

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

COMMERCIAL DIVISION

CLAIM NO. SLUHCM2023/0043

BETWEEN:

- 1. BOLUM TWENTY-THREE LIMITED**
- 2. CLAUDE LUSSIER**

Claimants

and

PETRUS PRIVATE BANK LIMITED

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Ms. Ann-Alicia Fagan with Mr. Peter Marshall and Mr. Mikhail Charles for the Claimants
Ms. Vanessa Pinnock for the Defendant

2024: July 9; 10
July 31 (Written Closing Submissions)
2025: June 13
July 31 (Re-Issued pursuant to Rule 42.10)

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** This is a Claim filed by Bolum Twenty-Three Limited (“Bolum”) and its beneficial owner Claude Lussier (“Mr. Lussier”) against Petrus Private Bank Limited (“the Bank”) wherein the claimants allege that the Bank acted unjustifiably and in breach of its fiduciary duty and contractual obligations, by placing and maintaining a hold on Bolum’s bank account, thereby causing loss and damage to them.

- [2] The Bank resists the claim stating that the hold was lawfully placed on the account based on information received from a third party, Ms Joycelyne Douville ("Ms Douville"), which caused the Bank to conclude that ownership of the funds in Bolum's account was disputed and that Ms Douville's information had given rise to a potentially legitimate claim to the funds. Further, the General Terms and Conditions which governed the account allowed the Bank to place the hold in such circumstances, without incurring any liability whatsoever.
- [3] The Bank contends that the claimants have taken no steps to refute the perception that Ms Douville has a potentially legitimate claim to ownership of the funds in the account, and until the issue of ownership is resolved, it is not in a position to release the hold.

The Issues

- [4] The issues which arise for determination are as follows:-
- (1) Did the Bank owe a fiduciary duty to the claimants and if so, whether this duty was breached by placing a hold on Bolum's bank account?
 - (2) Was the Bank justified in placing and maintaining the hold on Bolum's bank account?
 - (3) Are the claimants entitled to the remedies sought?

Pleadings

The Claim

- [5] Bolum is an international business company duly incorporated under the laws of the Commonwealth of the Bahamas. Its sole shareholder is Dinber Management Inc ("Dinber") and its sole director is Newmark Services Limited ("Newmark"). Bolum is the holder of an investment account at the Bank, bearing account number 18246 ("the Bolum account" or "the account") Mr. Lussier is the sole authorized signatory to the account and the beneficial

owner of all Dinber's shares¹ in Bolum, by virtue of a Declaration of Trust executed on 23rd August 2021².

- [6] The claimants allege that the account was opened in August 2021, and it was agreed then, that the Bank was authorized to act on any instruction given by Mr Lussier on behalf of Bolum. Thereafter, the Bank received and carried out instructions from Mr. Lussier, in relation to the account. In October 2021, it was discovered that a hold had been placed on the account. Upon making inquiries Mr. Lussier was informed by a representative of the Bank that the hold was imposed to protect the Bank against third-party lawsuits. The claimants assert that at the time the account was frozen, the balance stood at approximately US\$3,500,000.00. Since then, Mr Lussier has been unable to access Bolum's funds, and the Bank has refused to carry out any of his instructions, in relation to the account.
- [7] The claimants assert that as at the date of filing this claim (18th April 2023) the hold had not been released. They are unaware of the existence of any third-party lawsuits and have not been served with any claims and/or court orders related to the account or the funds contained therein, to justify the Bank placing or maintaining the hold. The claimants further state that the Bank has failed and/or refused to provide a valid reason for placing the hold and has also failed and/or refused to respond to Mr. Lussier's repeated inquiries. The claimants maintain that the Bank is not justified in law, or on the facts, to restrict access to Bolum's funds without due cause, or in perpetuity.
- [8] The claimants allege that as a consequence of the Bank's actions they have been deprived of the ability to invest the funds in the account, so as to reap a return on investments. They allege breach of fiduciary duties and breach of contract by the Bank, and seek the following relief:

¹ 100 Shares

² See Exhibit CL6

- (1) a mandatory injunction compelling the Bank to release the hold placed on the account, together with an order that the Bank transfers the funds to an account of the claimants' choosing;
- (2) damages for the deprivation of the use of the funds in the account;
- (3) an account of the profits received by the Bank with respect to the funds held in the account;
- (4) an order for payment of such profits, interest, costs; and any other relief.

The Defence

- [9] The Bank is an international business company duly incorporated under the laws of Saint Lucia. It is licensed to provide private banking, including wealth and asset management services to its customers, and is a regulated entity under the Financial Services Regulatory Authority Act³, as the holder of an International Banking License under class "A" bearing License Number 1B/014(A).
- [10] The Bank admits having placed a hold on the account but contends that the funds which were placed in the account were transferred directly from another account held at the Bank in the name of Sterling Wynterbourne Inc ("Sterling"). The Bank avers that while the funds were in Sterling's account, it received a Declaration of Trust dated 26th January 2017⁴ from Dinber, which stated that the shares in Sterling were held on trust for the sole benefit of Mr. Pierre Paul Desrochers ("Mr. Desrochers") during his lifetime. At that time Mr. Desrochers was the sole authorized signatory for the Sterling account. The Bank also received an External Asset Manager Agreement between the Bank, Sterling and Prime Investments Advisors Ltd ("Prime Investments"). The latter is an asset management company operated by Mr. Lussier, which was charged with the responsibility for managing the assets in the Sterling account, under the terms of a Power of Attorney, for the benefit of Mr. Desrochers. After Mr. Desrochers death in 2021, the Bank received documentation from Sterling indicating that the authorized signatory for the Sterling account was being changed from Mr.

³ Cap 12.23 of the Revised Edition of the Laws of Saint Lucia

⁴ See Exhibit MF5

Desrochers to Mr. Lussier, and that the shares in Sterling were held on trust for the sole benefit of Mr. Lussier during his lifetime. Thus, the Bank commenced accepting instructions from Mr. Lussier in relation to the Sterling account.

[11] The Bank admits that in August 2021 it received the application to open the Bolum account. The opening balance was stated as US\$3.1 million, and the source of funds was given as the Sterling account. The account was opened, and the funds were transferred from the Sterling account to the Bolum account, and the Sterling account was closed.

[12] The Bank states that by a letter dated 7th October 2021⁵ (“the October 2021 letter”) with enclosures, it received notification on behalf of Ms Douville, as the executrix of the estate of Mr. Desrochers, that the funds which were transferred to the Bolum account belonged to his estate. The Bank avers that in accordance with the General Terms and Conditions which governed the Bolum account, it was entitled to place a hold on that account, once it had formed the opinion that a potentially legitimate claim from a third-party had been made in relation to the assets in the account, and that the October 2021 letter constituted a potentially legitimate claim from a third party. The Bank avers that further letters received from Ms Douville’s attorneys continued to indicate the existence of a potentially legitimate claim by a third party, sufficient to warrant maintaining the hold on the account.

