISA to credit the Plaintiff's account. These transactions were prohibited or unauthorized transactions.

103. I also accept the evidence as stated by Mr. Saku and reject that of Mr. Smith and find that Base I and Base II are settlement processes of VISA which do not require human interaction. These transactions would normally be authorized through Base I and then cleared or settled or rejected through Base II.

104. I also accept that force-post transactions occur where the merchant bypasses the authorization process by manually entering an authorization code which is usually obtained from the issuing bank for each transaction. This was not done for these transactions. In fact all twenty-three of the transactions used the same code, which of and by itself raised a red flag. Despite the red flags, I find that it was VISA who refused to settle the transactions and accordingly the Defendant was fully justified in reversing the initial advance to the Plaintiff's account. The email from ZUNO Bank was simply further support to the Defendant that the issuing bank was not in support of the clearing of the transactions.

105. It was not necessary for the bank to prove fraud by the Plaintiff as stated earlier, the transactions were rejected by VISA because of the attempts to exceed the transaction limits, as prohibited or unauthorized transactions which resulted in acts of default by the Plaintiff.

106. Despite all of the myriad of issues which the Plaintiff raised, this matter was a simple one, namely whether the Defendant breached its contract to the Plaintiff. It did not. There was no actual credit to the Plaintiff's account to enable the Plaintiff to demand

payment of the same, there was only an initial advance which would normally be settled by VISA. VISA did not settle it. The Defendant rightfully reversed the advance.

107. The issue of defamation raised by the Plaintiff is dismissed. The elements required to prove defamation have not been established by the Plaintiff. The bank statement relied by the Defendant was issued to the Plaintiff and not to a third party. Further there was nothing contained in the bank statement which could possibly be construed as defamatory. The statement simply reflected the advance of the sum and the reversal of the advance once the sum was not cleared by VISA. The use of the term "fraud" on the credit statement I accept is reflective of the characterization of the transaction from VISA and ZUNO and not that the bank had proven that a fraud had been committed.

108. Upon a review of the evidence and the submissions generally, I prefer the evidence of the Defendant as to the sequence of events and the reason for the actions of the bank. The evidence of the Plaintiff's witness, Mr. Smith did not assist the Plaintiff in his evidence. It reflected a stance which was in direct and unjustified opposition both to the documentary and viva voce evidence on both sides.

109. I do not find that the Plaintiff has proven his case on a balance of probabilities. His account was not being used for the purpose for which the Sum was sent. He nor his witness Mr. Smith, provided the Court with any cogent evidence that the Sum was being sent for sand mining purposes. He failed to call as a witness the owner of the Sum, who could have provided sworn evidence of the transactions to support his case. In the absence of this, the court is compelled to make the determination that the Plaintiff could not prove that the transactions were legitimate and valid bearing in mind that (1) there was no regulatory approval, (2) VISA and ZUNO Bank had both rejected the transactions and (3) each transaction exceeded the agreed limit established by VISA and which Mr. Plavala should have been fully cogniscant of.

110. Accordingly, I do not find that the Defendant breached any contractual obligations to the Plaintiff in refusing to release the Sum or any part of the sum to him nor did the Defendant defame the Plaintiff and I accordingly dismiss the Plaintiff's action against the Defendant.

111. The Plaintiff shall pay to the Defendant its costs of the action to be taxed if not agreed.

Dated this 24th day of March 2023

Hon. Madam Justice G. Diane Stewart