

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2019/0493

BETWEEN:

CAPE CARIBBEAN (ANTIGUA) LTD

Claimant

-and-

RBC ROYAL BANK OF CANADA

Defendant

Appearances:

Mr. Justin L. Simon, KC for the Claimant

Mr. Jomokie Phillips for the Defendant

2022: November 30th

2023: December 22nd

JUDGMENT

[1] **DRYSDALE, J.:** The Claimant in this matter initiated proceedings against the Defendant seeking:

- (1) A declaration that the Defendant has wrongfully debited the Claimant's account with the amount of \$US119,257.44 by way of a fraudulent wire transfer on or around February 14, 2019, plus bank charges of US\$37.20.
- (2) The sum of US\$119,294.64 for money had and received by the Defendant to the Claimant's use; alternatively.
- (3) The return of the sum of US\$119,294.64 wrongfully debited to the Claimant's account by the Defendant without the Claimant's authority; and

- (4) Interest on the said sum at the prevailing bank rate, or as such other rate as to the Court seems just.

The Pleadings

The Claimant's Claim

- [2] The Claimant is a locally incorporated company doing business in Antigua and Barbuda and a customer of the Defendant having a US\$ current account at the said Branch. The Claimant claims the return of funds that were fraudulently debited from the its US account with the Defendant to a Trading Company in China called Qian Wan Li (HK) at its bank account at Bank of China (Hong Kong) Limited. The Claimant pleads that it became aware of this fraudulent transaction on February 15th, 2019, by way of email instructions dated February 12, 2019, allegedly emanating from the Manager of the Claimant, Mr. Michael Campbell, who in the ordinary course of business and to the full knowledge of the Defendant's officers had no signing authority to access that bank account.
- [3] The Claimant contends that the US account was only accessed by the Claimant's two authorized officers, Mr. James Flynn and Mr. Luis A. Rios as mandated through the Defendant's secure online system requiring code authorizations followed by telephone confirmation.
- [4] The Claimant contends that the authorizing email had been hacked and addressed to the Defendant's Junie Taylor, who had previously never received transfer directives in respect of the Claimant's US account from any of the Claimant's personnel. Furthermore, two of the Claimant's officers had been copied but on altered email addresses, and therefore not received by the Claimant who had no opportunity to stop the fraudulent request.

- [5] The Claimant avers that it was the duty of the Defendant to confirm the instructions received, by way of a telephone call to any of the Claimant's principals or signatories to the account and that the Defendant and its agents failed to do so. Thus, there had been a breach of duty of care in respect of the banking transactions of its customers and breached its fiduciary duty to the Claimant in allowing the transaction and failing to take note of the usual method of request, the non-signing authority of Michael Campbell and the erroneous emails which were copied on the request.
- [6] The Claimant has to the knowledge of the Defendant filed an official report, at the Criminal Investigation Department of the Royal Police Force of Antigua and Barbuda.

The Defence and Counterclaim

- [7] The Defendant asserts that on February 12, 2019, that it received email instructions from the Claimant's country representative Mr. Michael Campbell to process a wire transaction in the sum of US\$119,250.00 from the Claimant's US account with the Defendant. The wire transfer request had been signed by one of the authorised signatories, Mr. Luis Rios of the said account pursuant to the Customer Agreement signed by the Claimant and thus, the Defendant was obligated to act on his instructions.
- [8] The Defendant admits that although prior to the alleged fraudulent transaction, the Claimant at no time or its signatories authorised a wire transfer from its US account via email as was done in this case, that it was bound by the terms of the Email and Faxed Payment Instruction Agreement signed by the Claimant which entitled it to rely on email instructions that were on their face value genuine and/or authorised.
- [9] The Defendant asserts that the email instructions emanated from an authorised representative of the Claimant whose email address was the one on record with the Defendant. Further, since the opening of the Claimant's bank accounts with the Defendant and the signing of the Instruction Agreement, representatives of the Defendant have received and processed email instructions from authorised email

addresses of the Claimant. The Defendant states that their employee Ms. Junie Taylor, has since the opening of the said accounts, received email instructions from the Claimant which were passed to the requisite department for processing.

[10] The Defendant contends that it did not commit a breach of duty of care as pleaded by the Claimant since it was not put on inquiry that the transaction was a fraudulent one or was in any way unauthorised by the Claimant. The Defendant contends that the absence of a call to confirm the transaction was not negligent as there was no obligation to do so. The Defendant asserts that the Claimant by virtue of clause three of the Instruction Agreement with the Defendant, was bound to take all necessary action to ensure that adequate and appropriate security was in place for its email addresses so as to prevent the unauthorised transmission of email instructions since it ought to reasonably have known that the Defendant would have not only been entitled but obligated to process transactions which were initiated by what appeared to be valid and authorised instructions to the Defendant.

[11] The Defendant puts the Claimant to strict proof of the allegation that the account from which the email instructions emanated was hacked and did not represent the authorised instructions of the Claimant. Conclusively, the Defendant submits that the Claimant has breached its duty to the Defendant as in accordance with clause three of the Instruction Agreement and that in any event the Claimant would be bound to indemnify the Defendant in respect of any damages ordered to be paid.

The Reply and Defence to Counterclaim

[12] The Claimant asserted that the email emanated from a person who was not a signatory to its US\$ account and whom the Defendant knew had no authority to access that account. This, the Claimant advocated was a fact documented and well known to the Defendant and its agents, particularly Ms. Junie Taylor who failed to contact another signatory given her well-founded suspicions.

- [13] The Claimant asserted that the transaction instructions were not genuine even at face value and their very nature placed the Defendant through its servant or agent, on notice, but the Defendant negligently failed to do its due diligence as required and acted in breach of its contractual obligation to the Claimant.
- [14] It is adduced by the Claimant that the general words of the Instruction Service Agreement executed on March 19, 2018, did not override the specific mandate of its US account.
- [15] The Claimant advocated that the Defendant admitted being put on inquiry that the instructions were fraudulent and acted recklessly in breach of its duty to the Claimant given its knowledge of the specific signatories who were given a written mandate over that particular account.
- [16] The Claimant denied that it was in breach of its duty pursuant to clause three of the Instruction Agreement. It further maintained that the Defendant was negligent in facilitating the fraudulent transaction given its suspicions and denied that in the circumstances that the Defendant is entitled to an indemnity from the Claimant as claimed.