The Evidence

[13] At trial, Mr. Lussier testified as the sole witness for the claimants, and was cross examined. The Bank called two witnesses, Reda Bedjaoui (“Mr Bedjaoui”) and Marsha Ferguson (“Ms. Ferguson”), who were both cross examined.

⁵ See Exhibit RB17

Mr Lussier's Evidence

- [14] In his witness summary Mr. Lussier stated that he is a Canadian citizen with permanent residency status in the Bahamas. He is an investment banker with over 35 years' experience, managing investment portfolios for clients. In this regard, he owns and operates Prime Investments and has been doing business with the Bank for about 8 years. He currently manages two accounts with the Bank and in the past has managed about ten accounts with the Bank. Over the course of his career, he has managed numerous investment portfolios and accounts, made many business connections, and managed investment accounts on behalf of his friends.
- [15] He stated that he met Mr Desrochers who resided in Montreal Canada in 1999, when he worked as the Vice President of Private Banking for the National Bank of Canada in Montreal Canada. Their bond grew significantly over the years, such that he considered him as one of his best friends. Prior to Mr Desrochers death, Mr Lussier had known him for more than 20 years and would see him at least twice a year in Canada to talk business and catch up. On one occasion, Mr Desrochers mentioned to him that he would leave him a gift upon his passing, but did not provide him with details at the time. He says that Mr Desrochers was a very kind and generous individual, and he was aware that he was married but that his wife died many years ago. He was not aware that he had any children.
- [16] Mr Desrochers passed away in April 2021 and in June 2021 Mr Lussier was informed by Melanie Moxey ("Ms Moxey") of Valdy Administration (Bahamas) Ltd ("Valdy"), the registered agent for Sterling, that he was the beneficiary of the assets held by Sterling⁶. Mr Lussier says that he had managed Sterling's investment portfolio during Mr. Desrocher's lifetime. After Mr. Desrochers death, Valdy appointed him the sole authorized signatory to the Sterling account.

⁶ See Exhibit CL5 - Declaration of Trust executed by Dinber and Mr. Desrochers on 3rd October 2018

- [17] In June 2021 Bolum was incorporated in the Bahamas, with Dinber as the sole shareholder, on trust for Mr. Lussier⁷. Newmark is the sole director of Bolum. Valdy was hired as Bolum's registered agent, to maintain Bolum's corporate register, and is paid annual fees for its services. In August 2021 Valdy applied to open the Bolum account and on 14th September 2021, the Bank issued a letter⁸ confirming that the account was opened. On 15th September 2021 Mr Lussier wrote to the Bank requesting that the funds in the Sterling account be transferred to the Bolum account, and approximately US\$3.1 million was transferred. The Sterling account was closed and as at 27th September 2021, Bolum's portfolio at the Bank was valued at US\$3,147,146.74.
- [18] Mr. Lussier stated that in October 2021 he attempted to make a payment to Valdy for Bolum's annual fees, and sent written instructions to the Bank along with an invoice. He was informed by an officer of the Bank that his instructions would not be honored, as a hold had been placed on the Bolum account. At that time, he was given no information concerning the reason for the hold, and neither Valdy nor himself were informed of the reason for the hold, prior to the Bank freezing the account. He said that before the hold, he was able to invest in forex, shares, and mutual funds, among others. However, from October 2021, the Bank only accepted investment instructions for bonds, which limited the potential for the investment portfolio to grow and make money from higher yield investments. Thus, the claimants have suffered resultant losses.
- [19] Mr. Lussier stated that he made multiple attempts between October and December 2021 to obtain information on the reason for the hold. In December 2021 he was informed by Ms Moxey that the Bank had received a letter from a third-party informing that instructions should not be accepted from him. In August 2022, he attempted again to have Valdy's fees paid from the Bolum account and was informed that the account was blocked by Compliance. In September 2022, his attorney in the Bahamas wrote to the Bank but received no response. In January 2023, his attorney in Saint Lucian attorney wrote to the Bank, and received no response. Mr Lussier says that neither Valdy nor himself have been issued with

⁷ See Exhibit CL6

⁸ See Exhibit CL9

formal correspondence justifying the hold, or provided with information regarding when the hold will be released.

[20] Mr. Lussier further stated that at the time this claim was filed, there were no pending civil court actions or proceedings against Bolum in the Bahamas, or in Canada, or any other jurisdiction regarding Mr. Desrochers' estate, or an alleged third-party claim or interest, or any other subject matter. Bolum had also not been served with any documents in relation to this matter in Canada, the Bahamas, Saint Lucia, or any other jurisdiction. He stated that as of February 2023 the value of Bolum's portfolio stood at approximately US\$2.9 million. However, because the Bank has not honoured any requests regarding transfers or withdrawals, he has had to pay Valdy for its services to Bolum, from his personal funds. In his view, there is no legitimate reason for the hold. Therefore, he seeks to rectify the situation, and obtain compensation for his losses.

[21] In cross examination Mr. Lussier's responses did not contradict his witness summary. He maintained that Mr. Desrochers informed him on one occasion that he would leave him a gift upon his passing and that he was present in 2018 when Mr. Desrochers signed the Declaration of Trust dated 3rd October 2018. He denied having knowledge of the contents of this Declaration, and maintained that it was in June or July 2021 that he became aware of its contents, after Ms Moxey informed him that he was the ultimate beneficial owner of Sterling. When probed on his testimony that he was present when Mr. Desrochers signed the Declaration in 2018 yet he had no knowledge of the contents, or that it was in his favour before being advised of same by Ms Moxey, he remained resolute that both statements are accurate.

[22] Mr. Lussier agreed that a contractual relationship existed between the Bank and Bolum, because he signed as accepting the General Terms and Conditions governing use of the account. He agreed that upon receiving the October 2021 letter the Bank had acted reasonably and in accordance with the contract, by placing a hold on the account. However, he disagreed that the letters received on behalf of Ms Douville met the threshold for establishing the existence of a potentially legitimate claim. He accepted that banks usually

act to protect their own interests, but denied being aware that the Bank had no obligation to safeguard or act in the claimants best interest.

Mr. Bedjaoui's Evidence

- [23] Mr. Bedjaoui is employed with the Bank as its General Counsel. He testifies that on 24th November 2017, the Sterling account bearing account number 18065 was opened. He confirmed that the sole director of Sterling is Newmark and Dinber is the registered owner. Its shares were held on trust by Dinber for the benefit of Mr. Desrochers during his lifetime, and upon his death for the benefit of Huguette Phaneuf. Mr Lussier, who owns Prime Investments, was the asset manager for Sterling. By letter dated 26th July 2021 from Ms Moxey of Valdy, the Bank was informed that Mr. Desrochers died on 21st April 2021 and that Mr Lussier was now the authorized signatory on the Sterling account. The Bank also received a Declaration of Trust from Dinber dated 3rd October 2018⁹ which indicated that all Sterling's shares were held in trust for the sole benefit of Mr. Desrochers and upon his death for Mr. Lussier.
- [24] The Bank found it highly unusual that this information was being provided some 3 years after being signed, when clause 27 of the General Terms and Conditions specifies that customers are obligated to notify the Bank within thirty (30) days of any changes in customer information. Among the documents received by the Bank was another Declaration of Trust from Dinber dated 26th July 2021¹⁰ which stated that Sterling's shares were held on trust for Mr. Lussier and upon his death for the benefit of Andre Lussier and Jocelyne Lussier. The Bank again found it unusual that these assets which Mr. Lussier managed over the years now belonged to him. Nonetheless, the Bank's records were updated to reflect Mr. Lussier's beneficial ownership, in accordance with the instructions received from the trustee.
- [25] Mr Bedjaoui stated that in August 2021 the Bank received written consent from Newmark regarding the opening of an account, for which Mr. Lussier would be the authorized