EVIDENCE

- [17] The Claimant's case was supported by Ms. Mariama Murphy, Mr. James E. Flynn, and Mr. Luis A. Rios respectively. These three witnesses' examinations in chief were synonymous with their pleaded case and in the vast majority, averred similar statements. Thus, for the purposes of this judgment, the most pertinent evidence will be adduced. The same stance stands for the Defendant's case which was supported by the evidence of Ms. Junie Taylor and Ms. Efiyah Charlemagne-Norbert.

The Evidence of the Claimant

Mariama Murphey

- [18] At the time of the transaction in question, Ms. Murphy was an accounting clerk at the Claimant's company with administrative responsibilities from December 2018 and still holds that post to date. This witness amplified her statement to clarify that when she made wire transfer requests in the past by email that it had been in reference to the EC\$ account.
- [19] The witness stated that on 15th February 2019 she received a telephone call from Mr. Rios. He expressed surprise about a wire transfer transaction that debited the company's US\$ account with the Defendant for the sum of US\$119,257.44 to a Chinese company. Mr. Rios who is one of the two signatories on the US account and monitors it online was unaware of the transaction and wanted to know the reasons why the funds were debited from the account.
- [20] The witness asserted that it was decided that there was a need to query the transaction with the Defendant. She averred in her evidence that when she opted to contact Ms. Junie Taylor via email to query the transaction, she received an automatic email response that she had been out of office. However, when questioned by opposing counsel, Ms. Murphy was unable to recall the dates of Ms. Taylor's out-of-office period.
- [21] Being unable to contact Mrs Taylor she contacted another employee who advised that the Defendant had signed documentation demonstrating the requested transaction. The Defendant was advised that the request did not emanate from Mr. Rios and the Defendant advised to initiate a request to recall the transaction.
- [22] The following day it was discovered the email addresses for Mr. Rios and herself were altered to give the impression that they were included in the email threads. The witness identified that the word Caribbean was misspelt in her email address and in Mr. Rios email address a capital "I" was used in "inc".
- [23] Subsequently on 12th March 2019 upon instructions from James Flynn she filed a detailed police report about the fraudulent transaction.

[24] Ms. Murphy confirmed that she was not a signatory to any of the Claimant's accounts. She also admitted that when initiating wire transfer requests for the EC Dollar account, an email was sent, and the transfer would be signed by an authorized signatory.

James E. Flynn

[25] Mr Flynn at the time of the transaction in question, submitted that he was the Director of Cape Caribbean (Antigua) Ltd and an authorised signatory to the two bank accounts held at the Defendant. He submitted that both accounts which were held in the name of the Claimant Company were a US and local currency (EC) account respectfully.

[26] Mr. Flynn averred in his witness statement that he was the sole initiator and author of an email dated February 18th, 2019, which referenced his learning of the fraudulent transaction occurring on 15th February 2019 in the Claimant Company's US account at RBC. Mr. Flynn also submitted the only transactions from the US account were made through the Defendant's secure, online, key code protected authorisations initiated by Mr. Rios and himself using the same system. That he had learned of this fraudulent transaction from his co-authorized signatory Mr. Luis Rios.

[27] The witness further stated that the Defendant was uniquely aware of the tight controls which were required to transfer funds out of the US account and that these controls were never initiated by him or Mr. Rios. Accordingly, that this was an outright violation of the secure system and the express controls between the Claimant and the Defendant.

[28] The witness also submitted that Mr. Campbell only had access to the EC account and for minor amounts. That measures in the form of the signatory account card which was specifically handwritten by him documented this.

[29] The witness also asserted that during the week of 18th February 2019 and following that there were follow up telephone calls with the Defendant's witnesses and Mrs. Taylor specifically admitted that she found the request to be suspicious and had tried

to confirm the authenticity of the request with Mr Rios. However after being unable to contact him, she chose follow the email instructions of Mr. Campbell.

[30] On cross examination it was admitted by this witness that one of the allegations of the Claimant's claim is that the account of Mr. Campbell had been apparently hacked. Mr. Flynn stated that he had not commissioned a third-party investigation but rather an internal investigation had been conducted by having discussions with Mr. Michael Campbell, reviewing email trails, phone calls and communications with the fraud department at the Defendant. Further, this witness confirmed that no final report had been provided, and neither had the internal investigation been put into evidence before this court.

[31] When challenged by opposing counsel, it had been accepted by this witness that Mr. Campbell, whose email had been allegedly hacked had not been called as a witness in the present matter. The witness also accepted that there was no objective evidence in support of hacking before the court.

[32] The witness agreed that after the fraudulent transaction had been identified by the Claimant that he had sent several emails to the Defendant. However. he acknowledged that he did not mention the Defendant's employee's suspicion about the transaction which he now alleges in his evidence.

[33] Mr. Flynn submitted that one of the allegations of the Claimant company is that the Defendant was negligent in processing the wire transfer request. Mr. Flynn also accepted under cross-examination that the Claimant was bound by the E-mail and Faxed Payment Instruction Service Agreement. However, he submitted that the Defendant was not bound by this agreement as there were other agreements.

[34] The witness disputed that there was a difference between sending a wire transfer request and signing a wire transfer request and asserted that only signatory could send or sign a wire transfer request.

[35] Finally, this witness acknowledges the agreement with the Defendant stating that the Defendant is not responsible for losses unless the same is due to negligence but agreed that there is no testimony from an industry standard expert as to what would be the “reasonable commercial standards of the country’s banking industry”.

Luis A Rios

[36] Mr. Rios submitted that in February 2019, he was an authorized signatory to the two bank accounts that the Claimant held at the Defendant. He stated that he managed the accounts through RBC secured online system requiring key-code authorization with changing codes every few minutes. He asserted that all US account transactions were initiated by him and further required the secure online verification by Mr. Flynn to be acted upon by the Defendant.

[37] This witness averred in his witness statement that on February 15th, 2019, upon the realization of a fraudulent transaction, he immediately communicated in person his finding to the General Counsel, Mr. Flynn as well as brought it to the attention of Ms. Junie Taylor which he received an automatic response that she had been on vacation. Upon receiving an automatic out of office email, he promptly emailed Mrs. Norbert regarding the unauthorised transaction instructing the immediate reversal of the wire transfer. He confirmed not recalling any evidence of that automatic out-of-office email being presented into evidence to this court.

[38] The witness further asserted that he received communication from Mrs. Norbert of the wire transfer instructions received by the Defendant. He identified several discrepancies including incorrect email address of himself and Ms. Murphy, the impersonation of Mr. Campbell and a forged signature on the wire transfer request received by the Defendant. He also emphasized that the wire transfers from the US account were exclusively handled by him and Mr Flynn through the Defendant’s secure system. He also underlined that Mr. Campbell lacked authorization, was not part of the secure banking system and holds signature authority solely for the EC account and that this was known by the Defendant.

- [39] The witness further stated that during the week of 18th February 2019 that there were several calls in which Mrs Taylor participated and admitted that she had found the request suspicious and had attempted to make contact to confirm the transaction. However, being unable to reach him she decided to follow Mr. Campbell's emails labelled as fraudulent instead of reaching out again or contacting the other authorized signatory Mr. Flynn.
- [40] Under cross-examination, this witness denied that the wire transfer request sent from the email of Mr. Michael Campbell bore his signature but admittedly accepted that the Claimant had not gotten a handwriting expert to confirm this. He further confirmed that only on the EC account had he in the past signed wire transfer requests and had those requests forwarded to the Defendant by Ms. Murphy.
- [41] Mr. Rios submitted that Ms. Junie Taylor, a member of the Defendant, during the week of 18 February 2019 admitted to finding the request "suspicious" and that she tried to reach him to confirm the instructions. Mr. Rios however, accepted that he did not indicate that information to any members of the Defendant prior to filing the claim despite being copied in various correspondences.

The Evidence of the Defendant

Junie Taylor

- [42] Ms. Taylor submitted on behalf of the Defendant that at the time of the transaction in question, she was the Financial Solutions Specialist with the Defendant, Antigua branch. The witness deposed that she was assigned to the Claimant as its Account Manager from inception. This assignment meant that she was the primary contact person at the Defendant for the Claimant. The witness confirmed that she did not directly process transactions but rather she would receive instructions from various officials of the Claimant and forward them to the appropriate department for processing and action.

- [43] On 12th February 2019 she received one such wire transfer request from Michael Campbell on behalf of the Claimant. It related to the US account. Upon receiving the request, she conducted a review and observed that Mr. Campbell was an authorized representative, the wire transfer instructions aligned with his authorized email address and matched the defendant's records. Additionally, the accompanying wire transfer request featured the signature of Mr. Rios an authorized signatory to the US account.
- [44] The witness further deposed that she upon recognizing that the wire transfer request as an authorised email instruction, she addressed it by pointing out a typographical error dating it as December 6, 2018. She responded to Mr. Campbell, informing him that the request could not be processed with the incorrect date and advised him to correct it before resending the wire transfer request.
- [45] After Mr. Campbell responded with an amended wire transfer request, she observed that a typographical error with the date persisted. She notified him and attempted to reach him, aiming to facilitate the necessary correction for the wire transfer to align with his email instructions and fulfilling his request that the request for transfer be processed on the same day.
- [46] She was unable to reach Michael Campbell via telephone but received an email from him moments later with the corrected details. Subsequently she forwarded the amended wire transfer request to the Customer Service Department for procession. Once the wire transaction as complete, she sent the transaction receipt to Michael Campbell who acknowledged receipt.
- [47] Thereafter she proceeded on her pre-approved vacation. During that period, she was advised by an employee of the Defendant that Michael Campbell's alleged email address had been hacked and exploited to transmit fraudulent wire transfer instructions. Once these allegations were raised the branch Manager took over the process and all communications were handled by her. Therefore, she had no further communication with the Claimant or its representatives regarding the wire transfer transaction.

[48] This witness was asked to comment on the witness statement of Ms. Efiyah Norbert as it relates to the accuracy of the US account number in which she accepted that the US account number would have been correct in her statement rather than in Ms. Norbert's statement as "US accounts started with digits 270." Further, she confirmed the email instructions she received on February 12, 2019 from Mr. Michael Campbell. In answer to opposing counsel suggested that the email had no signature of Mr. Campbell the witness stated that the email had his name title at the bottom of the email and that was considered to be a signature. She also accepted that in the normal course of dealings emails had no signature attached but that an authorised signature would appear on the wire transfer instructions in respect of the US account.

[49] Opposing Counsel under cross examination indicated to this witness the significant disparity of the dates on both the invoice itself and the wire transfer request in which Ms. Taylor stated had not sparked her attention. However, she explained the reason being for the second wire transfer was due to the month being incorrect on the first one as she submitted that the email from Mr. Campbell came in on February 12th 2019. This witness clarified that the date of the wire transfer request should have corresponded with the date of the email and not the invoice date as the invoice was a document issue to the Claimant by the customer and had nothing to do with the processing of the wire transfer, however the instructions to the Defendant and the wire transfer request emanated from the Claimant and needed to be consistent.

[50] Opposing counsel suggested to this witness that the date of February 6, 2018 which was on the wire transfer request would raise an alarm bell in relation to the date on the invoice. She disagreed with that suggestion. She also asserted that Mr. Rios signature on the invoice would have been immaterial.