⁹ See Exhibit RB10

¹⁰ See Exhibit RB11

signatory. Thereafter, the Bank received the application form from Bolum stating that the opening balance for the account would be US\$3.1 million, and the source of funds was account number 18065 (the Sterling account). On 14th September 2021, the Bolum account was opened, and the Bank transferred the funds from the Sterling account into the Bolum account in accordance with the instructions received from Valdy. The Bank also received a Declaration of Trust from Dinber dated 23rd August 2021¹¹ stating that the shares in Bolum were held in trust for Mr. Lussier and upon his death for Andre Lussier and Jocelyne Lussier. This document stated that the trust was established under and was exclusively subject to the laws of the Bahamas and that the courts in the Bahamas would have exclusive jurisdiction over all matters arising from the trust. By letter dated 15th September 2021, Mr. Lussier instructed the Bank to transfer the remaining funds in the Sterling account to the Bolum account.¹² This transfer was approved by both Newmark and Valdy, and the Bank complied with the instructions.

[26] Thereafter, the Bank received the October 2021 letter from Ms Douville's attorneys in Canada advising that certain investments held at the Bank on behalf of Mr. Desrochers now formed part of his estate, and that the mandate for any portfolio manager should be suspended. Mr. Desrochers death certificate and Canadian Will were enclosed. This letter was forwarded to Valdy. According to the Will, Ms Douville was the beneficiary of all Mr. Desrochers assets and interests. As the Bolum account was funded entirely from the assets in the Sterling account, the Bank's Compliance Department immediately froze the account and ceased to accept instructions for incoming or outgoing transfers. The hold was implemented as a precautionary measure to protect the interests of all parties until a court decision could clarify the rightful owner of the assets, as there were conflicting claims over these assets. Bolum was advised in writing that a hold was placed on the account.

[27] Mr Bedjaoui further stated that on 20th October 2021 Mr. Lussier contacted him via Whatsapp¹³ stating that he received a phone call from Valdy indicating that Ms Douville's attorneys in Canada had contacted the Bank. He informed Mr. Lussier that the Bank had

¹¹ See Exhibit RB15

¹² See Exhibit RB16

¹³ See Exhibit RB24

received the Will and an account statement and took a decision to freeze the Bolum account until clarification was provided. He also informed Mr. Lussier that Valdy needed to make a determination in accordance with Bahamian laws on who was entitled to the funds. There has since been no agreement or final determination on how this issue is to be resolved. By email dated 6th December 2021 the Bank advised Valdy that it would not be taking any instructions from a third party, and requested that Valdy provide a written legal declaration confirming that it had received the documents, that the Declaration of Trust dated 3rd October 2018 was signed by Mr. Desrochers at their office, in their presence, that Valdy was not compelled by the provisions of the Will under Bahamian law, and that they would indemnify the Bank for any liability arising from the matter. In an email of even date Ms Moxey acknowledged receipt of the documents and indicated that Valdy declined to submit any such written declaration.¹⁴

[28] On 17th June 2022, the Bank received a letter from Ms Douville's attorneys in Saint Lucia, requesting details of Mr. Desrochers' investments with the Bank. Attached to this letter was a judgment of the Superior Court of Quebec, confirming Ms. Douville's appointment as personal representative, liquidator and sole beneficiary of Mr. Desrocher's estate.¹⁵ On 23rd August 2022 Mr. Lussier instructed the Bank to make a payment to Valdy. On 25th August 2022 Mr. Lussier was advised that the Bank could not process this transaction since the account was blocked by Compliance, pending resolution of the ownership issue. Mr Lussier was always able to conduct low risk investments and continued to receive payment for his work as investment manager for the Bolum account. On 24th April 2023 Mr. Lussier was emailed the income statement for the first quarter of 2023 with a request for his invoice, which was settled. On 30th November 2023, the Bank received a third letter on behalf of Ms. Douville maintaining her interest in the assets in the Bolum account and requesting that no payments be released.¹⁶

¹⁴ See Exhibit RB25 for email exchange between Mr Orhan Koc (COO of the Bank) and Ms Moxey

¹⁵ See RB26

¹⁶ See Exhibit RB30

- [29] In cross examination Mr. Bedjaoui confirmed that in his role as General Counsel he advises the Bank on legal matters, but the final decision is made by the Bank's board of directors which has direct oversight over legal decisions. He agreed that Bolum and Sterling are international business companies, each having separate legal personality. He agreed that the Bank was contractually obligated to Bolum, however the Bank's took the position that it was the function of a court to decide and to guide on matters of ownership, and to whom the assets should be released.
- [30] Concerning the Declaration of Trust dated 3rd October 2018 which the Bank received after Mr. Desrochers death in 2021, he agreed that he provided no evidence of his thoughts, remarks or discussions surrounding this. He explained that it was unusual for a regulated corporate service provider and trustee to wait three years after the death of one of its clients to provide such an important document to the Bank that they work with. When asked whether any document evidencing a claim filed by Ms. Douville had been exhibited with his witness statement, his response was that it would not have been possible to provide any information in relation to a claim filed by Ms. Douville, as it had just come to his knowledge that a claim was filed on the day before he gave evidence at trial. He agreed that no claim had been filed by Ms. Douville between 7th October 2021 and 8th July 2024.
- [31] Mr Bedjaoui also accepted that the Bank had not been served with any order restraining it from releasing the assets in the Bolum account, and that the Bank never sought a formal legal opinion on the competing claims between Bolum and Ms. Douville. He agreed that the Bank only requested a declaration from Valdy as the trustees, indicating that they were not compelled by the provisions of a Canadian Will.

Ms. Ferguson's Evidence

- [32] Ms Ferguson is the Chief Compliance Officer of the Bank with responsibility for providing support to senior management on the establishment and monitoring of the Bank's risk management policies, and reducing non-compliance with these policies. She also ensures that the Bank's operations are compliant with the applicable laws, regulatory requirements, and internal policies and procedures.