[51] Ms. Taylor stated that she had not noticed that the copied emails of Ms. Murphy and Mr. Rios in the email instructions dated February 12, 2019 had been incorrect. She agreed that in no correspondence in which the emails had been wrong had she noticed but posited that this would have required a "microscope" to notice. She further accepted that the emails were invalid and that it meant that those said persons would have never

received the emails. However, she asserted that as long as the email source is accurate that there was not duty to ensure the accuracy of the individuals copied on the email thread.

[52] Ms. Taylor accepted that Mr. Campbell was not an authorised signatory to the US account. Ms. Taylor asserted that contrary to what was stated in Mr. Rios's evidence, she had not found the wire request to be in any way suspicious and had never made any admission of this to Mr. Rios.

[53] Under re-examination, Ms. Taylor submitted that when she received wire transfer requests from a customer of the bank and persons are copied within that email, the most important person who would bind the bank would be the individual sending the email and that once the individual sending the email is an authorized person on behalf of the customer then the bank is satisfied.

Efiah Charlemagne-Norbert

[54] The witness deposed that she is the Country Manager for the Defendant and that as part of this position she has access to all files which form a substantial part of her evidence.

[55] The witness indicated that the Defendant in December 2015 completed and returned to the Defendant two applications for operating accounts. The applications concerned an EC and US accounts each with designated signatories. Subsequently changes to the signatory were made to the EC account but no changes were made to the US account.

[56] On 19th March 2019 the Claimant acting and represented by Michael Campbell executed an Email and Faxed Payment Instruction Agreement as it desired to conduct transactions via email as well as on the Defendant's electronic banking system. Clause 2 of the agreement articulates that any email or faxed instructions from the Claimant is considered as binding by the Defendant.

[57] The Claimant routinely utilised the services of the Defendant and therefore was assigned an Account Manager in the person of Mrs. Taylor who acted as the initial point of contact in order to access the desired services by the Claimant.

[58] Given that the Claimant is a company, email instructions must come from an authorised representative. There is no need for an authorised representative to be a signatory to the account in question. The witness stated further that the Claimant considered it normal for email instructions to come from individuals who were not signatories, and they had no objection to this practice throughout the operation of the account.

[59] Mrs Taylor received the email instruction from Michael Campbell on 12th February 2019 to process a wire transfer from eth US account. It was confirmed that Michael Campbell was an authorised representative of the Claimant and that the email instructions had come from his authorized email address.

[60] The witness reiterated the evidence of Mrs. Taylor regarding noting the typographical error in the date and the actions taken by Mrs Taylor as a result. For brevity the evidence is contained in the evidence of Mrs Taylor and will not be repeated here but suffice it to state that the witness stated that the Defendant was satisfied the wire transfer request had the signature of an approved signatory which was confirmed with the signature on file and that the Claimant had executed the agreement and thereby proceeded to process the request. The witness denied that the Defendant was ever put on notice that the wire instructions were fraudulent and did not represent the true intention of the Claimant.

[61] The witness disputed that there was a contractual right for the Claimant to be contacted via telephone to confirm the email instructions and referred to clause 2 of the agreement as negating this perceived requirement. She clarified that whilst there may be appropriate cases whereby a call back is necessitated this scenario did not qualify as the instructions emanated from an authorized representative using his authorized email address.

[62] After the transaction had been successfully processed the witness stated that she received a telephone call from James Flynn who asked that it be recalled as the transaction was alleged to be fraudulent. James Flynn intimated that the email address of Michael Campbell had been hacked and used to transmit instructions to the Defendant. However, the funds could not be recovered as the transaction had already been successfully processed.

[63] In the days that followed the Defendant provided assistance to the Claimant by disclosing the email instructions and the wire transfer request. A conference call was also held with representatives of the Claimant and herself and employees from the Defendant's branch in Trinidad and Tobago and Canada. Mrs. Taylor was never part of any of the conference call as issues of such magnitude are handled by her. Further Mrs Taylor was on pre-approved vacation at the material time. In any event all communication with the Claimant on this issue was handled by her or the senior members of staff which did not include Mrs. Taylor.

[64] The witness reiterated that the Defendant had a contractual obligation to process what appeared to be a genuine transaction as long as the Claimant had sufficient funds standing to its credit.

[65] The witness notes that whilst the Claimant has alleged that the email address of Michal Campbell was hacked that no evidence of hacking has been provided. In any event the witness avers, that for the Claimant to prove hacking to hold the Defendant liable, hacking and fraud in accordance with the criminal standard of proof is required.

[66] In any event the witness posits that the Claimant was contributory negligent since it failed to institute proper safeguards to protect its email from unauthorised use. The witness claims that the Claimant had total control over the email addresses and that the fraudulent use of the email address would not have occurred but for the failure of the Claimant to secure it. The witness highlighted that the Defendant had in no way contributed to the unauthorized use of the Claimant's email address and the subsequent transmission of the wire instructions. This failure the witness claims entitled

the Defendant to be indemnified in damages for the Claimant's breach clause 3 of the agreement.

[67] Ms. Norbert accepted that the witness Ms. Taylor had the accurate US account number in her evidence. She also accepted that Mr. Campbell was not an authorized signatory to the US account. She asserted that the authorised signature on the wire transfer request would have been sufficient for processing the transaction and further emphasised that the email could emanate from anyone in the Claimant. Ms. Murphy was specifically highlighted as someone who had regularly sent such emails for processing in the past.

[68] This witness clarified that the Defendant would only act on instructions after verifying the Claimant's email indemnity and confirming that the email originated from a legitimate source. Additionally, it was mentioned that the Defendant had the authorized signatories email addresses and signatures in their possession.

[69] The witness conveyed that the attending officer, upon confirming the legitimacy of the email source typically did not scrutinise the list of individuals copied on the email. It was mentioned that emails from the Claimant sometimes included 10 to 15 copied persons and that the officer was accustomed to receiving such emails without the need to check the recipients.