- [33] She stated that Bolum became a client of the Bank when the account was opened in September 2021, and that Mr. Lussier is the beneficiary of that account. On 5th August 2021, the Bank received a package from Valdy in relation to the Sterling account which included the following documents:-
- (1) a written consent of Sterling's sole director Newmark, dated 26th July 2021, to amend the signatories on Sterling's account by replacing Mr. Desrochers with Mr. Lussier;
 - (2) the death certificate of Mr. Desrochers;
 - (3) a Declaration of Trust dated 3rd October 2018 which stated that Dinber was the registered owner of 100 shares in Sterling and that the said shares were held for the benefit of Mr. Desrochers and upon his death for Mr. Lussier;
 - (4) a Declaration of Trust dated 23rd August 2021 which stated that Dinber was the registered owner of 100 shares in Sterling and that the said shares were held for the benefit of Mr. Lussier and upon his death for Jocelyn and Andre Lussier.
- [34] She reviewed the Bank's files and noted that there was a previous Declaration of Trust dated 26th January 2017 which stated that Dinber held all Sterling's shares on trust for Mr. Desrochers and upon his death for the benefit of Huguette Phaneuf. She found it strange, that the replacement Declaration was shared with the Bank only after Mr. Desrochers death. Nonetheless, the Bank began to accept instructions from Mr. Lussier in relation to the Sterling account. Thereafter, the Bank received an account application from Bolum with the necessary supporting documents. Further documents were requested and provided. Upon review and conduct of due diligence, the application and documents were sent to the Bank's New Account Committee for approval and to open the account. The application stated that the source of funds would be a transfer of US\$3.1 million from the Sterling account. The Bolum account was subsequently opened, and the Sterling account closed, after transferring the balance to the Bolum account.
- [35] Thereafter, the Bank received the October 2021 letter from Ms Douville's attorneys in Canada, requesting that Mr. Lussier be removed as the authorized signatory for any account associated with Mr. Desrochers. Enclosed with that letter was a document which appeared to be Sterling's portfolio valuation (before it was transferred to Bolum), along with Mr.

Desrochers Will. This raised suspicion on the part of the Bank regarding the rightful owner of the assets held in the Bolum account. Ms Ferguson had a conversation with the Bank's Chief Operating Officer, Orhan Koc and the decision was taken to block the account, to limit the Bank's exposure to litigation. The Bank acknowledged receipt of the letter and advised that given the conflicting documentation on its file, the account would be blocked. The Bank further advised Ms. Douville's attorneys to contact Valdy. In December 2021, the Bank contacted Ms Moxey at Valdy and advised of the information received which supported the claim of another beneficiary, and provided copies of the documents to Valdy. Ms Moxey was asked to provide various declarations to the Bank, which Valdy declined, although acknowledging that they were aware that the Bank had frozen the account.

[36] The Bank subsequently received a letter from Ms. Douville's attorneys in Saint Lucia, requesting details of Mr. Desrochers investments with the Bank, and enclosed the judgment which confirmed her appointment as personal representative, liquidator and sole beneficiary of Mr Desrochers estate. Consequently, requests from Mr. Lussier for payments from the Bolum account were denied. In November 2023, the Bank received further correspondence from Ms. Douville attorneys in Saint Lucia indicating that she had an interest in the assets in the Bolum account and that no payments should be released from the account. The Bank therefore made the decision to wait until an order was given by a court, before releasing any of the funds in the account to either of the parties.

[37] In cross examination Ms. Ferguson agreed that she had extensive knowledge of compliance matters and explained how the Bank would meet its compliance obligations. She confirmed that it was standard practice for compliance matters to be determined by the Compliance Department and the Operations Department assisted in getting any documentation or relevant information from clients. She too expressed that she had found it strange that a Declaration of Trust signed three years prior to Mr. Desrochers death was only presented to the Bank after his death in 2021, as Valdy was usually very proficient at providing information to the Bank. The practice is for the Bank to receive such document within three months of execution. Ms. Ferguson agreed that there was no record of a suspicious activity report, because there was no suspicion at the time the documents were presented.

Issue 1: Did the Bank owe a fiduciary duty to the claimants and if so, was such duty breached by placing a hold on the Bolum account?

The Bank's Submissions

- [38] The Bank refutes the claimants' assertion that a fiduciary duty was owed to them. Whilst accepting that a bank may in certain circumstances assume the position of a fiduciary to a customer, Counsel for the defendant submitted that the relationship between the parties was contractual in nature and went no further than that of banker and customer. The Bank did not undertake to act on behalf of the claimants, and at all times was acting on its own behalf, and did not owe the claimants a duty to take care of their interests or to provide them with advice. Thus, the relationship did not fall within any of the circumstances which could give rise to a fiduciary relationship.
- [39] Counsel further submitted that the facts disclosed an uncomplicated contractual relationship of banker and customer where the Bank acted in accordance with the General Terms and Conditions governing the account, by placing a hold on funds after receiving the October 2021 letter from Ms Douville's attorney. Thus, there was nothing on the facts which could cast fiduciary obligations on the Bank to look after the claimants' interests. As no such duty was owed to the claimants, there could be no breach by the Bank, in placing and maintaining a hold on the account.

Analysis

- [40] I note that the claimants made no submissions on this issue and appear to have conceded the point based on the application of the law, to the factual matrix of the case.
- [41] It is trite that a fiduciary relationship arises where one party has undertaken to act on behalf of another, in circumstances which gives rise to a relationship of trust and confidence, with the distinguishing obligation being that of loyalty¹⁷. I agree that the relationship between a

¹⁷ Bristol and West Building Society v Mothew [1998] Ch 1 at 18

bank and its customer is ordinarily one of a contractual nature, generally regarded as that of debtor and creditor, and not trustee and beneficiary¹⁸. Such was the nature of relationship between the Bank and the claimants. There is no evidence that anything outside of these normal parameters existed between the Bank and the claimants. It was not the case that the Bank undertook to act on behalf of the claimants, or to provide advice, or to act as their agent, to cause them to repose trust and confidence in the Bank, which could have invoked a fiduciary obligation on the part of the Bank. Bolum was simply a customer, with money deposited into its account at the Bank, to be withdrawn upon request, and as such was a creditor and the Bank a debtor.

- [42] I therefore conclude that the facts do not present any inclination of a fiduciary relationship between the claimants and the Bank. As a fiduciary duty did not exist, the Bank could not have acted in breach, by placing a hold on the Bolum account.

Issue 2: Was the Bank justified in placing and maintaining a hold on the Bolum account, based on the letters received on behalf of the third party, Ms. Douville?

The Claimants' Submissions

- [43] Counsel for the claimants submitted that the Bank was not justified in placing a hold on the account and by so doing violated its contractual obligation to provide the claimants with unimpeded banking services. Further, access to the account should not have been restricted without just cause, or in perpetuity, as the October 2021 letter did not establish a legal claim to the assets in the account. Although Ms. Douville was the sole beneficiary of Mr. Desrochers' estate, his Will was written in general terms and did not make reference to any specific movable or immovable property. It contained general assertions regarding his investments without demonstrating her entitlement to the Sterling assets. Thus, an assertion made by her attorneys could not amount to a "*potentially legitimate claim*" given the absence of a connection to the Bolum account, in the face of a countervailing Declaration of Trust.