The Issues

[70] The issues extrapolated for consideration are as follows:

1. Whether the Claimant has established a claim for breach of fiduciary duty?
2. Whether the Defendant was put on inquiry that the transaction was suspicious?
3. Whether the Defendant acted in breach of its duties to the Claimant?
4. Whether the Defendant was negligent in processing the wire transfer?
5. Whether the Claimant breached its duty to the Defendant under the Email and Faxed Payment Instruction Agreement

Analysis

Issue 1 - Whether the Claimant has established a claim for breach of fiduciary duty

[71] The Claimant assumes that a fiduciary relations existed and argues that the Defendant acted in breach of its fiduciary duty of care when it processed the fraudulent email instructions since Michael Campbell's authorisation was specifically limited to the EC account only. The Claimant contends that this was a fact well known to the Defendant who nonetheless and considering several glaring errors including that the email was unsigned and the inconsistencies in the date on the invoice nonetheless wrongfully debited its account to the tune of US\$119,294.64.

[72] The Defendant suggests that once the bank is making payments on a customer's behalf then that relation morphs into one of principal and agent. That accordingly the Defendant agreed that it owed a fiduciary duty to the customer as principle to execute its instructions with reasonable care and skill.

[73] It goes without saying that before there can be a breach of a fiduciary duty there must be a fiduciary relationship between the parties. 'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.' A banker and customer relationship essentially, is a relationship of debtor and creditor. This does not typically fall within the remit of a fiduciary relationship as the relationship is one at arm's length with each party looking to protect its own interests. Thus, elements of loyalty, trust and confidence which forms the bedrock of a fiduciary relationship are noticeably absent that is unless the bank acted in such a way to give rise to rely on its financial expertise or to place trust and confidence that it would act specifically for the clients best interests. Sykes J in the case of **JMMB v Finzi**¹ Sykes J. endorsed this view and stated that:

¹ [2014] JMCCCD 10

“...the banker and customer relationship is not a presumptively fiduciary such as lawyer /client, trustee /beneficiary or company/company director. The reasons are obvious. A lender and the debtor from the commencement of the relationship have two different interests. The lender is not looking out for the best interest of the debtor. He has not undertaken any obligation of fidelity and loyalty. He has not promised to look out for the best interest of the debtor. The sole interest of the lender is getting back his money with interest at the appointed time and if not, he enforces the security. The authorities show that before a lender is held to be in a fiduciary relationship with a debtor it has to be shown that the lender crossed the line from an ordinary lender and became advisor and confidante to such an extent that it can safely be said that he undertook to act for and on behalf of the debtor in a particular matter and by virtue of that decision a relationship of trust and confidence arose.”

[74] The learned authors on Pagets on Banking Law also agree that a typical banker customer relationship is not a fiduciary relationship, but one based in contract. At paragraph 4.6 of the book they express that ‘[t]he relationship of banker to customer is one of contract. It consists of a general contract, which is basic to all transactions, together with special contracts which arise only as they are brought into being in relation to specific transactions or banking services.’

[75] However, the general rule regarding the characterization of the relationship between a banker and a customer is not a fiduciary can have exceptions based on specific circumstances or agreements. This was demonstrated in the case of **Barclays Bank v Quincecare**² which ruled that where a bank holds a discretionary authority over a customer’s account a fiduciary duty may arise. The case concerned the bank’s alleged negligence in recognizing and preventing fraudulent instructions relating to a customer’s account. Specifically, S sought a £400,000.00 loan from the bank for acquiring four chemist shops. The bank’s agreement included conditions like the loan being made to a new company, the first defendant and the directors injecting

² [1992] 4 All E R 393

£50,000.00 into the company and a guarantee from a major pharmaceutical supplier across the UK. S formed the new company and when the loan was approved he requested the bank to transfer a significant portion of the money to a firm of solicitors who had acted for him before and whom he said was acting for the company. S previously arranged with the solicitors to transfer the money into an account in the United States. He then absconded to the United States where he misappropriated the money. The court ruled that:

'the relationship between banker and customer quoad drawing and payment of the customer's cheques against the money in of the customer's in the banker's hands was that of principal and agent and as agent the bank **owed fiduciary duties to the customer and prima facie was bound to exercise reasonable care and skill in carrying out the instructions of its principal.**' (emphasis mine)

[76] The legal authority of **Barclays Bank v Quincecare (supra)** clearly establishes the Defendant's fiduciary position and corresponding obligations to the Claimant regarding the processing of funds to a third party. Thus it is agreed that a fiduciary relationship existed between the parties. Subsequent exploration will delve into the nature and extent of those duties.

What is the duty of care owed by the Defendant to the Claimant

[77] Steyn J in the **Quincecera** case expounded on the bank's fiduciary role and stated:

Given that the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to transfer money, it is nevertheless a duty which must generally speaking be subordinate to the bank's other conflicting contractual duties. Ex hypothesi one is considering a case where the bank received a valid and proper order which it is prima facie bound to execute promptly on pain of incurring liability for consequential loss to the customer. How are these conflicting duties to be reconciled in a case where the customer

suffers loss because it is subsequently established that the order to transfer money was an act of misappropriation of money by the director or officer? If the bank executes the order knowing it to be dishonestly given, shutting its eyes to the obvious fact of the dishonesty, or acting recklessly in failing to make such inquiries as an honest and reasonable man would make, no problem arises: the bank will plainly be liable. But in real life such a stark situation seldom arises. The critical question is: what lesser state of knowledge on the part of the bank will oblige the bank to make inquiries as to the legitimacy of the order? In judging where the line is to be drawn there are countervailing policy considerations. **The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers. In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company.'** (emphasis mine)

[78] The Quincecera duty is considered a negative duty as it involves the obligation of the bank from processing certain instructions rather than actively taking specific actions. Thus, the Defendant is under a duty not to pay of honour a transaction if it has received notice indicating that reasonable grounds to suspect that the transaction may be fraudulent or unauthorized.

Whether the Defendant breached its duty of care owed to the Claimant?