- [44] The claimants relied on the case of **Philipp v Barclay's Bank UK PLC**¹⁹ to argue that the Bank's discretion to freeze the account should be exercised honestly and not arbitrarily. In that case the court emphasized that a bank's concern that it might incur liability by carrying out its customer's authorized instructions must be valid, and it is not enough that the concern is genuine or reasonable. The claimants further contend that the enclosures in the October 2021 letter, which the Bank relied on were not authenticated. On the date the hold was placed (7th October 2021), Mr. Desrochers' Will was a foreign document, and lacked verification through the apostille process, which rendered it insufficient as a basis for the Bank's action. Ms. Douville was appointed as executrix of Mr Deroschers' estate in June 2022, and the letter from her attorneys which confirmed this was received, eight months after the Bank froze the account. Thus, an authenticated Will ought to have been requested prior to freezing the account, and more so in the absence of a court order.
- [45] Counsel for the claimants further submitted that the Bank was unaware whether a valid claim could be filed and maintained by Ms Douville against it, Bolum or Mr. Lussier, and was unaware of whether the assets could have validly formed part of Mr. Desrochers' estate. The legitimacy of any potential claim by Ms. Douville was a matter for an expert on Bahamian law, and up to the date of filing closing written submissions after trial, no claim had been brought challenging the validity of the Trust in the Bahamas. Therefore, the Bank's insistence that a potentially legitimate competing claim was demonstrated by these letters, is neither genuine nor reasonable. Further, the decision to freeze the account and continue to maintain the hold past the two-year time limit for challenging a fraudulent disposition under the laws which govern the Declaration of Trust, was unjustified and lacked any legal merit.
- [46] It was Counsel's contention that the Declaration of Trust dated 3rd October 2018 provided uncontroverted evidence that beneficial ownership of the funds currently in the Bolum account had passed from Mr. Desrochers to Mr. Lussier immediately upon Mr. Desrochers' death. The Bank was aware of this and acted on that Declaration when it opened the Bolum account, and thereafter approved the transfer of assets from the Sterling account to the Bolum account. Additionally, the validity of the Declaration of Trust has not been challenged

¹⁹ [2023] UKSC 25

by the Bank or Ms. Douville. The claimants also say that these assets had changed hands legally, and the Bank was not freezing an account held by a company beneficially owned by Mr. Desrochers. Bolum is a separate legal entity from Sterling, and the funds which were legally transferred from the Sterling account to the Bolum account could not be claimed by Mr. Desrochers' estate, since they would not have formed part of his estate upon his death. Thus, a letter containing a copy of his Will and subsequently a Canadian Probate would be ineffectual in establishing ownership to the assets in the Bolum account.

[47] Counsel argued that although clause 17 of the General Terms and Conditions allows a hold to be placed on an account if a potentially legitimate claim is made by a third party, that clause must be construed narrowly and read subject to the implied term that the Bank would not exercise this discretion without due regard to all the circumstances. Whilst the general rule is that the parties are free to contract as they wish, a court may limit or fetter a contractual discretion by implying the rule that the Bank ought not to exercise its right to place a hold on its customers' accounts dishonestly, for an improper purpose, capriciously, arbitrarily or irrationally. In support, Counsel relied on the case of **Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd**²⁰ which referred to the following statement by Legatt LJ in *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star) (No 2)* [1993] 1 Lloyd's Rep 397:-

"The essential question always is whether the relevant power has been abused. Where A and B contract with one another to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith but having regard to the provisions of the contract by which it must be conferred, it must not be exercised arbitrarily, capriciously, or unreasonably. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith but having regard to the provisions of the contract by which it must be conferred, it must not be exercised arbitrarily, capriciously, or unreasonably."

²⁰ [2008] EWCA Civ 116, at paragraph 61 of the judgment.

- [48] Counsel submitted that the meaning of the term “*potentially legitimate claim*” must be examined, against the definitions contained in Black’s Law Dictionary²¹ which defines the term “*legitimate*” as “*that which is lawful, recognized by law, or according to law*”. If the Bank was entitled under clause 17 to freeze the account on the basis of the letters asserting rights which had not been proven or substantiated by a court of competent jurisdiction, this would be an affront to the principles of justice. Accordingly, the Bank’s conduct in freezing the account for almost three years without taking meaningful steps to verify the alleged claim to ownership or resolve the matter could not fall within the intent of clause 17.
- [49] Counsel further submitted that the Bank had an implied duty of good faith, to not act arbitrarily, and to make reasonable inquiries before freezing the account. This would have required that active steps be taken to investigate and resolve competing claims, within a reasonable time. Whilst the claimants accept that the Bank is not an arbiter of the law, Counsel posited that the Bank was well placed to obtain and ought to have obtained proper legal advice in relation to how Mr Desrochers’ Will would be construed against the valid, unchallenged Declaration of Trust. As the Bank did nothing to satisfy itself that Ms. Douville could properly have challenged the Declaration of Trust before the courts in the Bahamas, the Bank was not in a position to determine whether any claim made by Ms. Douville in any jurisdiction would be “*potentially legitimate*”.
- [50] Counsel argued that Mr. Bedjaoui’s evidence revealed that the Bank did not seek to investigate or verify the validity of the third party claim, nor was any attempt made to obtain legal advice on the interaction between his Will and the trust, or to otherwise satisfy itself on how the competing claims could be resolved. Instead, the Bank sought a legal declaration from Valdy, as trustee for Bolum, in order to release the hold, and remained steadfast in its belief that the hold should not be released until the true owner was ascertained by a court of competent jurisdiction. Counsel says a written declaration and indemnity from Valdy could not have relieved the Bank of its contractual duties to the claimants and fell woefully short of the standard to which a Bank ought to be held. This is bolstered by the fact that the Bank’s sole concern was its own interests, and no consideration was given to whether the third party

²¹ Black’s Law Dictionary with Pronunciations by Henry Campbell Black – 6th Edition

had a truly legitimate claim. Having failed to conduct any investigations by obtaining legal advice or otherwise, despite the clear terms of the Declaration of Trust, the Bank could not have properly concluded that the claim made by Ms. Douville was a potentially legitimate one, and as such committed a serious breach of its implied duty.

[51] Counsel further submitted that by placing a hold on the account without proper justification and without making reasonable inquiries, the Bank acted rashly and breached its contractual obligations to the claimants, including (i) the duty to honor the instructions of the authorized signatories on the account (clause 15 of the General Terms and Conditions); (ii) the implied duty of good faith and fair dealing; and (iii) the implied duty of loyalty to avoid conflicts of interest. By prioritizing the unsubstantiated assertions of a third party over the claimants' clear contractual rights and entitlements, the Bank violated its overriding duty of loyalty to Bolum as its client, and abused its contractual position by freezing the account, solely on instructions from Ms. Douville.

[52] Counsel submitted that if the Court should find that the Bank was initially justified in placing the hold on the account in October 2021 based on the initial letter from Ms. Douville's attorneys, it was unreasonable, arbitrary and capricious to continue to maintain the hold indefinitely because (i) no substantiated claim was made by Ms. Douville to the funds in the account; (ii) the Bank failed to make further inquiries to ascertain the legitimacy of the alleged claim; and (iii) the Bank ignored subsequent evidence and communication from the claimants and Valdy, indicating Mr Lussier's clear beneficial entitlement to the Sterling assets, which by then were already transferred to the Bolum account.