[79] Establishing whether the Defendant breached its duty of care involves first confirming if there was a reasonable suspicion of fraud or questionable activity that should have prompted inquiry. This is a factual matter assessed within the specific context of each case. Steyn J in *Quincecera* cautioned that:

‘Having stated what appears to me to be the governing principle, it may be useful to consider briefly how one should approach the problem. Everything will no doubt depend on the particular facts of each case. Factors such as the standing of the corporate customer, the bank's knowledge of the signatory, the amount involved, the need for a prompt transfer, the presence of unusual features, and the scope and means for making reasonable inquiries may be relevant. But there is one particular factor which will often be decisive. That is the consideration that, in the absence of telling indications to the contrary, a banker will usually approach a suggestion that a director of a corporate customer is trying to defraud the company with an initial reaction of instinctive disbelief.’

[80] Lord Steyn's guidance was recently applied in the case of **Caye International Bank v Rosemore International Corp.**³ Burgess JCCJ categorically stated that ‘It is manifest from this statement that, if Caye Bank is to be held to have been put on inquiry, the facts must reveal ‘telling indications’. The court heavily relied on and based its determination on expert evidence regarding potential breaches of the fiduciary duties of the bank.

[81] The court also considered whether there were other observable differences which did not necessitate an expert, but which should have alerted the bank and triggered further

³ [2023] CCJ 4 (AJ) BZ

investigation. Particularly the court found that there were obvious differences in the signature on the wire transfer request and the signature on record.

[82] The position of the court in relying on expert testimony in identifying potential breaches of fiduciary duty is common in legal proceedings involving complex matters like banking where specialized knowledge falling within the realm of opinion evidence beyond the expertise of ordinary witnesses is crucial for a thorough evaluation of fiduciary duties. It is therefore unfortunate that no expert was appointed to assist the court in this regard. The absence of an expert though regrettable is not automatically fatal. However, it does introduce a challenge in meeting the high standard required to establish breach of fiduciary duty.

[83] Regard therefore will be given to appropriate legal authorities to guide the determination of this matter. It would be remiss however to not note that whilst legal precedents can guide decisions, each case must be resolved on its own facts and circumstances. The Claimant asserts that the following reasons establish a basis that the Defendant was negligent and in breach of its fiduciary duty to it.

- a) That Michael Campbell was not the author of emails sent to Junie Taylor, the Defendant's Financial Solutions Manager.
- b) The lack of authorisation as a signatory on the US account should have raised questions about his authority to instruct the Defendant regarding wire transfers concerning the US account.
- c) The email thread revealed certain glaring errors including the wrong date and the lack of signature of Michael Campbell.
- d) The purported signature of Louis Rios is identical to that on the invoice which suggests a copy and paste and on the face of it differs significantly with his signature on the Defendant's signature forms.
- e) The purported signature of Luis Rios appears on a separate sheet headed "re Wire Transfer Request" with no date and instructions or any indication that the sheet was part of the documentation.

- f) The only authorized transactions out of the US account had been by used on the Defendant's secure, online key code which required online via the Defendant's secure system confirmation by Mr James Flynn. No prior request had been made via email to transfer funds from the US account.
- g) That Junie Taylor admitted that she found the transaction as suspicious yet chose to process it.

The duty of the defendant to initiate a call back before processing the transaction.

[84] A thorough exploration of the claims made by the Claimant articulated above is necessary to determine the validity of the alleged breach of fiduciary duty. It is noted that there is some overlap in the assertions made above and for ease of reference where appropriate the same has been condensed into an appropriate heading and dealt with accordingly.

Hacking

[85] The Claimant contends that the email instructions for the processing of the wire transfer was not genuine the account of Michael Campbell having been hacked. Other than to state this version of events and to state that a police report was made in this regard no other evidence was led to substantiate this assertion. Further no investigative reports or were produced neither has there been any physical evidence confirming that the email address was tampered with and not genuinely associated with or emanating from the Claimant. Ms Murphy a witness for the Claimant who made the report to the police about the hacking in response to a question from the Court, admitted that there had been no follow up since the initial report was made over two years ago. The absence of such evidence raises concern about the validity of the claim of hacking given the ample time available to the Claimant to present such evidence.

[86] The lack of investigative reports and tangible evidence linking the email address to hacking emphasises the significance of presenting the hacked employee's account as evidence. However, the employee whose account was allegedly hacked was not called as a witness. Further the absence of an explanation for not calling Michael Campbell

as a witness adds to the concerns regarding transparency and completeness in presenting this case. The court in the case of **Todman v Hodge**⁴ found that in such circumstances it is entitled to draw negative inferences from the absence of a witness. At paragraph 8 the court had this to say:

‘a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in action. If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness. There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue. If the reason for the witness’ absence or silence satisfies the court, then no such adverse inference may be drawn.’

[87]. Having considered the nature and seriousness of the allegation in relation to this case, I am of the considered opinion that Michael Campbell or some technical expert should have given evidence as to how and when it was discovered that the account was hacked and what security features were enabled at that time and confirm that the alleged hacked account emanated from outside the Claimant’s business. In light of the failure of the Claimant to call this crucial witness and or provide any explanation for his absence I agree with counsel for the Defendant that a negative inference being that this employee’s evidence was excluded to avoid weaking the Claimant’s case should be drawn in considering this case. I also agree that the failure to provide any technical expert evidence to establish hacking and or at the least any report agreeing that the email address was hacked does not augur well for the Claimant.

⁴ BVIHCVAP2012/0002 (Delivered 4th October 2012 unreported)

[88] The principle 'he who alleges must prove' places the burden of proof on the party making the allegation. Hacking, which is essentially an allegation of fraud, often requires a higher standard of evidence thereby placing a greater burden on the party making the claim to provide substantial and convincing proof. Therefore, mere assertion without substantial backing is insufficient. The Claimant's failure to meet the burden of proof is evident considering the lack of compelling and credible evidence to substantiate the hacking claim. Therefore, based on a preponderance of evidence I find that the email which was the source of instructions to the Defendant was not hacked or compromised.