[53] Counsel opined further, that the legal authorities establish that even if the hold was initially justified, the Bank was still required to take reasonable steps to inquire and resolve the matter within a reasonable time and could not have relied on obtaining an indemnity from Valdy as a basis for releasing the hold on the account.

The Bank's Submissions

[54] The Bank defended its decision to place and maintain the hold, stating that its actions were in accordance with its legal and contractual obligations under the General Terms and Conditions which governed the account. Counsel for the Bank noted that Mr. Lussier accepted in cross examination that he read and signed for receipt of the General Terms and Conditions for the Bolum account on 26th August 2021, and in the absence of any misrepresentation, his signature on this document operates as an incorporation and acceptance of all the terms.²²

[55] Counsel submitted that the parties are bound by clause 17 of the General Terms and Conditions which allowed the Bank the discretion to place a hold on the account, where, in its sole opinion, it was satisfied that a potentially legitimate claim had been made by a third party. Counsel cited the authority of **L'Estrange v Graucob**²³ in which Scrutton LJ stated:

“when a document containing contractual terms is signed, then in the absence of fraud, or ... misrepresentation, the party signing it is bound, and it is wholly irrelevant whether he had read the document or not.”

[56] Counsel also referred to the case of **Arnold v Britton**²⁴ in support of the defendant's position that the meaning of a clause is to be ascertained through the eyes of the reasonable reader, and it is only in instances where the words are not clear, that a court may depart from their natural meaning. Counsel contends that as clause 17 is clear and unambiguous, its natural meaning is what should be applied in this case. Potential means: *“existing in possibility but not in act; naturally and probably expected to come into existence at some future time, though not now existing”*. Legitimate means something that is *“genuine, real, or allowed according to rules or laws”* and a claim is *“a legal assertion or a legal demand.”*

²² Peekay v Australia and New Zealand Banking Group [2006] EWCA Civ 386, per Moore-Bick LJ

²³ [1934] 2 KB 394

²⁴ [2015] UKSC 36

- [57] Thus, the wording of clause 17 did not require that the Bank be completely certain of whether the claim was truly legitimate, at the time the hold was placed. The clause is not limited to an actual claim filed in a court of competent jurisdiction and only has to be one which could potentially arise at some time in the future. Counsel argued that the potential claim was legitimate, as the October 2021 letter was accompanied by (i) an excerpt of Mr Desrochers' portfolio valuation for Sterling, which bore similarities to the Bolum account portfolio summary, (ii) Mr. Desrochers' death certificate, and (iii) his notarized Will which bequeath all his moveable and immovable property, rights, titles and interests to Ms Douville. Thus, through these letter and enclosures, the possibility of a claim by Ms Douville, was brought to its attention.
- [58] Moreover, Counsel submitted that the phrase, "*in the Bank's sole opinion*" must be taken to mean that it was completely within the Bank's discretion, to determine the circumstances in which it was appropriate to freeze the account. The permission or agreement of the claimants was not required, as this was the Bank's internal decision. Upon review of the letter, the Bank, in its sole opinion, believed that a potentially legitimate claim was being flagged by a third party, against the assets in the Bolum account. As the Bank was unable to determine which party was the rightful owner of the assets, the hold was placed in accordance with clause 17 to preserve the assets in the account.
- [59] Counsel submitted that having signed the General Terms and Conditions, the claimants accepted clause 17 and cannot object to the Bank acting in accordance with that clause. One ought to look no further than the contents of the contract when determining whether the Bank was entitled to place a hold on the account. Any surrounding or further legal issues in relation to whether Ms. Douville was in fact entitled to the assets as she claimed could not have been determined by the Bank and were matters solely for a court's determination. Had the Bank determined the issue on its own and released the hold, it may have become exposed to litigation from Ms. Douville at some time in the future, even if it was merely the custodian of the assets, on behalf of the rightful owner.

[60] Counsel further contends that Valdy was fully aware of the hold and had advised the attorneys acting on behalf of Ms Douville to pursue the matter in the Bahamian courts, as Valdy could do nothing, until this was done. This reinforced the Bank's belief that it was not allowed to alter the position of the account to the detriment of either party, until there was a court order permitting it to do so. The Bank's only obligation was to protect its own interests and reputation, and having reviewed the October 2021 letter, and noting that Ms Douville was a third party making a claim to the assets in the Bolum account, the Bank was obligated to make a decision to protect itself from liability to competing parties over assets in one account. As the assets which were transferred as the opening balance for the Bolum account came directly from the Sterling account for which Mr. Desrochers was originally the ultimate beneficial owner, and Ms Douville continued to assert her entitlement to the funds in the Bolum account from 2021 to 2023, the Bank had no choice but to keep the hold in place, until directed by a court order to do otherwise. Counsel concluded that having acted in accordance with the terms of the contract, the Bank could not be faulted for its conduct.

[61] Concerning the claimants' suggestion that the Bank acted in breach of implied duties, Counsel countered that it is trite law that the express terms of a contract will prevail. Relying on the case of **Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and Another**²⁵, Counsel argued that a term will be implied into a contract, only if it is necessary to do so, to give ordinary business efficacy to the contract. Thus, the obligations of the parties cannot be any greater than those to be found expressly or by necessary implication in their contract.²⁶ Counsel also referenced the Privy Council decision of **BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings**²⁷ where Lord Simon said the following:

"[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must

²⁵ [2015] UKSC 72

²⁶ *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, per curiam

²⁷ (1977) 52 ALJR 20, 26

be capable of clear expression; (5) it must not contradict any express term of the contract.”

- [62] Thus, Counsel for the Bank submitted that any attempts by the claimants to imply any further duties into the contractual relationship between the parties ought to be rejected, as the expressed terms of the contract permitted the hold to be placed on the account, in the particular circumstances of this case.

Analysis

- [63] The evidence reveals that the Bank accepted the documents submitted by the claimants between June to October 2021 and were satisfied on the authority of these documents to change the signatory on the Sterling account, open the Bolum account, transfer the funds from the Sterling account to the Bolum account, and close the Sterling account. There is no allegation of fraud or a legal challenge to any of the documents concerned, save that Mr Bedjaoui and Ms Ferguson both say they found it strange that a fund manager was benefiting from funds he had managed, and that Valdy had taken three years to notify the Bank of the Declaration of Trust executed by Mr Desrochers, despite the Bank's three-month requirement for notification of changes to information. Regardless, after conducting due diligence the Bank accepted these documents and proceeded to act on instructions from Valdy, on behalf of both Sterling and Bolum.