Whether the Defendant was put on inquiry/Red Flags

Change in transaction method

[89] The Claimant argues that the deviation from previous transaction patterns being from the online key code method requiring confirmation by another employee particularly James Flynn to an email should have alerted the Defendant to the potential of fraud. However, the absence of prior notification to the Defendant about the exclusive use of the online platform and the existence of an email instruction agreement which allowed for instructions to be issued in relation to any account, and the email instructions involving a known credible employee of the Claimant could not be said to have imputed suspicion the Defendant about the validity of the transaction. Reference is made to the case of **Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd.**⁵ In that case the court found that the claimant had not informed the bank that it would only use the S2B platform to issue instructions and that a change therefrom was not intrinsically suspicious to amount to a red flag which would put the bank on notice.

[90] Further the absence of limitations specified in the instruction agreement coupled with the lack of specification that the instruction agreement did not relate to the US account, contributes to the reasonableness of the Defendant in not flagging the email

⁵ [2018] SGHC 04

instructions which emanated from a well-known email address associated with the Claimant as potentially fraudulent.

[91] Moreover, changes in payment patterns of a customer are not inherently suspicious, as these can naturally evolve over time based on shifting business needs. Such alterations do not provide a basis for additional inquiries or for the Defendant to decline the processing of a wire transfer nor do they raise a suspicion of fraudulent activity.

Signature of Luis Rios

[92] The Claimant raised concern about the signature of Luis Rios on the invoice and wire transfer request. The Claimant suggested that the signature on a separate page of the wire transfer document without any context and suggested a copy and paste scenario with the signature affidavit to the invoice and wire transfer request. The Claimant also challenged the similarity of the signature on the wire transfer request and invoice to that on file with the Defendant.

[93] Challenging the authenticity of a signature requires more than mere allegations. It typically requires expert testimony especially considering the natural evolution of signatures over time. In the absence of expert testimony, the court can only review the signature on the invoice and wire transfer documents in comparison to the signature on file with the Defendant to determine whether there are any apparent discrepancies. To the untrained eye there are no obvious discrepancies and signatures on all the documents seem authentic.

[94] The Claimant also complains that the signatures on the invoice and wire transfer request are a copy and paste. However, this complaint is questionable given that the witness signed digitally his witness statement. Thus, it can be inferred that the witness routinely utilised a digital signature on documents and thereby provides a plausible explanation for the consistency in signatures on various documents. The consistency of the digital signature aligns with expectations that they would appear to be identical and not because of a copy and paste. This further underscores the need for expert

testimony to deem the signature as a copy and paste. Denials or arguments without foundational basis are insufficient to establish such claims.

[95] Further the Claimant tried to draw a nexus between the authenticity of the signature on the wire transfer request on the basis that it appeared on a separate page without any connecting information to that contained on the first page of the document. Whilst the two pages contain different information it is untrue that the second page bore no connection to the first page of the wire transfer request. In the absence of evidence of tampering with the wire transfer document, the presence of the signature on a separate page of the document is not sufficient to constitute a red flag sufficient to prompt the Defendant to question the document's authenticity.

[96] Having regard to all of the above I find that without any supporting evidence or expert testimony especially where the signature appears consistent with the one on file, it is reasonable for the Defendant not to fault the authenticity of the transaction.

Errors in documents

[97] The Claimant asserts that the errors in certain documents were so fundamental that the Defendant's employee ought to have been put on notice of the suspicious nature of the transaction. The Claimant cites the wrong dates on the wire transfer request and the incorrect emails of two persons copied on the source email. The Defendant argues that the incorrect dates were viewed as merely typographical and any changes in the copied emails were so subtle that they would require scrutiny akin to using a microspore to identify.

[98] I will first address the errors in the email addresses of persons carbon copied. The distinction between the source email and slight discrepancies in the carbon copied emails is crucial. Individuals who are carbon copied receives a copy solely for informational purposes. They are not directly involved in the decisions and are not expected to take any action or perform any specific role. Given the correctness of the source email, an error in a carbon copied email is immaterial and insufficient to cast doubt on the validity of the transaction.

[99] Concerning the issue regarding the incorrect dates, I note that in the case of **Major Shipping (supra)** the court accepted that it was reasonable for a banker to conclude that a wrong date was an obvious typographical error. However, I note that the court's acceptance was based on expert testimony in this regard. Notwithstanding the absence of expert evidence which I do not believe is necessary to determine this issue, I am of the considered opinion that it is entirely reasonable for the Defendant to accept an error in the date as a typographical error without raising a red flag concerning the transaction. Banks routinely process a significant number of transactions and minor errors may go unnoticed especially when the other elements of the transaction are accurate. Given the practical challenges of scrutinizing every detail in real time acceptance of minor typographical errors as innocent oversight seems reasonable.

Email instructions issued by Michael Campbell who was not a signatory to the account

[100] The Email and Faxed Payment Instruction Service Agreement expressly states that 'the customer may send instructions by e-mail or facsimile to the Bank in relation to **any** account in the customer's name.' Clause 2 of the agreement also stipulates that the agreement is binding and allows the Defendant to rely on such instruction 'even if it was not sent by the Customer or its representative.' The Agreement however lacks any requirement for the sender of an email instruction to be a signatory on the associated account. Given Michael Campbell's role as the Country Representative⁶ of the Claimant and his execution of the Agreement it is reasonable for the Defendant to accept instructions from him especially considering his familiarity with the Defendant.

[101] The wire transfer request is a banking document which contains all necessary signatures and transaction details and serves as the formal instruction and authorization to the Defendant to carry out the request. In this instance the email is merely a mechanism by which the wire transfer request is communicated. The evidence of witnesses for the Claimant of particularly Ms Murphy and James Flynn solicited on cross examination both confirm that Ms. Murphy who is not a signatory on

⁶ Letter dated 15th March 2018 from Claimant to Defendant

any account had routinely sent emails to the Defendant with attached wire transfer requests for processing thereby confirming that an email is merely a communication mechanism for the issuance of the wire transfer request. Thus it is accepted that the legal authority for effecting a wire transfer rather than the accompanying email request. Given that the attached wire transfer document is the authority for the Defendant's action, Michael Campbell's status as a non-signatory to the account is immaterial to the sending of email instructions related to the wire transfer request.