- [64] It is not disputed that when the account was opened, Bolum agreed to the General Terms and Conditions²⁸, which governed the account. Thus, a good starting point would be to examine clause 17 which the Bank says was the basis for placing the hold. It reads as follows:-

“17. HOLD ON FUND. The Bank has the right to place a hold on any Account in the following circumstances: (i) subject to the Bank's cheque hold policy deferring the customer's right to withdraw funds represented by a cheque or non-cash instrument until the Bank receives actual irrevocable payment from the

²⁸ See Exhibit MF11

drawee, Any credit to an Account for any non-cash instrument before the Bank receives actual irrevocable payment is provisional and subject to reversal; (ii) if the Bank becomes aware of suspicious or possible fraudulent and unauthorized Account activity that may cause a loss to the Customer, the Bank or an identifiable third party; (iii) if an issue arises as to who are the proper signing authorities on any Account; (iv) if, in the Bank's sole opinion, a potentially legitimate claim is made by a third party on those funds. The Bank will not be liable for any loss for following or disregarding any Instructions to place or remove a hold.” [Emphasis added]

[65] The Bank has argued that clause 17 is clear and unambiguous and the words used should be given their natural and ordinary meaning. The claimants, on the other hand, submits that a narrow construction should be given to the clause subject to the implied term established in case law, that the Bank should not exercise the discretion granted by such clause arbitrarily, and without due regard to all the circumstances.

[66] I accept that there is no ambiguity in the clause. For this purpose, a potentially legitimate claim is one which, on its face, has a reasonable basis in law, and could possibly be upheld by a court or relevant authority if further investigated or litigated. It is not one that necessarily guarantees success, but it must be credible enough to warrant further investigation or serious consideration. The question then is whether the October 2021 letter from Ms. Douville’s Canadian attorneys constituted ‘a *potentially legitimate claim*’, to warrant freezing the account, and thereafter to maintain the hold based on subsequent letters and exchanges which the Bank received. The claimants argue that the letters were insufficient and lacked verification, while the Bank says that they raised reasonable suspicions that required immediate action by placing and maintaining the hold. The Bank placed heavy reliance on the use of the phrase “*in the Bank’s sole opinion*”, to say that it was the responsibility of the Bank to make that decision, with no involvement from the claimants.

[67] It is correct to say that clause 17 gave the Bank a contractual discretion to place a hold on the account once a potentially legitimate claim was made in relation to the funds in the account. In this way the Bank is afforded a defence against a claim for ordinary breach of

mandate. The legal authorities and pronouncements cited by the claimants on the exercise of this contractual discretion correctly state that the discretion is not to be exercised unjustly or in bad faith. In other words, even where a discretion is contractually conferred, it must be exercised in good faith, and on reasonable grounds. It must not be abused and must be exercised rationally and not arbitrarily. The English courts have repeatedly held that even where that contractual discretion is broad, it is not to be seen as unfettered. More recently in **Braganza v BP Shipping Ltd**²⁹ the UK Supreme Court in a judgment written by Lady Hale took a further look at the principles underlying the exercise of contractual discretion and cited with approval a passage from **British Telecommunications Plc v Telefónica O2 UK Ltd**³⁰ where Lord Sumption made the following observation:

“As a general rule, the scope of a contractual discretion will depend on the nature of the discretion and construction of the language conferring it. But it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously.....”

[68] In **Braganza**, the court was tasked with revisiting the test to be applied in deciding whether an employer was entitled to form the opinion that it did, in the exercise of contractual discretion. It was said that:

“Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to re-write the parties’ bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be

²⁹ [2015] UKSC 17

³⁰ [2014] UKSC 42 at paragraph 37 of the judgment

exercised, a term which may vary according to the terms of the contract and the context in which the decision- making power is given.³¹ [Emphasis added]

- [69] The court in **Braganza** examined several authorities on this issue and accepted that when exercising a contractual discretion “*a decision-maker’s discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused*”. Further, “*it imports a requirement of good faith, such that there should be some logical connection between the evidence and the ostensible reasons for the decision, and an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse.*”³²
- [70] With increased recognition of the **Braganza** duty, as it has come to be known, the English Courts have helpfully reminded that the burden is a high one, and the duty will not easily be breached, unless a decision is made in a particularly unreasonable manner, such that no reasonable person having that same discretion would have exercised it in that way. It is also the case that the duty may not be applicable to all clauses which confer a contractual discretion, and will usually be driven by the construction of the language of the relevant clause.
- [71] I note that clause 17 gave the Bank unilateral authority to determine the circumstances in which it would be appropriate to place a hold on the account, without any input from the claimants. I accept that exercising such discretion would attract scrutiny through the lens of the **Braganza** duty, when assessing whether the Bank acted reasonably and in good faith in freezing the account. It is logical that the Bank’s responsibility would favour preservation of assets, as opposed to dissipation, and this would have informed its decision on whether to freeze the account, when presented with conflicting information on ownership of the assets. The Bank’s witnesses expressed concern at the length of time it took (three years) to present the Declaration of Trust in which Mr Desrochers purported to substitute Mr Lussier

³¹ Supra note 12 at paragraph 18 of the judgment

³² Supra note 12 at paragraphs 22 – 23 of the judgment

as beneficiary to the shares of Sterling, upon his death. The Bank's evidence is that upon reviewing the October 2021 letter and enclosures, and noting the similarities between the Sterling portfolio valuation and the funds transferred to open the Bolum account, coupled with the observation that Mr Lussier had now become the owner of the funds which he had managed, a genuine concern arose concerning the third party claim.

[72] Accepting that funds in a bank account can be moved relatively easily, in my opinion, it could not have been unreasonable or whimsical for the Bank to conclude that having examined the information, albeit not in the form of a filed legal claim, that it was prudent to place a hold to protect the assets, pending presentation of sufficiently cogent evidence to justify or refute the third party claim. There is nothing in the evidence which suggests that the Bank was arbitrary, capricious or perverse, in arriving at this decision. It is commonplace that in the ordinary course of business, banks will be faced with such circumstances, and must have the ability to act quickly, to avert a perceived injustice.

[73] I therefore conclude that the Bank was justified in initially placing the hold on the account. However, the matter does not end there. In the absence of legal restraint, a hold is never intended to last for a prolonged or indefinite period. The usual duration is days or weeks, unless an injunction has been obtained, or pending the outcome of a financial regulatory inquiry. The initial underlying cause for placing the hold must be investigated with alacrity, by all the parties concerned and the hold should be released if the third party is unable to present a valid legal claim, or legal restraint within a reasonable time. It was the Bank's responsibility to immediately inform Bolum of the circumstances which led to the hold and provide the necessary information to enable Bolum to conduct its own investigations or take the necessary steps to resolve the matter. Mr Lussier says he only discovered that the account was frozen when he made a request for payment of Valdy's annual fees between October and December 2021. The Bank refused to provide the information which was eventually provided to Valdy as trustee for Bolum.

[74] I note the Banks position that the hold would not be released unless directed by a court order, however this is not a recognized practice. Mr Bedjaoui says that he provided legal advice to the Bank, however the final decision was that of the board of directors. Once the

Bank determined that the account should be frozen, the third party should have been asked to present documents to support a valid legal claim, or a court order requiring that the hold be maintained, failing which the hold would be released. I note that instead of taking these steps, to hold the third party accountable for verifying any legitimate claim she may have had, the Bank continued to engage Valdy on the matter. It is now four years later, and no further information has been provided to the Bank to substantiate the third party claim. In the letter dated 30th November 2023, Ms Douville's attorneys advised that she intended to intervene in the present claim. This was never done. I agree that Ms Douville could have taken any form of legal action deemed necessary to assert the validity of her claim to the assets in the account, from as early as October 2021.