Right to Call Back

[102] There is no contractual right to a for the Defendant to initiate a callback before processing of a wire transfer request. In order to be successful therefore, the Claimant needs to establish that the lack of such action was a deviation from the standard practices of a reasonably prudent banker. To establish whether there was a breach of banking standards requires evidence provided by a qualified banking expert⁷. Without such evidence it is challenging for the court to determine the standards and assess whether the Defendant's actions were in line with them. In the absence of appropriate evidence, it is impossible to attribute any failure or decision of the Defendant to not call the Claimant as a failing or breach of duty which could have circumvented the fraudulent transaction.

[103] Further and in any event the case of **Major Shipping & Trading Inc v Standard Chartered Bank (Singapore) Ltd. (supra)** illustrates that there is no blanket right to initiate a call back procedure. The court found that imposing such a requirement on all electronic transactions would be unreasonable and unduly burdensome on the bank, considering their high daily transaction volume and the contractual duty to pay.

Alleged confession of Junie Taylor

[104] The Claimant contends that the Defendant's witness Mrs. Taylor admitted to being suspicious about the transaction and in fact trying to reach Michael Campbell to ally

⁷ See *Caye International Bank Ltd v Rosemore International Corp* [2023] CCJ 4 (AJ) BZ and see also *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50

her fears. Mrs. Taylor vehemently denied that there was anything to cause her to be concerned about the wire transfer save minor typographical errors. There is no indication that the Claimant despite repeated communication with the Defendant subsequent to identifying the fraudulent activity, raised any concerns about the Defendant's witness or the processing of the transaction without a callback. The discrepancy in the timing of the Claimant's assertion regarding Mrs. Taylor's alleged suspicion, raised only upon the filing of these proceedings without prior mention in numerous communications with the Defendant, raises questions of the credibility and veracity of these allegations. Further a comprehensive consideration of the evidence and the demeanour of the Claimant's witnesses supports the conclusion that there is no truth to this claim, and I so find.

[105] After a thorough examination of the above resulting in each subheading not found to be material in raising a red flag, I find that the cumulative circumstances do not support the argument that the Defendant should have been suspicious of the transaction.

Whether the Defendant was negligent in processing the wire transfer

[106] Section 6 of the Agreement⁸ outlines the conditions under which the Defendant assumes responsibility. It establishes that the Defendant is not liable for losses resulting from the execution or refusal to give effect to email or faxed instructions unless negligence in accordance with reasonable commercial standards is involved. The determination of negligence is to be assessed in the context of reasonable commercial

⁸ The Bank will not be responsible for any loss or damage suffered or incurred by the Customer with respect to this Agreement or resulting from the Bank's giving effect or refusing to give effect to an email or faxed instruction, except in a case where there has been negligence (to be determined in light of reasonable commercial standards of the country's banking industry) on the part of the Bank and in any such case, the Bank will not, under any circumstances, be liable for any loss of data or any indirect, consequential or exemplary damages (including but not limited to loss of profits and any other commercial or economic loss), regardless of the cause of action, even if the Bank was notified of the possibility of these damages.'

standards within the country's banking industry. The requirement for evidence to establish negligence in line with or against industry standards, especially in technical matters necessitates expert testimony. The absence of such an expert makes it challenging to meet the burden of demonstrating a deviation from agreed standards. Without a clear benchmark of industry norms the court lacks the necessary foundation to make an informed determination about negligence. In the context of the contractual term and the Claimant's burden to prove breach, the failure to establish industry norms is fatal to the claim in negligence. Consequently, the Defendant cannot be deemed to have acted in breach of its duties to the Claimant.

Whether the Claimant breached its duty to the Defendant under the Email and Faxed Payment Instruction Agreement

[107] The Defendant's counterclaim seeks a declaration that the Claimant breached its duty under Clause 3 of the Instruction Agreement. Additionally, the Defendant pursues an order as per Clause 7 of the Instruction Agreement that the Claimant indemnify the Defendant for any sum awarded against it due to the alleged breach.

[108] Pursuant to clause 3 of the Instruction Agreement⁹ the Claimant owed a duty to the Defendant to take such steps as may be reasonably necessary to prevent the unauthorised transmission of email instructions. Despite the suggestion of hacking, the court's previous ruling finding no evidence of hacking leads to the unavoidable conclusion that the Claimant failed to secure its email addresses or operate them in a manner to prevent the issuance of unauthorized instructions.

⁹ 'The Customer will comply with any security procedures prescribed by the bank for e-mail and faxed instructions and will take any other steps reasonably necessary to prevent unauthorized transmission of e-mail and faxed instruction.'

[109] Clause 7 of the Instruction Agreement¹⁰ imposes an obligation on the Claimant to indemnify the Defendant for any losses resulting from the Defendant acting on invalid instructions. Given the previous finding that the Defendant acted in accordance with its duty of care coupled with the Claimant's failure to establish its case, the issue of indemnity becomes inconsequential as it does not apply when the Defendant's actions align with its responsibilities.

Order

[110] In light of the above it is hereby ordered that:

- a) The Claimant's claim is dismissed.
- b) The Defendant's counterclaim is dismissed.
- c) The Claimant shall pay the Defendant prescribed costs
- d) Interest.

Justice Jan Drysdale

High Court Judge

By the Court

Registrar

¹⁰ Except with respect to claims, costs and liabilities arising principally by reason of the Bank negligence, the Customer will indemnify the Bank against any claim, cost or liability incurred by the Customer resulting from the Bank giving effect or refusing to give effect to any e-mail or faxed instruction, including without limitation, legal and other professional fees and disbursements reasonably incurred by the Customer.