[75] To this date, all that exists is a hold over the Bolum account from October 2021, which ought to have been released within a reasonable time, unless the third party had presented the Bank with cogent evidence of the purported claim, which led to the hold. In these circumstances, the Bank would not be entitled to continue to maintain the hold. Although Mr Bedjaoui says the hold was maintained to protect the Bank from litigation, ironically the Bank has now become the subject of litigation for failing to release the hold in the absence of proper legal restraint.

[76] The claimants also had a responsibility to assist the Bank by investigating Ms Douville's claim and instituting legal action at the earliest, to release the hold, once the Bank had exceeded a reasonable period for maintaining it without proper or lawful justification from the third party. From all indications, none of the parties took any steps to resolve the matter within a reasonable time.

[77] The documents relied on by the Bank to initially placed the hold, are now inadequate for that purpose. From the evidence, the Bank has not been served with a court order to maintain the hold, or a viable claim filed in a court of competent jurisdiction. Additionally, there is no evidence from the Bank which challenges the authenticity or validity of the documents presented by Valdy on behalf of the claimants, which the Bank relied on to transfer the assets from the Sterling to Bolum account, and close the Sterling account.

[78] Against this backdrop, there is no valid reason for the Bank continuing to maintain the hold on the Bolum account. The third party has not been able to demonstrate to the Bank that a claim exists, and in any event recourse would be against the claimants, with damages being an adequate remedy, recoverable from the claimants.

[79] I therefore conclude that whilst the October 2021 letter and enclosures were sufficient to place the initial hold on the account, the follow-up letters in 2022 and 2023 and attendant enclosures without more, are insufficient for maintaining the hold, over such a prolonged period.

Issue 3: Are the claimants entitled to the remedies sought?

[80] The issue of the relief can be disposed of succinctly.

Mandatory Injunction

[81] I have considered the submissions of the parties regarding this relief. Having determined that the hold has been maintained for an unreasonably protracted period, without legal justification, the logical consequence would be that the Bank is directed to release the hold and comply with the mandate for the Bolum account.

Damages for Deprivation of Use of Funds

[82] I have given due consideration to the submissions and the authorities advanced by the parties on this matter. The cases³³ relied on by the claimants do not assist. It is the law that damages for breach of contract must be pleaded and proven. Mr Lussier's evidence is that since placing the hold, the Bank has not honoured any payment requests, which forced him to utilize his personal funds to pay Valdy for its services to Bolum for 2021 to 2023 in the amount of US\$11,850.00. He did not provide any proof of these payments. Additionally, he

³³ Sagicor Bank Jamaica Ltd v Seaton [2022] UKPC 48; Earl Terrace Properties Ltd v Nilsson Design Ltd [2004] EWHC 136 (TCC);

stated that Bolum has incurred monetary loss as a result of the Bank limiting the investment portfolio to the purchase of bonds only and restricting his ability to invest in other high yield investments. No evidence was provided to enable quantification of such loss.

- [83] In any event, the overriding consideration here is clause 17 of the General Terms and Conditions which states that the Bank will not be liable for any loss for following or disregarding any instructions to place or remove a hold on the account. It is trite that parties to a contract are bound by the terms of the contract irrespective of how unreasonable it may be, absent fraud or misrepresentation. Effect must be given to the intention of the parties as demonstrated in the contract. Having accepted the General Terms and Conditions, the claimants are bound by all the terms of use, and would not be entitled to damages for deprivation of use of the funds in the account, for the period that the hold was maintained.

Account of Profits and Order for Payment of Profits

- [84] Counsel for the claimants argued that the claimants are entitled to the net interest income earned by the Bank in relation to the amount held in the account, as the Bank would have utilized the funds to invest and make a profit. This position is untenable as the authorities clearly establish that when a customer deposits money into a bank account, a debtor-creditor relationship arises such that the funds become the property of the Bank to be utilized by the Bank, with the sole caveat that it should be paid to the creditor immediately upon request, with interest as agreed. Bolum was a creditor of the Bank, and the Bank had a contractual obligation to repay the equivalent of the sums deposited into the account upon the demand, as long as it was appropriate to do so. Placing a hold on the account did not change the nature of the relationship. The Bank could have utilized the funds in its ordinary course of business during the period of the hold. Bolum would only be entitled to repayment of the principal amount and any agreed interest, but not to an account of profits made by the Bank, and payment of such profits.

- [85] Accordingly, the claimants are not entitled to this relief.

Costs

- [86] The general rule is that cost follows the event and the unsuccessful party is usually ordered to pay the costs of the successful party³⁴. The Bank relies on clause 25 of the General Terms and Conditions which is an indemnity clause. It states:

“The Bank shall be indemnified and held harmless from all loss, including all out-of-pocket legal expenses suffered or incurred or brought against the Bank arising out of or relating to this Agreement, and Accounts, Instructions or other Customer dealings with the Bank, EXCEPT in the case of gross negligence or intentional misconduct proven on the part of the Bank”.

- [87] Counsel for the defendant therefore submitted that since there was no gross negligence or intentional misconduct on the part of the Bank, it is contractually entitled to be indemnified by the claimants for all losses incurred, including all out-of-pocket legal expenses.

- [88] I accept that the parties were free to agree to whatever terms they chose, including terms relating to indemnity by either party. I have made no finding of gross negligence or intentional misconduct, on the part of the Bank. As Bolum has agreed based on clause 25 to indemnify the Bank's for all costs, including legal expense, any costs awarded to the claimants in these proceedings would ultimately be indemnified. Thus, the just disposal on cost would be that the parties each bear their own cost of the proceedings.

Conclusion

- [89] In summary, the Bank did not owe a fiduciary duty to the claimants. The Bank was entitled to initially place a hold on the Bolum account, however the hold ought to have been released within a reasonable period, if the third party was unable to present evidence to substantiate a viable claim to the funds in the account, or a court order requiring that the hold be maintained, pending a future outcome. The Bank and the claimants both had a responsibility to investigating the claim promptly. In the claimants' case a claim could have been filed at

³⁴ See CPR 64.6

the soonest either to resolve the conflict in an appropriate forum, or to lift the hold, once they formed the view that the hold ought to have been released.

[90] Based on the foregoing, I make the following orders:

1. The defendant Petrus Private Bank Limited shall within seven (7) days of the date of this judgment release the hold placed on account number 18246 held in the name of the first claimant Bolum Twenty-Three Limited.
2. The claimants are not entitled to any of the relief claimed against the Bank, save and except interest which has accrued on the sums held in the said account, at the rate contractually agreed between the parties.
3. The parties will each bear their own cost of these proceedings.

[91] I wish to thank Counsel for their helpful submissions and express sincere apologies to everyone for the delay in delivering this judgment, which was due entirely to circumstances beyond my control.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar