

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

COMMERCIAL DIVISION

CLAIM NO. SLUHCM2019/0063

BETWEEN:

BAMBOO SPRINGS BOTTLED WATER LTD

Claimant

And

THE BANK OF NOVA SCOTIA

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Ms Natalie DaBreo, for the Claimant

Mr. Deale Lee, for the Defendant

2021: March 1, 2, 22
April 19
August 12, 25 (Written Closing Submissions)
September 8, 15 (Written Closing Submissions)
November 4

2022: March 29

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** Bamboo Springs Bottled Water Ltd (“Bamboo Springs”) has filed this claim, seeking several orders against The Bank of Nova Scotia (“the Bank”), inclusive of declarations, special and general damages, and an injunction.

- [2] The causes of action as pleaded comprise (i) fraud (ii) breach of contract, (iii) negligence, (iv) undue influence and (v) breach of fiduciary duty, all arising from the Bank's Small Business Financial Services Agreement ("the SBFSA") said to be executed between the parties and a Credit Card Facility to the value of \$400,000.00, which Bamboo Springs says it received from the Bank, in questionable circumstances.
- [3] The Bank denies the claim in entirety, stating that its relationship with Bamboo Springs never went beyond that of banker and customer; a Credit Card Facility was never issued to the company, and only two services were granted, namely (i) a chequing account and (ii) merchant and cash management services. The Bank says Bamboo Springs has breached the terms of the merchant and cash management services agreement by attempting to manually process exorbitant unauthorized card transactions and filed a counterclaim for outstanding sums which it says are due to it, by reason of Bamboo Springs' overdrawn chequing account.

The Issues

- [4] The issues which the Court is required to resolve are as follows:
1. Was a Credit Card Facility or mortgage loan granted to, or on behalf of, Bamboo Springs?
 2. Whether the SBFSA contained the full scope of the contractual obligations and relations between parties, and the relationship thereunder remained strictly within the realm of banker and customer, or did it constitute a partnership arrangement between them?
 3. Was Bamboo Springs issued with Current Account Number 61526 ("the Chequing Account" or "the Account") under SBFSA and if yes, did the Bank unlawfully reverse the sum of \$1,500,000.00 from the Account thereby causing loss and damage to the company's business?.

4. Is Bamboo Springs entitled to a refund of the sum said to have been reversed from the Account?
5. Did the Bank unlawfully refuse to process and/or clear three debit card transactions processed through the merchant and cash management services provided to Bamboo Springs by the Bank?
6. Is the Bank entitled to the sum claimed as overdraft on the Chequing Account together with interest?
7. Did the Bank breach any fiduciary obligations to Bamboo Springs?
8. Was the Bank obligated to instruct Bamboo Springs of the need to have a financial expert present at meetings, and to seek independent legal advice in relation to its banking transactions?

[5] It must be stated here that all references to sums of money in this judgment are to Eastern Caribbean Currency (XCD), except where it is expressly stated to be another currency.

Bamboo Springs Claim

[6] Bamboo Springs is engaged in the business of harvesting and bottling spring water for wholesale and retail on the open market. It alleges that pursuant to the SBFSA which was executed between the parties, the company engaged in a business partnership with the Bank. The Bank as the principal partner, agreed to use its knowledge, skills, experience and expertise to provide flexible and customized financial services and knowledge of the business world to enable the company to achieve its business objectives with maximum efficiency and effectiveness. It is said that at the Bank's invitation, the directors of Bamboo Springs met with representatives of the Bank to discuss the nature and effect of entering into the SBFSA. The Bank gave assurances that the SBFSA was in Bamboo Springs' best interest and was designed to enable the company to obtain expert financial advice, and reasonable customer-friendly financial services. In that regard, at a meeting with Andrew

Augustine, a loans officer at the Bank, Bamboo Springs relied on the following assurances given by the Bank:

- i. the Bank was not in a position at that time to offer a mortgage loan facility as requested by Bamboo Springs, but could make available a Credit Card Facility in the amount of \$400,000.00 ("the CCF") secured by immovable property valued at \$1,500,000.00, belonging to a director;
- ii. the company could return after a period of two years, at which time the Bank would reconsider the effect of the CCF on its business and the possibility of converting it to a mortgage loan;
- iii. Bamboo Springs could return to the Bank in the event that it was having difficulty meeting payments on the CCF, and the Bank would arrange to make the payments more manageable; and
- iv. the Bank would do all in its power to ensure that Bamboo Springs' business remained a going concern by providing reasonable interest rates and payment arrangements.

[7] It is alleged that upon signing the SBFSA, the CCF and the Chequing Account were issued with the assurance that the latter could be used to deposit any amount of money needed for the business operations, with no mention of any restrictions on the use of the Account. However, the interest rates soon became unbearable, and the company approached the Bank on numerous occasions for a more lenient facility, which the Bank refused. The result was that Bamboo Springs began to fall into significant indebtedness. It is said that the Bank's assurance that the SBFSA was a business partnership and its undertaking to provide sound financial arrangements were less than forthright.

[8] Bamboo Springs asserts that it was coerced and unduly influenced to enter into the SBFSA because the Bank withheld the true meaning and implication of the CCF, thereby acting in breach of its fiduciary duty to inform the company of the right to seek independent legal advice. It is said that the Bank knew or ought to have known that Bamboo Springs' directors were ignorant of the business world, as such, granting them the CCF betrayed the spirit and intent of the SBFSA. It is pleaded that the Bank was in an advantageous

position, having knowledge of small business operations and knowing that the CCF was not a strict loan facility, and exacted interest rates and monthly payments which were certain to bankrupt a small emerging business. Further, the CCF was not a feature of the SBFSA but was fraudulently, maliciously and clandestinely forced upon Bamboo Springs as part of it.

[9] Bamboo Springs pleaded that the Bank was the only party to the SBFSA that was represented at the discussions leading up to the signing of the SBFSA and issuing the CCF, therefore the Bank was under a duty of care to:

- i. inform Bamboo Springs that it was free to have a financial or business expert present to represent its interest;
- ii. inform Bamboo Springs it had the right to consult an Attorney-at-Law for independent legal advice;
- iii. invite the directors to read the SBFSA, or read and explain it to the directors, and inquire whether they understood the details and technical terminology used, and the nature and consequences of the SBFSA;
- iv. determine whether the company was sufficiently profitable and in a position to make the payments under the CCF having regard to market competition and the volume of sales required to sustain profitability;
- v. inform Bamboo Springs that the CCF was not part of the SBFSA, and to inquire into whether it was amenable to the use of this facility;
- vi. inform Bamboo Springs of details concerning use of the Chequing Account and any restrictions imposed thereon;
- vii. inform Bamboo Springs that there would be mercantile charges for services rendered, in the usual manner.

[10] It is asserted that the SBFSA was obtained by economic manipulation, economic duress, undue influence, fraud and bad faith, and was intended to unjustly enrich the Bank. Having had the upper hand, the Bank made misrepresentations to Bamboo Springs, upon which it relied, to its detriment. When the company started to experience financial difficulty it relied on the advice of the Bank that it was free to seek other financial support, as a result of which it sought and obtained investments from four investors. The Bank subsequently

froze the investment funds and reported to the Police that Bamboo Springs was misusing the facilities granted by the Bank.

[11] Bamboo Springs says on 7th December 2017, the sum of \$1,500,000.00 was received from Nguyen Ton Van via its Chequing Account, as a transfer from Scotia Merchant Bank in Trinidad and Tobago. The sum was cleared by the Bank and the company was permitted to use those funds. The Bank honored cheques issued and thereby acquiesced to Bamboo Springs' use of the funds. Thereafter, without warning, without its knowledge or consent, and for undisclosed reasons, the Bank froze the Chequing Account, prohibited Bamboo Springs from using the funds and ordered persons to whom payments had been made to return the sums disbursed to them. Bamboo Springs further says that to date these funds have not been returned to Nguyen Ton Van, and he continues to hold the company liable for the said sum, under their Investors Agreement. Additionally, three other investments from Hunkar Aydin for €700,000.00, Imran Farooq Ur-Rehman Khan for €500,000.00, and Ben Edward White for US\$1,000,000.00 were withheld in Trinidad and Tobago and never transferred to its Chequing Account. As the Bank has denied receiving these monies, Bamboo Springs has been placed in jeopardy of being liquidated by its investors.

[12] Bamboo Springs claims that as a business partner, the Bank never once called in its directors to inform them that there was suspicion about the funds deposited into its Chequing Account. The Bank involved the Police who secured search warrants from the court, and this could not have been possible without the Bank divulging confidential information. As a result, one of its director's, Martin Fenton Martin ("Martin"), was arrested and his character has been defamed, as he has been branded a thief, money launderer, and criminal, with people refusing to transact business with the company. Bamboo Springs says the Bank acted as a competitor and not as a partner by using its position to seize legitimate investment funds which the company had obtained to alleviate the financial rut in which it found itself, as a consequence of the Bank's actions.

[13] The particulars pleaded against the Bank are reproduced below:

1. Fraud, Bad Faith, Economic Badgering, and Unjust Enrichment:-

- a. acted in conflict of interest by entering into partnership with Bamboo Springs to provide the most flexible and manageable financial facilities yet also seeking to maximize the Bank's profitability by realizing enormous levels of interest from the facility, which it knew Bamboo Springs would find difficult to meet;
- b. failed to ensure that Bamboo Springs obtained independent legal advice and appointed its counsel to provide legal advice to itself and Bamboo Springs;
- c. failed to advise Bamboo Springs that it was free to have independent professional business and financial advice on the business prospect of using the CCF as opposed to a mortgage;
- d. failed to advise Bamboo Springs on the fiercely competitive state of the bottling water industry, which would have enabled it to make an informed choice on whether to accept the CCF or seek a more favorable financial arrangement;
- e. withheld from Bamboo Springs the true picture as it relates to the CCF by failing adequately or at all to inform it that interest rates are very high and that there is a tendency for arrears to build up quickly;
- f. failed to adequately or at all explain the detail and technical jargon in the SBFSA to Bamboo Springs and coercing it to sign the SBFSA knowing that it was not understood.
- g. failed to weigh the business prospects of Bamboo Springs against the high and unmanageable payments required under the CCF;
- h. manipulated, badgered, and held Bamboo Springs hostage and under duress by taking advantage of the ignorance of the directors on financial matters and luring Bamboo Springs into a most oppressive financial facility;
- i. refused to convert the CCF into a Hypothecary Obligation which would have made the payments of interest and installments more manageable;
- j. imposed mercantile charges which were not explained;
- k. deliberately withheld assistance sought by Bamboo Springs when business hit an all-time low and the outstanding installments on the CCF began increasing rapidly.

2. Breach of Contract:-

- a. provided the CCF in violation of the express obligation to deliver a flexible solution to enable Bamboo Springs to achieve its goals, from which the Bank would profit at Bamboo Springs' expense;
- b. failed to act in a manner which evidences an understanding of Bamboo Springs' specific business needs which was an express term of the SBFSA;
- c. failed to use its extensive industry knowledge, causing Bamboo Springs to enter into a business venture which was highly competitive, and which required large outlays of capital;
- d. acted in conflict of interest and in circumstances where there was a real and apparent danger of self- interest and bias.

3. Negligence, Breach of Fiduciary Duty and Undue Influence:

- a. failed to exercise skill and care towards Bamboo Springs, which was in need of responsible financial advice, which as banker it owed to its customer, particularly having regard to its obligations under the partnership;
- b. failed to give to Bamboo Springs a manageable financial arrangement, having regard to the competition and the capital needed to meet its obligations under the CCF;
- c. acted without care and prudence by coercing Bamboo Springs to ignorantly enter into the SBFSA upon terms which were unfair and the bargaining power unequal;
- d. acted without care by placing Bamboo Springs under the draconian CCF knowing that Bamboo Springs would not have been able to bottle and sell the amount of water to pay the interest on CCF, having regard to the pace at which it accrued;
- e. acted in circumstances where there was a clear and obvious conflict of interest where the Bank was in the business of making profits on lending and Bamboo Springs was seeking a manageable, flexible and interest-easy financial package;

- f. acted in circumstances where there was real and apparent bias that the Bank would obtain a transaction advantageous to itself and detrimental to Bamboo Springs;
- g. failed to advise Bamboo Springs that it had the right to retain and instruct an attorney at law to obtain independent legal advice;
- h. acted in breach of the duty of care to inform Bamboo Springs that it was free to obtain professional business advice;
- i. maliciously and in bad faith acted as agent both for Bamboo Springs and for itself in the face of the competing interests evident in the nature of the transaction;
- j. failed to read or cause the SBFSA to be read to Bamboo Springs and to explain the technical terms;
- k. failed to ensure that Bamboo Springs understood, appreciated and agreed to the terms of the SBFSA;
- l. failed to inform Bamboo Springs that it was going to employ financial services which were already in existence, and which did not form part of the SBFSA;
- m. failed to inform Bamboo Springs that it was prohibited from seeking additional investments;
- n. failed to inform Bamboo Springs that it would be accused of committing the criminal offence of money laundering and subject to criminal investigation by the police in the event that it obtained investments;
- o. failed to inform Bamboo Springs that it was required to keep injections of cash within a stipulated limit failing which the Bank reserved the right to report to the police that Bamboo Springs had committed the offence of money laundering, to refuse to accept or to seize and confiscate the sums, and to instruct its agents and other banks to do the same;
- p. took advantage of the inequality of bargaining power, securing the signature of Bamboo Springs' directors by duress of circumstances, undue influence, undue pressure and abusing its position;
- q. acted in violation of the fiduciary duties of utmost good faith, integrity, trust and confidentiality which Bamboo Springs reposed in the Bank;

r. acted in breach of its duty of care of confidentiality.

[14] Consequently, Bamboo Springs says that it has suffered loss and claims the following relief:

1. Return of the sum of \$1,500,000.00, being the amount received from Nguyen Ton Van which the Bank removed from the Chequing Account;
2. Release of all funds pending from the following credit card transactions:
 - (i) Visa MasterCard number 4766 1900 7439 9002 on 4th December 2017 in the name of Hunkar Aydin for €700,000.00;
 - (ii) Visa card number 4570 1310 4001 1574 on 8th December 2017 in the name of Imran Farooq Ur-Rehman Khan in the sum of €500,000.00;
 - (iii) Visa debit card number 4427 4260 1859 3651 in the name of Ben Edward White in the sum of US\$1,000,000.00;
3. A declaration that the Bank has no authority or power over the four investment tranches deposited into the Chequing Account;
4. A declaration that the Bank has no charge over monies sent to Trinidad and Tobago for or on behalf of Bamboo Springs;
5. An injunction prohibiting the Bank, by itself or its agents, from holding, seizing, freezing or in any way interfering with or using monies deposited into the Chequing Account;
6. General damages for breach of contract and loss of use in respect of the sums identified at paragraphs 1 and 2 above;
7. General damages for negligence, breach of fiduciary duty, undue influence, economic duress and unequal bargain;
8. Damages for loss of profits as a consequence of the Bank's actions;
9. Interest at the statutory rate on all sums being held by the Bank;
10. Interest on damages awarded, and costs.

The Bank's Defence

- [15] The Bank denies that it was in a partnership with Bamboo Springs within the meaning expressed in the **Commercial Code**¹ or any other applicable law, and maintains that the parties are separate entities, having no relationship other than that of banker and customer. The Bank also denies that it undertook to use its knowledge, skills, experience and expertise to provide flexible and customized financial services and to enable Bamboo Springs to achieve its business objectives. The advice provided to the company was limited to basic financial advice in respect of the banking services which it is licensed to provide. Further, the terms that Bamboo Springs relies upon in the SBFSA do not create a special relationship between the parties beyond that of banker and customer, and the Bank has not breached any obligations owed under the SBFSA.
- [16] The Bank denies the claim that its officers made any of the alleged representations and says that it provided business banking services to Bamboo Springs and personal banking services to some of its directors and shareholders. On 8th April 2011, a personal line of credit in the sum of \$400,000.00 was extended to Septimus Martin ("Septimus"), who is Martin's father, and Christina Martin ("Christina"), then Martin's wife. Both subsequently became directors of Bamboo Springs. That loan facility was secured by property belonging to Septimus and the stated purpose for the loan was to pay off Septimus and Martin's existing personal debts. As this was a personal facility and the loan was not advanced for the purpose of financing the company, Septimus remains personally liable for this debt. Further, it is against the Bank's policy to grant personal loans for business purposes, and the terms and conditions for granting personal and business loans are very different. The Bank maintains that these services are separate and create separate legal relations between the Bank and the respective borrowers.
- [17] The Bank avers that it was Bamboo Springs who approached its officers on every occasion requesting banking services. Around July 2011 the application for business banking services was completed and the Chequing Account was opened, at which point Bamboo Springs became a customer of the Bank. The Account permitted the company to receive deposits and issue cheques and was subject to the terms and conditions

¹ Cap 13.31 of the Laws of Saint Lucia

established in the SBFSA. It was not until sometime in 2017 that Bamboo Springs approached Augustinus Andrew, an officer of the Bank, seeking a business loan. That loan application was unsuccessful, and a business loan was never granted. At no time was the CCF or any other loan or credit facility granted to the company.

[18] The Bank puts Bamboo Springs to strict proof that it was given the CCF as an interim facility pending subsequent conversion to a mortgage loan, and asserts that Bamboo Springs is unable to make any claims in relation to the personal loan granted to Septimus. The Bank denies that it was under a duty of care, or breached any duty of care owed to Bamboo Springs, and states that when the application was made for the Chequing Account, the applicable terms were explained to Bamboo Springs and there was no loan or credit facility attached to it. The use of the Account was, at all times, subject to the laws of Saint Lucia and the SBFSA, which imposed limits and conditions on its use. On 20th October 2017 Bamboo Springs made a separate application for merchant and cash management services to facilitate the processing of credit and debit card payments at its business premises. At that time, the conditions applicable to those services were fully explained.

[19] The Bank asserts that there is no requirement to obtain independent legal advice to open a chequing account. This was an arm's length transaction designed to facilitate Bamboo Springs' business and there were no unusual terms to which that account was subjected. Additionally, the Bank would not have known that the company was unfamiliar with the operation of a chequing account, particularly as it was Bamboo Springs who approached the Bank and applied for the service in July 2011. The Bank denies that the circumstances were such that it knew or ought to have known that Bamboo Springs required advice, and denies that it took advantage of the company.

[20] The Bank emphatically denies that it has committed fraud, or acted in bad faith, or engaged in economic badgering and undue influence, or benefited from unjust enrichment. Concerning the allegation of fraud, it is reiterated that a personal loan was granted to Septimus, and the Bank cannot compel a borrower to use monies lent in a particular way.

If he used the proceeds from his personal loan to finance Bamboo Springs' business operations, the Bank was unaware and made no representations to him in that regard.

- [21] Regarding the allegation of bad faith, the Bank states that there is no conflict of interest involved in providing the Chequing Account or merchant services. It was always explained to Bamboo Springs that there were charges associated with these two products and what those charges would be. The Bank denies that it withheld the reason for not approving the business loan, which was, mainly, that Bamboo Springs did not satisfy the Bank's conditions. The property referred to is owned by Septimus and was already held as security for his personal debts when the application for the business loan was made in 2017. At that time Bamboo Springs did not own any property. The Bank denies having any duty to advise the company on the viability of its business and says that it was for Bamboo Springs to undertake all the necessary market research to determine how best to pursue its business objectives. The Bank also states that it only provides advice on the products that it offers and not the general conduct of a customer's business undertakings.
- [22] Concerning the allegation of exerting undue influence over Bamboo Springs, the Bank denies same, stating that Bamboo Springs is a company with a board of directors, engaging in commercial activity. The Bank was approached for a chequing account and merchant and cash management services, which were by no means exceptional or unique. These services did not put the Bank in a position to control or to direct Bamboo Springs' business and would also not have adversely affected Bamboo Springs' business operation to the benefit of the Bank.
- [23] The Bank avers that Bamboo Springs has not identified any fiduciary duty which has been breached. It denies breaching any contractual or common law obligation to the company, and says that at all times it acted in a manner consistent with the services provided. It is reiterated that the Chequing Account was always subject to the terms of SBFSA, including the Bank's anti money laundering policies and the laws of Saint Lucia, and the Bank denies seizing any money due to Bamboo Springs. In that regard it was Bamboo Springs that attempted to process payments through the merchant and cash management services, which were outside the limits established for this facility. The third-party

processor which handles credit and debit payments flagged the transactions and blocked them without the intervention of the Bank. Only one transaction was processed, however, as the Bank was unable to ascertain the requisite source of funds, that transaction was reversed. In doing so, the Bank was at all times acting in compliance of the laws of Saint Lucia. Bamboo Springs was always free to seek financing and have banking relationships with other banks, and never expressed dissatisfaction with the manner in which the Bank conducted their relationship.

- [24] Regarding the allegations of breach of contract, the Bank states that none of the matters asserted by Bamboo Springs constitute terms of the SBFSA. Alternatively, if they are terms, they did not apply to the Chequing Account or the merchant and cash management services provided, and the Bank has not breached the SBFSA in relation to these services.
- [25] Concerning the particulars of negligence, the Bank states that it was under no obligation to provide Bamboo Springs with finance, and its application for a business loan was considered and declined because it failed to meet the Bank's requirements. The Bank did not breach any duty of care related to the services provided to Bamboo Springs, and the nature of the products which it applied for and received were fully explained. Those services do not require the Bank to inform Bamboo Springs of the need to obtain independent legal or financial advice. No undue influence was exerted over the company and the Bank did not owe any fiduciary duty to it. Alternatively, the Bank says, it has not acted in a manner which violates any established category of fiduciary duty.
- [26] The Bank avers that Bamboo Springs was never prevented from seeking investments locally or internationally, however it was required to provide an explanation of the source and purpose of the funds remitted, which it failed to do. As the Bank is subject to the Proceeds of Crime Act and other legislation for combatting money laundering, it is barred under the applicable laws from disclosing whether a transaction is being considered as suspicious, or is reported to the relevant authorities. Thus, there has been no breach of its confidentiality obligation to Bamboo Springs, and there was no seizure or unlawful detention of funds. The company was only entitled to move through the Chequing Account, money that was proven to be legitimate and belonged to it. To date Bamboo Springs has

failed to provide any information regarding the sum of money which was credited into the Account.

- [27] The Bank further says that when Bamboo Springs applied for merchant and cash management services in October 2017, the Merchant Services Request and Pricing Schedule (“MSR&PS”) which accompanied the application stated that it was requesting a card terminal to process EDC swipe or CHIP EVM transactions. No request was made for processing of manual or card not present transactions. The merchant services provided are subject to the terms of the SBFSA, which incorporates the MSR&PS and the Business Accounts and Services Application (“BASA”).
- [28] It was therefore a term of the SBFSA that Bamboo Springs would use the terminal only to process transactions where the card was presented at the time of payment and either swiped or inserted into the terminal. Bamboo Springs did not inform the Bank of any intention to seek capital from either local or foreign investors. The BASA submitted by Bamboo Springs stated that the company expected to receive deposits ranging between \$5,000.00 - \$10,000.00 monthly. Consistent with this, the MSR&PS completed by Bamboo Spring stated that the expected transaction size for both credit and debit cards would be \$9,098.00.
- [29] The Bank states that it has no record of any transaction from credit card number 4585 1400 2000 5426 as alleged and that the money received into the Chequing Account did not originate from the credit card in the name of Nguyen Ton Van. The sum of \$1,500,000.00 was received by the Bank but not from the source indicated by Bamboo Springs. Despite repeated requests, Bamboo Springs was unable to provide information to the Bank to establish the validity of the transfer, as a result of which, it was reversed by the third-party processor. Thus, the Bank did not suspend any credit card payment transactions, neither is it holding or suspending any funds intended for Bamboo Springs, as these sums were never received by the Bank.
- [30] The Bank further says that on 6th and 13th December 2017 an agent or someone to whom Bamboo Springs granted access to the card terminal machine attempted to manually

process 10 transactions totaling \$18,512,653.74. All the transactions were declined. The attempted transactions on card numbers 4427 4260 1859 3651 and 4766 1900 7439 9002 were among the rejected transactions, and the Bank has no record of any transaction related to card number 4570 1310 4001 1574. The Bank denies that Bamboo Springs' use of the funds was legitimate as the company has not been able to provide any information on the funds received. Consequently, the transaction was reversed, and the Chequing Account was frozen. However, prior to the reversal, Bamboo Springs was able to withdraw funds from the Chequing Account, as a result of which the Account is now overdrawn.

[31] The Bank says it was in regular contact with Martin, requesting information on the transfer, and informed him of the reversal and freezing of the Account. It was an express term of the SBFSA that Bamboo Springs would not carry on, or be associated with activities that are improper, illegal or unlawful, or connected with a business that the Bank may determine, in its sole discretion, is a restricted business. Bamboo Springs accepted and agreed to abide by the Bank's policies. Having acted in breach of the terms of the SBFSA by using the terminal to process transactions without the card being present and being unable to provide any information with regard to the credit card used for that transaction or its owner; and the card being confirmed to have been stolen, the Bank determined that the transaction was improper and potentially illegal. In keeping with its policies, it reversed that transaction, and this action was authorized by the express terms of the SBFSA. As to Martin's arrest, the Bank states that it has no knowledge of the matters alleged and is not responsible for the actions of the Royal Saint Lucia Police Force, which is an independent agency and not the servant or agent of the Bank. The Bank denies that it was in any way responsible for such matters if they occurred.

[32] The Bank denies that Bamboo Springs has suffered any loss or damage as a result of its actions, and that it is not entitled to any of the relief sought.

The Bank's Counterclaim

[33] The Bank alleges that in the application for merchant and cash management services Bamboo Springs represented that the volume and size of transactions to be processed

through the card terminal machine would be small. It was aware that the Bank would rely on this representation to assess the risk attached to the application and to decide whether or not to grant this service. Thus, the representation was made knowing it to be false. Shortly after approval and installation of the card terminal machine, Bamboo Springs attempted to manually process the 10 transactions totaling \$18,512,653.74, which were well in excess of the sums represented to the Bank. Had the Bank been informed at the time of the application that Bamboo Springs intended to process this volume and size of transactions, the Bank would not have approved the application for merchant services.

[34] Bamboo Springs further represented that it would only be processing transactions where the customer was present at its premises, the card would be swiped or inserted into the machine, and the transactions would relate to payments for its products. This representation was also made knowing same to be false and knowing that the Bank would have relied upon it in determining whether to approve the application. The Bank alleges that Bamboo Springs was under a duty of care in making the representations and breached this duty.

[35] As these transactions were not in keeping with Bamboo Springs' representations the majority were rejected as not being within the terms of the SBFSA, save the one transaction said to be from Nguyen Ton Van, which was inadvertently credited to the Chequing Account. When the Bank recognized that this transaction was not in keeping with the SBFSA and Bamboo Springs was unable to provide information on the transaction or the payer, it was reversed. The Bank has subsequently established that the amount was initiated against a fraudulent credit card account.

[36] Prior to reversal of the funds, Bamboo Springs had effected several transactions totaling \$472,145.80, which the Bank attempted to recover, but fell short by \$178,387.16. This resulted in the Chequing Account being overdrawn and additionally overdraft fees and recycling service charges have been incurred. The outstanding sum due as of 24th September 2019 was \$234,288.68 with interest continuing to accrue at the rate of 19% per annum. The Bank avers that Bamboo Springs had no right or interest in the funds which had been inadvertently credited to the Account and which was wrongfully obtained as a

result of its false representations. The company has failed or refused to repay the overdrawn amounts despite the Bank's requests for payment. Consequently the Bank has suffered loss and damage.

[37] The Bank says that the aforementioned conduct of Bamboo Springs amounts to breach of the terms of the SBFSA, and pleaded the following particulars of breach:

- i. The MSR&PS stated that Bamboo Springs was applying for merchant services for processing of transactions where the credit or debit card would be swiped or inserted into the card machine only. The SBFSA which governs the relationship between the parties expressly incorporates the MSR&PS which states that Bamboo Springs is only entitled to the services specifically requested in that document. It was therefore an express term of the SBFSA that Bamboo Springs would only process transactions where the card was swiped or inserted into the machine. It was also an implied term of the SBFSA that the machine would only be used to process payments for goods sold to customers and not for facilitating transfers of money. In breach of the express and implied terms of the SBFSA, Bamboo Springs processed payment for an alleged investment from a person who did not swipe or insert the relevant credit card into the machine at the time of the transaction.
- ii. It was also an express term of SBFSA that Bamboo Springs would comply with the Bank's policies. However, in breach of the policies, Bamboo Springs did not provide the Bank with the Source of Funds Declaration for the funds received or adequate information on the transaction when requested.

Bamboo Springs Reply to Defence

[38] Bamboo Springs made no admission to the matters raised in the defence and says that it discloses no reasonable grounds for defending the claim, that it is an abuse of process, and otherwise frivolous and vexatious.

- [39] Bamboo Springs maintained that the CCF was granted to the company, which it says is supported by the Bank's acknowledgment in a letter dated 17th April 2012, that a Scotia Line Card Account No. 5467968050001109 was opened for Bamboo Springs' business operations. Bamboo Springs states that when its representatives approached the Bank for the loan, the company was not yet incorporated, and the reason for incorporation was because its intended representatives were given the assurance by Augustinas Andrew that they could use the CCF to set up and manage the business. That facility was given to the representatives of Bamboo Springs on 8th April 2011 and the company was subsequently incorporated on 9th May 2011.
- [40] Bamboo Springs, maintains that when the Bank was first approached for a business loan, it was Augustinas Andrew who informed that the Bank would not be able to grant such loan and instead offered a Scotia Line Card up to the limit of \$400,000.00, stating that Bamboo Springs could use the loan to start off the business, clear off all existing debt, and at the end of two years the Bank would convert the CCF into a mortgage loan. Bamboo Springs says that this officer insisted that its representatives disclose whether they had outstanding loans with other financial institutions and encouraged them to use the CCF to pay off a mortgage on Christina's house and Martin's vehicle. In the same breath, Bamboo Springs alleges that it entered into an agreement with the Bank to provide a loan facility which it thought was a mortgage loan, however it turned out that it was misled into signing off on the CCF which was incapable of meeting its financial obligations. Bamboo Springs further says that the CCF was deliberately not given under Bamboo Spring's name to make it appear that it was a private loan, which is not the case, as the loan was given for operating the business. It is also said that the MSR&PS did not contain any expressed or implied terms forbidding the company from seeking additional investments for the business, and did nothing to prohibit it from transacting such business through the card terminal.

Bamboo Springs Defence to the Counterclaim

- [41] Bamboo Springs relies on the doctrine of *ex turpi causa no oritur actio* to say that the Bank cannot found a cause of action on a transaction that is both unconscionable and illegal, in

that it was done in breach of the fiduciary duty owed by the Bank, and against the law requiring independent legal advice. Further, the conduct of the Bank is so reprehensible that it cannot seek to obtain a benefit from such actions, and the counterclaim evidences its intention to take advantage of and force the company into bankruptcy.

[42] It maintains that the Bank held out that the company was not limited to the CCF in seeking financing. The Bank has admitted that the monies deposited into the Chequing Account came into the Bank and cannot deny that it was aware of the monies. The Bank is put to strict proof of how it became aware of the alleged attempts to manually process sums totaling \$18,512,653.74, without the monies coming into the Bank. Bamboo Springs maintains that the Bank has all the funds in its possession and was aware of all the transactions as the card information is processed through the card terminal and eventually transmitted to the Bank's processing unit, which would send the funds to the Account.

[43] Bamboo Springs states that it did not make any representations to the Bank regarding the volume and size of transactions it would require, since it depended on the CCF which failed to provide sufficient funding. The company denies informing the Bank that the merchant services would be limited to purchases and purchasers who would attend personally to purchase goods and services. It is said that the Bank knew of the injections and agreed to disburse the funds, as there was no limit placed by the Bank on the card terminal and no prohibitions on its use. No monies were overdrawn, as the funds were drawn down when there was money in the Account, and no cheques were issued for which there were insufficient funds. Bamboo Springs denies that any misrepresentations were made and puts the Bank to strict proof of the allegations of false and negligent representations. Bamboo Springs denies that the Bank is entitled to any of the sums claimed.

The Bank's Reply to Bamboo Springs Defence to Counterclaim

[44] The Bank reiterates that its actions were at all times, lawful and in keeping with the terms of the contract between the parties. It never received the funds totaling \$18,512,653.74 that Bamboo Springs attempted to process, as these transactions were blocked by the

third-party processor, however, notice of the attempted transactions were provided to the Bank.

Issue 1 : Was a Credit Card Facility (the CCF) or any other loan facility granted to, or on behalf of Bamboo Springs?

Bamboo Springs' Submissions

- [45] Counsel for Bamboo Springs contends that the loan was one which should not have been given to the company as its directors were not financially literate, they were disadvantaged, and the loan was not suited to Bamboo Springs as a borrower. The CCF was given in the amount of \$400,000.00, which was later discovered to be a loan erroneously made to directors of Bamboo Springs, for which Septimus mortgaged his personal property as security.
- [46] Counsel submits that small loans totaling about \$100,000.00 were consolidated under the CCF, which was intended to finance Bamboo Springs business operation, and in that regard the Bank had a fiscal responsibility to protect its customers. Septimus used his land to secure the loan, in circumstances where he did not require a personal loan. Thus, the Bank acted recklessly in granting the CCF and is now claiming that Septimus and Christina (who is now Martin's ex-wife) are responsible for repayment of the loan. Counsel goes on to say that some of the best evidence in relation to the CCF is not available as these documents were seized from Martin's home and Bamboo Springs' offices by the Police in July 2018. That includes the loan agreement and the application for conversion of the CCF to a regular mortgage loan. In these circumstances, Counsel says the Bank took advantage of its superior position against these vulnerable and ill-equipped directors, who were duped into taking the CCF. The Bank must therefore be held accountable for all the breaches alleged, including breach of contract, breach of fiduciary duty, negligence, fraud, undue influence and unjust enrichment.

- [47] Counsel invoked section 16 of the Companies Act² which deals with Pre-Incorporation Agreements, in support of her contention that the CCF was granted to or on behalf of Bamboo Springs before its incorporation.

The Bank's Submissions

- [48] Counsel for the Bank has argued that the relationship between a bank and its customer is contractual³, therefore the issue of privity of contract arises. The CCF that Bamboo Springs complains of as having crippled its business was not provided to it, but was a loan provided to some of its directors for their personal use. Thus, Bamboo Springs has no locus standi to bring a claim in relation to this facility, as it was not privy to this transaction, and the only services provided to it by the Bank were the Chequing Account, which was opened in July 2011 and merchant and cash management services (through the use of a card terminal) provided in October 2017. In response to the proposition that the CCF was granted to or on behalf of Bamboo Springs pursuant to section 16 of the Companies Act, Counsel argued that Bamboo Springs has the insurmountable task of disproving that the net effect of section 16(1) is that any such loan agreement would remain binding on the individuals who obtained the loan, as Bamboo Springs has not adduced any evidence to satisfy compliance with sections 16(2) and 16(5).

Bamboo Springs' Evidence

- [49] Martin and Septimus testified on behalf of Bamboo Springs.
- [50] Martin's evidence is that in October of 2010, he prepared a business plan⁴ for a bottled spring water business and approached the Bank for financing. He was directed to a small business loans officer named Andrew Augustine. Among other things, he says he was told that in order to receive financing for the business he would have to commit to registering a company. At a subsequent meeting he was presented with a proposal for financing the

² Cap 13.01 of the Revised Edition of the Laws of Saint Lucia

³ *Joachimson v Swiss Bank Corp* [1921] 3 KB 110

⁴ See Exhibit BS1

business based on the SBFSA, where the Bank proposed to pay off his two existing loans and provide funding for the business, totaling \$400,000.00. He says the loan was to be granted as a credit card facility, which he was assured would be converted if necessary into a mortgage loan on easier terms, after two years. He says he was also informed that the loan agreement would have to be signed by his father Septimus and his wife Christina, as he was unemployed, and the business was just starting up. Martin says the CCF was given to Bamboo Springs on 8th May 2011 and included cheques to CIBC and Bank of Saint Lucia to settle his existing loans. By this time, he had already submitted the documents for incorporation of the company, and it was registered on 9th May 2011. He says he secured loan statements from CIBC (FCIB) and Bank of Saint Lucia (BOSL) which showed that both of his loans were settled from 8th April 2011. The balance of the money remained in the CCF to fund Bamboo Springs business.

- [51] Martin further says when he approached the Bank for a loan he did not have a credit card in mind, nor did he plan to transfer his existing loans, or have them paid off by the Bank. The decision to obtain the CCF and to use it to pay off existing loans was made on the advice of the Bank. Registration of the company was also done on the advice of the Bank, with the intention of the business obtaining the loan for itself. He says no attempt was made by the Bank to distinguish between the SBFSA and the CCF and both were presented as part of one financial arrangement. However, the Bank was always aware that the purpose of the loan was to fund the bottled water business. The letter from the Bank dated 17th April 2012 which is addressed to Septimus and Christina gives a clear indication that the CCF was used for the business, and the Bank was aware that it was not given as a personal loan. He says at no time did he have discussions with the personal lending department, and all consultations leading up to the signing of the CCF were between himself and Andrew Augustine. He says the CCF was granted to Bamboo Springs, but he was lured by the Bank into believing that it was best for his wife and father to sign. He did not understand the legal and financial implications then, and these matters were never explained to him.

- [52] In cross examination, he admitted to having engaged in extensive research and market analysis and got professional assistance to put a business plan together. He approached the Bank for a loan of about \$92,000.00. He stated that he owns a home, but the loan which was transferred from FCIB was not secured against his home. It was secured by land belonging to Septimus, because at that time they were young and required security, and Septimus agreed to help them out. His home is on a plot of land which was given to him by Septimus, but that land was not used to secure the loan with FCIB. He stated that it was not unusual to build on family land in Saint Lucia, and he had decided to keep that lot safe by using another piece of land belonging to Septimus, to secure the loan from FCIB.
- [53] In answer to questions from the Court, he clarified that a physical credit card was never issued to Bamboo Springs. Two checks were written, one to FCIB to pay off his mortgage loan and the other to BOSL to pay off a loan for his van. The balance was issued for the business under what is called a Scotia Line Account and the signatories to that account were Septimus and Christina. This account was not in the name of Bamboo Springs as the company had not yet been registered and could not have opened an account in its name. Over a period of about a year and a half, all of the money was used up to start the business. The Scotia Line Account was being repaid and the last payment was in December 2017 for about \$100,000.00, and payments stopped when the Chequing Account was frozen. Apart from that, there was the point-of-sale machine where the claimants would process card payments. The monies from card payments would go to the Chequing Account, which is the account that the defendant now says has an overdraft of approximately \$178,000.00.
- [54] Septimus who spoke primarily in Kewyol dialect testified as a director of Bamboo Springs, stating that in 2010 his son Martin came to him and his wife about opening up a business to produce spring water from a water source on their land. He needed them to use their land as security to obtain the funds needed to start off the business. They agreed to help because it seemed like a good idea. Martin was the one who mostly went back and forth to obtain the loan for the business, although sometimes he participated in the meetings. He says he is sub-literate and relied on a loans officer named Andrew Augustine, who presented them with a proposal accompanied by the SBFSA. He was not able to read and

understand it and it was never explained to him in detail by the Bank, however he understood that it established a partnership between Bamboo Springs and the Bank. His evidence in most respects mirrored Martin's in relation to the circumstances surrounding the CCF. He says at the time it was granted he had no loans and had no intention of obtaining a personal loan. It was clearly understood that the loan was to be made to the company and that was the reason for registering it. He would not have agreed to the CCF, had all these matters been properly explained to him.

[55] In cross examination he admitted that he had in the past permitted Martin to use his land as security for a mortgage for Martin's own home. He admitted giving his permission for a business loan because he wanted to help Martin with the bottled water business. He stated that Christina had to get involved because she was required to help pay the mortgage for the house loan, as Martin was not employed at the time. When they started the business there was no bank account for it and he was required to open an account and place the money there. Thereafter an account was opened in Bamboo Springs' name and Martin was the signatory to that account. He explained that he understood what it meant to provide security for a loan and had provided security for mortgages obtained by Martin on two occasions in the past. He recalled that the loan went into arrears when Bamboo Springs' account was closed and that the sum of \$5,000.00 was usually paid toward the loan and sometimes they would pay more depending on the availability of funds.

[56] Very late in the proceedings, under its continuing duty of disclosure Bamboo Springs produced a copy of a Hypothecary Obligation registered at the Land Registry as Instrument No. 2312/2011 (the "Hypothec"). It was executed on 29th April 2011 by Septimus Martin, Antonia Martin and Christina Tala-Martin as mortgagors, in favour of the Bank as mortgagee. It is in respect of a parcel of land registered in the Land Registry as Parcel No. 1222B 71, to secure a loan for the principal sum of \$400,000.00 plus interest at the rate of 12% per annum. The property is situated at Vieux Fort and is stated as belonging to Septimus and Antonia Martin by way of a title deed registered in the Land Registry as Instrument No. 2329/94.

The Bank's Evidence

- [57] The totality of the Bank's evidence on this issue comes from its sole witness Suzette Armoogam-Shah ("Suzette"), who served as Country Manager of the Bank from July 2018 to November 2019. She testified that Bamboo Springs became a customer of the Bank in 2011 when the Chequing Account was opened. In 2017, the company applied for and was provided with merchant and cash management services, and the Bank has never advanced any credit facilities to Bamboo Springs. She did not work at the Bank at the time the loan was granted. She disclosed that she had read about the CCF in the documents filed by Bamboo Springs but was unable to say what was the purpose of that loan. She had reviewed Bamboo Springs file, and it revealed that there is no loan from the Bank to the company. She was aware that sometime in 2017 Bamboo Springs had applied for a business loan, but failed to satisfy the qualifying conditions. She noted that neither the loan application nor the rejection letter were exhibited. She did not know if the application was to convert an initial loan to a regular mortgage loan, and was not in possession of this information.
- [58] Under cross examination she admitted that she was not familiar with Bamboo Springs' account history and the circumstances leading to this claim. Although she could not speak directly to the loan transaction in 2011 and what had occurred in 2017 and the transactions in 2018, when she took over as Country Manager she was briefed on the matter as part of her orientation, and was updated by the Bank on what had occurred in relation to the claim. She agreed that she was not the loans officer who had dealt with Bamboo Springs in 2011. She had never met the Martin's or Christina and could not say whether Septimus was illiterate or what Christina earned. However she was aware that the Bank has policies for qualifying for loans and would look at different sets of criteria to grant loans. She was unable to speak to the CCF as this claim is between the Bamboo Springs and the Bank, for which there is no such loan in the Bank's records. She stated that there are privacy issues which guide her testimony, and she could not divulge information on external loans, which were no longer with the Bank.

[59] In response to a question from the Court she explained that a line of credit grants access to credit as needed, for example for emergency home purposes such as home renovation, vehicle repairs and the like. It does not have a card associated with it and carries more favourable interest rates. A credit card facility on the other hand has an associated card, which is used for everyday purchases.

Analysis

[60] Examination of the documents adduced confirms that Bamboo Springs was incorporated on 9th May 2011 as Company No. 2011/C137⁵ and as such it has separate legal personality. I have examined the SBFSA which has been adduced by both parties, and which Bamboo Springs says is the basis of the CCF. It contains no execution date or signatory page. On the cover page it states: "*Small Business Financial Services Agreement*" which is an indication that it pertains to financial products offered by the Bank, to small businesses. It is described on page 1 as a booklet which explains the types of products and services offered, and the terms and conditions which governs Business Accounts, Certificates of Deposits, Term Deposits and the following services; *Scotiocard* Banking Card, *Scotia Online* Internet Banking, Small Business Credit Products and Cash Management Services. It makes no reference to a product called a Scotia Line Account. It is not possible from this document to make an objective or informed determination on whether it was required to be signed, by whom, in what capacity, and on what date. These matters are important as it is the core document on which Bamboo Springs' relies regarding its complaint that the Bank fraudulently, by undue influence, and in breach of its fiduciary duty coerced Bamboo Springs and its directors into the CCF. There is no other evidence of a loan agreement in relation to the CCF which Bamboo Springs speaks of. Nonetheless, both Bamboo Springs and the Bank agree that the SBFSA was executed between them and governed their relationship.

[61] Martin's evidence is that the CCF was granted to Bamboo Springs in April 2011, albeit that the company was incorporated subsequently in May 2011. Counsel for the Bank relied on

⁵ See Exhibit BS11

section 16 of the Companies Act presumably to make the point that it was possible to enter into pre-incorporation agreements on behalf of Bamboo Springs in relation to the CCF. The section states:

“16. Pre-incorporation agreements

(1) Except as provided in this section, a person who enters into a written contract in the name of or on behalf of a company before it comes into existence is personally bound by the contract and is entitled to the benefits of the contract.

(2) Within a reasonable time after a company comes into existence, it may, by any action or conduct signifying the intention to be bound thereby, adopt a written contract made, in its name or on its behalf, before it came into existence.

(3) When a company adopts a contract under subsection (2) —

(a) the company is bound by the contract and is entitled to the benefits thereof as if the company had been in existence at the date of the contract and had been a party to it; and

(b) a person, who purported to act in the name of the company or on its behalf ceases, except as provided in subsection (4), to be bound by or entitled to the benefits of the contract.

(4) Except as provided in subsection (5), whether or not a written contract made before the coming into existence of the company is adopted by the company, a party to the contract may apply to the court for an order fixing obligations under the contract as joint or joint and several, or apportioning liability between or among the company and a person who purported to act in the name of the company or on its behalf; and the court may, upon the application, make any order it thinks fit.

(5) If expressly so provided in the written contract, a person who purported to act for or on behalf of a company before it came into existence is not in any event bound by the contract or entitled to the benefits of the contract.” [Emphasis added]

[62] In my view these provisions do not assist Bamboo Springs as there is not a scintilla of evidence to show that a written contract was made in the name or on behalf of Bamboo Springs before it came into existence. On a balance of probabilities, it is more plausible that Bamboo Springs committed to the SBFSA after the company was incorporated for the purposes of obtaining the Chequing Account and cash management services, to which the SBFSA speaks directly. It simply does not mention the Scotia Line Account which Martin says was granted in April 2011, as part of the services covered there.

- [63] Bamboo Springs says that the best evidence of the arrangements surrounding the CCF and the application for its conversion to a regular loan were confiscated by the Police sometime in 2018 pursuant to a Warrant to Search for Property⁶ obtained on 30th July 2018 from the First District Court, which it exhibited. A document titled “*Evidence/ Seized Property Receipt*”⁷ from the Royal St Lucia Police Force containing a list of several items and documents, was also exhibited. Bamboo Springs says the Bank was best placed to provide all the relevant documents in relation to the CCF and has failed to do so.
- [64] In response Counsel for the Bank has pointed out that in Schedule 2 of the Bank’s List of Documents for Standard Disclosure, the Bank has disclosed a list of documents which are no longer in its possession, and what has happened to them. The list includes 9 categories of documents concerning Bamboo’s Springs applications for business accounts, merchant services and loans, customer records, and general correspondence between the parties. These documents are said to be in the possession of Republic Bank EC Limited following transfer of the Bank’s banking business to that entity. I note that Bamboo Springs made no effort to secure these documents, either by way of specific disclosure, or to have them retrieved by its directors and placed before the Court for due consideration.
- [65] It is Bamboo Springs’ word against the Bank’s in relation to negotiations and representations made for obtaining the CCF. Martin’s evidence that Christina and Septimus were induced into taking the CCF because he was unemployed is more suggestive of a personal facility, otherwise there would have been no issue with him signing a loan agreement as an intended director or promoter of Bamboo Springs, even if he was unemployed. The use of the loan to settle pre-existing personal debt is also indicative of a personal loan facility being granted. Martin’s evidence that under the CCF two cheques issued to him on 8th May 2011 to settle his existing debts contradicts his own documentary evidence which shows that these loan accounts were settled from 8th April 2011⁸. The letter of 17th April 2012 which he exhibited is issued by the Bank, and addressed to Christina and Septimus in relation to interest paid on their “....*Scotialine* #

⁶ See Exhibit BS9

⁷ See Exhibit BS10

⁸ See Exhibits BS13 & 14

5467968050001109 for calendar year ended December 31, 2011..." The interest is categorized into four components for which the largest amount by far is in relation to "Construction of Business Facility (Bamboo Springs)" The letter further states *inter alia* : "According to our records, the stated purpose of the loan was for construction of business facility, settle competitors (First Caribbean Int'l Bank and Bank of St Lucia) and sundry expenses." Taken together these matters indicate an awareness by the Bank that one of the purposes of the funds disbursed under this account was to support a business venture. The letter does require some response from the Bank, which is notably absent.

[66] Martin did not appear to me as someone who was not knowledgeable about finance and loans. He says he started out working as a janitor at Paradise Springs (another bottled water company) and rose through the ranks of sales and delivery, culminating in the post of operations supervisor by the time he left there to start Bamboo Springs. He had obtained personal loans before and had used Septimus' property as security. As such he would have been very familiar with that process. By his own admission he was strategic in ensuring that the lot on which his home was built was kept safe by ensuring that another lot was mortgaged to FCIB for the very loan to build his home.

[67] Septimus seemed a simple and modest man from all appearances. He appears to repose great trust and confidence in his son Martin, and gave unequivocal evidence of his loyalty to him, and his desire to facilitate their bottled water business endeavor. He stated emphatically in cross examination that all of the lands belonged to him, he had worked hard for it and owned it, and if his son needed help, he would help him. He knew the difference between a credit card and a loan and stated that they did not request a credit card from the Bank. I consider that both himself and Martin were not new to the process of obtaining bank loans. A land register exhibited for Parcel No. 1222B 71⁹ shows a first hypothec registered in 1994, a second in 2004, and variations of hypothec in 2004 and 2006.

⁹ See Trial Bundle 3 at page 173

[68] On the totality of the evidence, what emerges is that the facility which Bamboo Springs refers to as the CCF is not a credit card facility granted to it or on its behalf, but is in fact a loan granted in April 2011 to Septimus, his wife Antonia and Christina. The Hypothec provides conclusive evidence that Septimus property was used as security for the loan, and that Antonia, Christina and himself are the named mortgagors. It is not stated anywhere in the Hypothec that they were engaging or transacting as surety, or that Bamboo Springs was the principal debtor or a mortgagor. The purpose of the loan is not stated there, except for the generic clause which says, "*The Agreed Purposes*" means *purposes from time to time agreed between the mortgagor and the mortgagee.*" It may well mean that as an alternative, the intended directors in their personal capacity, secured the loan with the intention to use it nonetheless to fund the business. The Hypothec was executed a mere 10 days before the company was incorporated. If the intention was to secure the loan on behalf of Bamboo Springs it would have been prudent to ensure that the company was incorporated and at the very least captured as principal debtor, in the Hypothec, as is customary for such transactions. That is not the case, and the intended directors of Bamboo Springs appeared to have arranged their financial affairs as they saw fit, with the loan being obtained by Septimus, Antonia and Christina, in their personal capacity, as the mortgagors.

[69] Matters concerning this mortgage loan would not fall to be considered here, and a claim to challenge the lending ought to have to been brought by the borrowers in their personal and private capacity. The Bank is therefore correct in stating that the relationship between itself and Bamboo Springs was contractual, and the company has no locus standi to bring a claim in relation to this loan, as it was not a party, nor privy to it. Septimus, Antoina and Christina are not parties to this claim and Septimus has only testified as a witness on behalf of Bamboo Springs.

[70] The Hypothec is the only document which has been provided in relation to the loan. It is a notarial instrument which has not been impugned and remains an authentic representation of the matters contained therein, contrary to what has been asserted by Bamboo Springs. I therefore remain fortified in my view that the evidence leads to the conclusion that a loan was granted to the three individuals named in the Hypothec as the mortgagors. Further the

Bank's evidence that only two services were provided to Bamboo Springs after incorporation, namely the Chequing Account in July 2011 and merchant and cash management services in October 2017 has greater weight and credibility, when assessed against Bamboo Springs' testimony and its version of the events.

- [71] I therefore conclude that there is no CCF or mortgage loan between Bamboo Springs and the Bank as alleged. The evidence has not shown on the balance of probabilities that the company was the entity which obtained the loan from the Bank, or that the loan was procured in its name or on its behalf, albeit that the proceeds were used to fund its business.

Issue 2 : Did the SBFSA contain the full scope of the contractual obligations and banking relations between parties, and the relationship thereunder remain strictly within the realm of the relationship of banker and customer, or did it constitute a partnership arrangement between them?

Bamboo Springs' Submissions

- [72] Counsel for Bamboo Springs' has argued that certain representations were made by the Bank's agent during the course of discussions and negotiations, which were acted on or relied upon by Bamboo Springs. As the Bank has provided no evidence to the contrary and its sole witness was not involved in the negotiations or discussions leading up to the signing of SBFSA, Martin and Septimus' testimony remains uncontroverted. Thus, under article 956 of the Civil Code¹⁰, the obligation of a contract extends not only to what is expressed in it, but also to all the consequences which, by equity, usage or law, are incident to the contract, according to its nature. Therefore, all the circumstances must be considered, in determining the full terms of the SBFSA.

The Bank's Submissions

¹⁰ Cap 4.01 of the Laws of Saint Lucia

- [73] Counsel for the Bank reiterated that the relationship between a bank and its customer is contractual. Bamboo Springs, on entering the relationship, would have been provided with the SBFSA. At page 6 under the rubric '*Scope of this Agreement*', it expressly provides that the business banking services provided to Bamboo Springs are subject to the terms and conditions established by the SBFSA. Thus, the terms of the contract between them are contained in the SBFSA, which expressly incorporates the BASA¹¹ and the MSR&PS¹² in relation to merchant and cash management services. The terms of these two documents form part of the contract as well as those of the Merchant Services Agreement and Addendum.
- [74] The SBFSA specifically states that it governs all business accounts held with the Bank. Bamboo Springs seeks to rely on the terms of this document and cannot at the same time appear to be challenging its applicability. Alternatively, if the Chequing Account was not subject to the SBFSA when it was opened, at the very least it became subject to its terms by virtue of the BASA signed by the directors of Bamboo Springs on 11th October 2017. The BASA expressly required Bamboo Springs' directors to certify that they agreed to be bound by the terms and conditions of the SBFSA. Whilst it is a general agreement which provides for the operation of business accounts, the specific services being the merchant services are subject to the additional agreements such as the Merchants Services Agreement and Addendum. These additional agreements do not eliminate the applicability of the SBFSA.
- [75] Regarding Bamboo Springs allegation of implied terms which govern the relationship between the parties, the courts have consistently stated that a term can only be implied into a contract where it is necessary to give the contract business efficacy, that is, where the contract cannot operate without the implied term.¹³ Additionally an implied term must not conflict with the expressed terms of the contract.

¹¹ See Exhibit SA1

¹² See Exhibit SA2

¹³ Marks & Spencers v BNP Paribas [2016] 4 All ER 441; Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10 at paras 16-27.

[76] Counsel further submits that Bamboo Springs must contend with the limitation of liability clause contained at page 27 of the SBFSA, which provides that “*nothing in this limitation of liability section will operate, be construed or interpreted in any way to impose any obligation on us that we have not expressly agreed to assume in this Agreement or booklet.*” The Bank has, therefore, expressly excluded the operation of any duties and obligations not specifically included in the SBFSA.

Analysis

[77] The SBFSA which is some 85 pages in length appears to be a general document which governs small business products offered by the Bank. No other document setting out the specific product(s) offered to Bamboo Springs and any specific terms in relation to them has been pleaded or adduced in evidence. On page 6, it states that it contains the terms and conditions that apply to all business accounts and contains specific terms and conditions for use of its *Scotiabank* Banking Card and the Small Business Credit Services and Cash Management Services. Under the section entitled ‘*Operation of this Agreement*’ it states that the SBFSA as amended from time to time and the instructions given under it, constitute the entire agreement between the customer and the Bank regarding the business accounts and replaces all previous agreements, either written or oral, that the Bank has entered into with the customer for any of the services covered by the SBFSA.

[78] I have examined the law relating to the contractual effect of statements made prior to or at the time of entering a contract, as well as the parole evidence rule, entire agreement clauses, and implied terms. Although neither party has made any submissions on these matters, I considered them relevant to determine this issue. They are adeptly discussed in the **Law of Contract (Common Law Series)** from which I have noted the applicable principles.

[79] Concerning the contractual effect of statements made, the question is whether what was said became a term of the contract, i.e., whether the statement was a warranty which was intended to indicate a binding promise. No special form of words is needed to create a warranty, but it is well established that a statement can only be a warranty provided it

appear on the evidence to be so intended. The basic test is that of the intention of the parties, and it depends on their conduct, words and behavior, rather than on their thoughts. It is their intention, objectively ascertained, which must be deduced from the totality of the evidence.¹⁴

- [80] Determining factors would include the importance of a statement to the making of the contract, in the absence of which the other party may not have entered the contract; an indication that a statement by one party can be relied upon and need not be verified by the other in contrast to a situation where the statement was qualified; disparity of knowledge, expertise or experience between the parties when a statement of fact is in question, and more likely to be within the maker's own knowledge as opposed to a statement of opinion; the recording of contract terms in writing, omitting the contested statement, where it is found that the document was intended to record all the terms.¹⁵

- [81] Concerning the parole evidence rule it is generally expressed as follows:-

...
The type of situation to which it is relevant is that in which there is a written document³ containing contract terms and the question arises whether evidence can be given to show that the parties agreed to additional express terms which were not contained within the written document. It has been said that it 'is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written document'⁴ and it has been seen as 'a salutary rule which prevented great inconvenience and troublesome litigation in many instances'⁵. Although referred to as the 'parol evidence rule' it has extended beyond oral statements to written documents which were not part of the relevant document⁶, such as earlier proposed terms⁷, drafts⁸ or preliminary agreements.'¹⁶

- [82] It is said that the rule has been undermined by many exceptions such that it has been considered a presumption which is applicable only when it has first been determined that the terms of an agreement are wholly contained in a written document. Here, the Bank relies on a clause in the SBFSA which suggests that its terms are wholly contained in it,

¹⁴ Jason Chuah, Contract: The Law of Contract (Common Law Series) > Chapter 3 Contents > A Express Terms > Statements > Basic Approach

¹⁵ Jason Chuah, Contract: The Law of Contract (Common Law Series) > Chapter 3 Contents > A Express Terms > Statements > Factors

¹⁶ Jason Chuah, Contract: The Law of Contract (Common Law Series) > Chapter 3 Contents > A Express Terms > The Parol Evidence Rule > The Rule

thus making it appropriate to apply the parol evidence rule, which would have the effect of barring evidence of any additional terms.

[83] Concerning entire agreement clauses, case law establishes that:

“..... such clauses should simply be taken at face value. Their mere existence as terms serve to provide certainty that there is no need to consider the possibility of further terms beyond those stated in the identified contractual documents.....

Such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document.....

On the whole, the approach currently indicated, to entire agreement clauses and the content of the contract, emphasizes certainty at the expense of any consideration of the reality of the clause as a reflection of the transaction between the parties...”¹⁷

[84] Applying these principles to the facts of the present case, I am of the opinion that it is an expressed term of the SBFSA that the terms and conditions which governed the Chequing Account and cash management services provided to Bamboo Springs are as contained in the SBFSA and only the terms contained therein bind the parties. Any prior agreement or representation made during negotiation or discussion is essentially superseded by it. Effect must be given to the entire contract clause which operates to ensure certainty by limiting the contractual obligations of the parties to those stipulated in the contract. These circumstances are also apt for giving effect to the parol evidence rule which would operate to exclude any evidence of what was said in negotiations and discussions leading up to the SBFSA.

¹⁷ Jason Chuah, Contract: The Law of Contract (Common Law Series) > Chapter 3 Contents > B Implied Terms > Terms Implied in Fact

[85] There is limited evidence of the statements made and conduct of the parties leading up to the SBFSA to permit an objective determination on the true intention of the parties. All that is before the Court is what Martin and Septimus have said that Augustinas Andrew, the small business loans officer conveyed in two meetings prior to the signing of the SBFSA. The statements attributed to him, seem quite convenient to Bamboo Springs' case and are unlikely to have been said by any reasonably competent loans officer. Certainly, an absolute promise to convert a personal loan facility into a business loan, without any consideration of the circumstances at a future date would be quite unusual, particularly where Bamboo Springs had not yet been incorporated and would have had no business history, on which to make such promise. Similarly questionable is the absolute promise to grant more manageable terms if Bamboo Springs was having difficulty with repayment. Also fanciful is the alleged promise to provide Bamboo Springs with business and management advice for operating its business. Commercial banks are not usually in the business of advising customers on operating their private businesses. This would be a monumental task given the numerous small business customers operating in varying industries, and the extent of varying financial, human and other resources any business could require. In the circumstances, I do not attribute any weight to the alleged representations which Bamboo Springs have put forward as forming part of the contract.

[86] I am also of the view that none of the terms advanced by Bamboo Springs could be properly implied into the contract. It is the law that where express terms of a contract do not deal with all relevant aspects of performance, there may be scope for implying a term into the contract. There are three main types of express terms: a term implied by custom on the basis that the parties contracted against the background of relevant custom; a term implied in law because a contract is of a certain type; or a term implied in fact on the basis that the parties intended to include them. Of relevance to this case, would be terms implied in fact. Having examined the law¹⁸ on this issue I formed the view that none of the terms put forward by Bamboo Spring are necessary to make the contract workable or are in any

¹⁸ Jason Chuah, Contract: The Law of Contract (Common Law Series) > Chapter 3 Contents > A Express Terms > The Parol Evidence Rule > Entire Agreement Clauses.

way obvious such that it goes without saying that they must have been intended by both parties to have been included as terms of the SBFSA.

Issues 3, 4 and 5

Issue 3: Was Bamboo Springs issued with Current Account Number 61526 (“the Account”) under SBFSA and if yes, did the Bank unlawfully reverse the sum of \$1,500,000.00 from the Account thereby causing loss and damage to the company’s business?

Issue 4 : Is Bamboo Springs entitled to a refund of the sum which was reversed from the Account?

Issue 5: Did the Bank unlawfully refuse to process and/or clear three debit card transactions processed through the merchant and cash management services provided to Bamboo Springs by the Bank?

The Chequing Account

- [87] The parties do not dispute that the Chequing Account was granted pursuant to or was governed by the SBFSA. The point of contention was whether certain representations alleged to have been made by the Bank at the time of entering the SBFSA, but not recorded therein, formed part of the contractual obligations which bind the Bank. As these matters have already been addressed and resolved above, there is nothing further to be investigated in relation to the validity of this account. The SBFSA clearly states that it applies to all business accounts, and the Chequing Account was a business account granted to Bamboo Springs, by the Bank.

Reversal of \$1,500,000.00 from the Chequing Account and refusal to process three other card transactions

Bamboo Springs’ Submissions

- [88] Bamboo Spring’s contends that funds were released into its Chequing Account, which was confirmed by the Bank. These funds were seized by the Bank without a court order and

without any proof that the funds were stolen or otherwise illegitimate. Counsel submits that no evidence has been provided to support the Bank's position that the funds were reversed. Consequently, Bamboo Springs was thrust into debt and became financially crippled, being unable to meet its expenses. Bamboo Springs further submits that it has provided signed contracts, identification card and credit card details from the senders of the funds and the Bank has provided no evidence to challenge this. The Bank is in possession of the records of the transactions and has failed to produce these records in evidence, and has only stated that the amounts in three other card transactions were not transferred to it. The evidence is from third parties who were not involved in processing the transactions, is not the best evidence to be produced and is insufficient to refute Bamboo Spring's evidence. Counsel argues that whilst the Bank asserts that the funds were reversed to sender, it is well known that he who asserts must prove and the Bank has failed to prove this. It must then be presumed that the funds have not been reversed, that Bank remains in possession of these funds and Bamboo Springs should be refunded in full.

- [89] Bamboo Springs further says the Bank has failed to produce a signed application form or a signed agreement which shows that the company agreed to refrain from processing offline or card not present transactions. The Bank has therefore failed to prove that there was any breach of the SBFSA relating to the use of the card terminal.

The Bank's Submissions

- [90] The Bank submits that within weeks of installing the card terminal, Bamboo Springs purported to manually process a number of card transactions amounting to \$18,512,653.74, for which no cards were presented. This occurred over the course of a few days and those transactions were found to be highly unusual. The MSR&PS did not include an express request for card not present transactions. Further in the MSR&PS Bamboo Springs represented its average monthly credit and debit card transactions size to be \$9,098.00 and the transactions were well outside the operating parameters of what Bamboo Springs had represented to the Bank.

- [91] Bamboo Springs obtained the ability to process its customers debit and credit cards through the Bank's cash management services. These services are provided through the credit card associations (Visa and MasterCard) and third-party electronic payment service providers. In this case, the service provider utilized by the Bank was an entity known as First Data. The SBFSA, and in particular the Merchant Services Agreement and Addendum` provide that the cash management services are subject to the terms and conditions imposed by the credit card associations and the electronic payment service providers, who retain the authority to charge back or reverse transactions for a number of reasons, including that they are not satisfied that the transaction is a legitimate one. The reversal of funds from the Chequing Account was done by the electronic payment service provider First Data and not by the Bank. The SBFSA at page 18 specifically states that the Bank will not be liable for involuntary transfers, that is, transfers resulting from processes outside the Bank's control.
- [92] Counsel for the Bank further submits that even if the Bank had reversed the transaction on its own initiative such action would have been authorized under SBFSA, which states at page 19 under the rubric '*Your Payment Obligation to Us*' that the Bank can deduct from Bamboo Springs' business account: "*the amount credited to your business account if in our sole and absolute discretion such instruction is in any way whatsoever related to a fraudulent item, forged endorsement, or any item with an endorsement error, insufficient funds, account closed, funds not cleared, irregular signature, or an item for which we may incur a loss if the payment or credit thereof is not reversed*".
- [93] It is the Bank's submission that as the reversed transaction was highly suspicious in nature. Bamboo Springs was unable to satisfy the required source of funds, and the information provided did not match the funds received. In the circumstances the Bank had reasonable cause to believe that the transaction was unlawful. Further, the Bank was required to observe the anti-money laundering laws in Saint Lucia which impose liability for being part of an arrangement which a person ought to know facilitates the acquisition and retention of the proceeds of criminal conduct. The SBFSA at page 7 expressly made the operation of the Chequing Account subject to the anti-money laundering laws of Saint

Lucia and the Bank's internal anti-money laundering policies. Thus, Bamboo Springs is not entitled to a refund of the amount reversed as the reversal was lawful.

[94] The Bank further says that clearance of the three transactions which Bamboo Springs says were suspended by the Bank is subject to the approval of the credit card associations and the third-party electronic payment processors. The dropped transactions report adduced by the Bank shows that the three transactions in question were dropped by the electronic payment processor for exceeding the limits set on the account. Further, the transactions did not correspond with the agreements purporting to authorize them. Thus, the Bank did not fail to clear the three transactions, rather they were intercepted by the third-party processor before they were presented to the Bank for clearance.

[95] Additionally, the Bank submits that the relationship between a bank and customer is that of debtor and creditor. The funds credited to the customer's account, are not the customer's funds but rather a debt due from the Bank to the customer. The Bank can opt at any time to not increase the debt further by accessing more funds, particularly where the source of the funds is questionable. In any event, failure to clear the funds does not represent a loss of the funds. It simply means that the funds would have been retained by the transferor and could be transferred again to Bamboo Springs by any other means.

Analysis

[96] The question here is whether the Bank was entitled to, or acted lawfully by reversing \$1,500,000.00 which had been transferred into the Chequing Account, and refusing to clear the other three transactions. I have examined the SBFSA, and other documents relied upon by the Bank, and conclude that the Bank had the requisite authority to reverse and reject the transactions in the circumstances that it did.

[97] The BASA completed by Bamboo Springs and submitted to the Bank as part of its request for cash management services, contains what is described as a resolution which is essentially a set of terms that Bamboo Springs agreed to. One of the terms is that all instructions, agreements and documents which the customer signs, makes, draws,

accepts, endorses or completes and which are signed by the persons the customer has authorized from time to time are valid and are binding on the customer and the company seal is not required on any written document to make it valid or show consideration. The BASA further states that, by signing it, the customer's directors/officers/signing authorities certify to the Bank that the information recorded in the application is true and complete and that the customer acknowledges receipt and agrees to be bound by the terms and conditions in SBFSA. The BASA itself contains an agreement between the parties that makes all other documents signed and submitted by Bamboo Springs binding in relation to the information provided therein and makes Bamboo Springs liable for the veracity of such information.

- [98] Similarly, on the first page of the MSR&PS it states that by executing same, Bamboo Springs acknowledges receipt and agrees to be bound by the terms and conditions of the Scotiabank Merchant Services Agreement and Services Addendum and the SBFSA. It required Bamboo Springs to provide information about total annual sales, total annual card sales, total annual debit card sales, and the average credit card transaction size and average debit card transaction size which Bamboo Springs stated would be \$9,098.00 per month. The processing type selected by Bamboo Springs was EDC Swipe/Chip EVM. I note that none of the other options on the form were selected, such as paper/authorization only, card not present, internet merchant and recurring payments. The MSR&PS was duly signed by Martin and Septimus as directors of Bamboo Springs. It stipulates that it is itself an agreement between the parties. The information provided therein is therefore binding on Bamboo Springs, and formed the basis on which the Bank would have considered the application for cash management services. The Bank would therefore be entitled to rely on the information provided to set the parameters of the services to be rendered and Bamboo Springs' usage of the service outside of the set limits, would amount to a breach of that agreement. The fact that Bamboo Springs did not select card not present or any of the other processing types is to my mind an agreement that it would not be processing such transactions.

- [99] The terms and conditions of SBFSA are also relevant in so far as it sets out the parties' obligations towards each other. As it relates to the provision of cash management services, I note that in consonance with the BASA and the MSR&PS, the SBFSA states at page 45 that the customer will provide the relevant information in the MSR&PS and will be solely responsible for the accuracy and completeness of all information furnished to the Bank in the MSR&PS. It is also expressly stated at page 6 of SBFSA that the customer acknowledges that it is not carrying on or associated with activities that are improper, illegal or unlawful or that it is not connected with a business that the Bank may determine, in its sole discretion, is a restricted business. At pages 6-7 it informs that from time to time the Bank will adopt policies and procedures to address reporting, client identification and record keeping requirements under the anti-money laundering laws and regulations of Saint Lucia and the customer agrees to abide by and comply with all such policies and procedures as applicable and recognizes that such policies and procedures may be more rigorous than the statutory requirements. The customer further agrees not to use any business account, product or service or give any instruction for any unlawful, illegal or improper purpose, or otherwise in violation of applicable laws.
- [100] On page 9, it expressly states that the Bank may terminate any services it provides to the customer under the SBFSA without prior notice to the customer in any circumstance in which the Bank considers it reasonable to do so including without limitation, if the customer does not operate the business account in a satisfactory manner for example if the customer maintains an unauthorized overdrawn balance; the customer breaches any terms and conditions of the SBFSA; if the Bank has reasonable grounds to believe that the customer is using the business account or services for any illegal, unlawful, fraudulent or improper purpose; if the Bank has reasonable grounds to believe that the customer, for the purpose of opening its business account, knowingly made a material misrepresentation in the information provided to the Bank.
- [101] Then on page 18 under the section entitled '*Our Payment Obligations to You*', the SBFSA states that the customer acknowledges that nothing in it or in any other agreement between the customer and the Bank will prevent the Bank from restricting access to the customer's business account; refusing to release funds in the business account if the Bank

is required to do so or if in the Bank's opinion there is unusual, improper or suspicious activity in the business account; or closing the business account for any reason in the Bank's sole and complete discretion.

- [102] On page 19, the SBFSA states that the customer also agrees that the Bank can deduct from the business account, without prior notice to the customer, the amount credited to the customer's business account or paid to the customer pursuant to any instruction, regardless of whether or not the Bank has received settlement in respect of such instruction if in the Bank's sole and absolute discretion such instruction is in any way whatsoever related to a fraudulent item, forged endorsement, or an item with an endorsement error, insufficient funds, account closed, funds not cleared, irregular signature or an item for which the Bank may incur a loss if payment of credit thereof is not reversed together with all related costs associated with such a charge to the business account.
- [103] On page 20 under the section entitled '*We may use Agents and Transmission Services*' it advises that the Bank may use any entity, correspondent, third party or any funds transfer method or system in its complete discretion to process and settle the customers' instructions or any other transactions on its behalf. The SBFSA further states that any entity, correspondent, third party or any funds transfer method or system that provides such services to the customer and that the Bank uses is or are considered the customer's agents and not an agent of the Bank. The Bank is not liable for any act or omission of any entity, correspondent, third party or any funds transfer method or system for any loss, destruction, or delay in the funds transfer that is beyond the Bank's control.
- [104] On page 25 under the section entitled '*Limitation of Liability and Indemnity*', it is stated that the Bank is not liable for any loss damage or inconvenience the customer suffers in connection with the business account or the provision of any products or service or the refusal to provide any products or service except if it was caused by the bank's gross negligence or willful misconduct including the following specific matters: honoring or refusing to honor an instruction for any reason; any delay in completing or failing to provide a product or service for any reason even if this means the customer is unable to access

funds in the business account; any matter arising from the customer's actions or failure to perform its obligations properly under SBFSA even if the customer is not at fault; a forged, unauthorized or fraudulent use of services or instruction even if the customer or the Bank did or did not verify the signature or instruction or authorization.

[105] It is pellucid from the foregoing clauses contained in the SBFSA that Bamboo Springs agreed not to carry on or be associated with any activities that are fraudulent, improper, illegal or unlawful, the impropriety, illegality or unlawfulness of which are to be determined by the Bank in its sole discretion. The company also agreed to certain consequences which would arise from such a determination by the Bank, which could include the Bank terminating services or products granted, restricting access to the Chequing Account, refusing to release funds held in the Account, or deducting funds from the Account, which again is a decision the Bank would take in its sole discretion.

[106] The Bank also explicitly advised that third parties may be used in the provision of services to Bamboo Springs, which are the company's agents and not the Bank's. Thus, the act of the third-party processor in dropping or not accepting the transactions would have been the act of Bamboo Springs' agent. The Bank expressly excluded any liability for the actions of such third-party processor and therefore cannot be held liable for the three transactions being dropped. Bamboo Springs complains that the Bank has not proven that the action is that of a third-party processor and has not proven that the funds were returned to the sender. I disagree that the Bank is required to prove this. It is Bamboo Springs who has to prove its case that the funds have not been returned, and it has not brought any of the investors to provide such evidence or adduced their respective account records to show that the funds were never returned or that the funds ever left their account. It is sufficient that the Bank has produced the Dropped Transactions Record. Bamboo Springs is the claimant, and must prove its case.

[107] I accept and agree with the Bank's position that having regard to all the circumstances the transactions were highly unusual and suspicious. It was reasonable for the Bank to form the view that they were tainted with impropriety, illegality or unlawfulness and quite possibly fraudulent. The Bank produced a document entitled '*Bamboo Springs Dropped*

*Transaction_Dec 6-13_FDMS Report.txt*¹⁹ which showed 10 dropped transactions which were destined for the Chequing Account totaling \$18,512,653.74. The transactions ranged from \$1,120,000.00 to \$3,198,663.74 originating from 6 different credit card numbers within a week. The amount of these transactions is well outside even the total annual sales stated by Bamboo Springs, and moreover the monthly card transaction size of approximately \$9,098.00.

- [108] Bamboo Springs was given the opportunity to clarify the source of these funds and to prove the legality of the transactions. The Bank adduced the documents provided to it by Bamboo Springs in an attempt to do so. They comprised of two Declarations of Source of Funds in respect of two transactions dated 11th and 12th December 2017 (totaling \$1,449,000.00) from Ben Edward White for investment purposes as well as a document entitled Investors Agreement between Bamboo Springs and Ben Edward White who is identified as a shareholder and speaks to a 'funds download' in two tranches of €350,000.00 each to be used for investment purposes in consideration of which he is to hold 20% of the issued share capital, with Martin holding the remaining 80%. There is a Letter of Authorization dated 29th November 2017 to deduct from his account the sum of US\$1,000,000.00 for investment purposes via an online transaction from Visa card number 4427 4260 1859 3651. There is also a Letter of Intention from Nguyen Ton Van giving full authorization to debit his account in the sum of \$477,200.00 for investment purposes.
- [109] The Bank also adduced a credit Card Authorization Letter from Hunkar Aydin to use his credit card for services provided. The name of the service provider is omitted from the document and there is no indication of the sum to be charged. Additionally, there is an Investors Agreement between Martin and Hunkar Aydin dated 15th December 2017. He is identified as a shareholder and that agreement also speaks to a 'funds download' in two tranches of €350,000.00 to be used for investment purposes in consideration of which he is to hold 20% of the issued share capital, with Martin holding the remaining 80%. It is similar to the Investment Agreement provided in respect of Ben Edward White and would contradict each other in relation to shareholding.

¹⁹ See Exhibit SA3

- [110] In respect of Imran Farooq Ur-Rehman Khan, there is a Client Information Sheet and Letter of Authorization from him authorizing a transaction via Bamboo Springs in the sum of €500,000.00 in four tranches from card number 4570 1310 4001 1574. It states that interest is to be charged on the said sum, with Bamboo Springs being required to return the sum of \$650,000.00 within 72 months.
- [111] The Bank also produced three Force Sale Receipts²⁰ from Bamboo Springs, one for a transaction in the sum of \$350,000.00 from a credit card ending 1574 on 14th December 2017, another for a transaction in the sum of \$1,120,000.00 from a card ending 9002 on 12th December 2017 and another which is mostly illegible. Most significantly, the Bank produced a letter from Bamboo Springs dated 27th December 2017²¹, signed by Martin, and addressed "*To Whom It May Concern*" in which he indicates that a Frank Ramalho introduced the investor, acted on behalf of the investor and all transactions were conducted through him. The missive does not identify the investor that he refers to. Martin went on to state in the letter that he was misled by Frank Ramalho and only became aware of this when the legitimate investor contacted him directly. He then requested that all transactions be sent back, except for the €350,000.00, which amounted to \$1,120,000.00.
- [112] In cross examination, Martin testified that he was asked to write this letter by the Country Manager for the Bank in order to rectify the Chequing Account for use by Bamboo Springs. He stated that Frank Ramalho did not in fact mislead him and that those were the words he was instructed to use by the Manager. He says he wrote the letter to recover \$1,120,000.00 even though his claim is for \$1,500,000.00 because he was negotiating to have the Chequing Account unfrozen, and the funds released. He says he had nothing in writing between himself and the Manager, and their conversations were all via telephone. He further stated that he did not know any of the investors and relied on information from Frank Ramalho as the broker. He had no interest in obtaining information about them, or how they earned their money, and was solely interested in obtaining the investment funds facilitated through the broker. He claims that he did not know much about the very broker who arranged these investments. He says he was assisted by the Bank's representative in

²⁰ See Exhibit SA5

²¹ See Exhibit SA6

completing the MRS&PS and the BASA and was advised on the amounts to be stated therein in order to qualify for cash management services.

[113] In my view the documents provided to the Bank to confirm the source of funds and Martin's testimony are totally unsatisfactory in proving the legality of the transactions, as they are either incomplete or contradictory. They do not confirm that the funds are from a legitimate source, and should be regarded with suspicion. The letter from Martin is significant as it is, to my mind, an admission that the transactions and the persons involved, entailed some amount of impropriety and that Martin did not conduct the necessary due diligence before engaging these persons and accepting investments from them. Further, he instructed the Bank to reject all the transactions except one. I also reject his evidence that he wrote the letter on the instruction of the Bank's Country Manager. The Bank was therefore not only entitled to reverse the sum of \$1,500,000.00 and not accept the other three transactions, but also to report these transactions to the relevant authority under the **Money Laundering (Prevention) Act**²² ("the MLPA").

[114] The Bank is bound by the MLPA which Bamboo Springs was made aware of through the SBFSA and the Bank's policies which would have to be as strict as the requirements of the MLPA. Bamboo Springs further agreed that it would be bound by the MLPA, and any stricter policies imposed by the Bank to ensure compliance with the statute. I have highlighted a few of the provisions from the MLPA which impose duties upon the Bank in this regard and which justify the Bank's actions. Section 16 of the MLPA sets out the responsibility of a financial institution, which includes to develop and apply internal policies, procedures or controls to combat money laundering²³; report to the Authority any suspicious transaction relating to money laundering as soon as reasonably practicable²⁴; report to the Authority complex transactions or unusual transactions²⁵; report to the Authority where accounts and business relationships are terminated or closed because the financial institution is unable to satisfy itself as to the background and purpose of the

²² Cap 12.20 of the Laws of Saint Lucia

²³ Section 16(1)(g)

²⁴ Section 16(1)(k)

²⁵ Section 16(1)(m)

transaction²⁶. Further, the MLPA prohibits a financial institution that makes a report from disclosing the fact of its suspicion and the report to the person who is the subject or anyone else.²⁷

[115] A financial institution is also required to undertake customer due diligence measures when there is doubt about the veracity or adequacy of previously obtained customer identification data, when carrying out occasional transactions above \$25,000.00, when funds are transferred and do not contain complete originator information; or there is a suspicion of money laundering or terrorist financing. This involves taking measures to identify a customer and verify a customer's identity using reliable, independent source documents and information; obtaining information on the purpose and intended nature of the business relationship; and conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken to ensure that the transactions being conducted are consistent with the financial institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds. Where the financial institution is unable to comply with the customer due diligence requirements, it shall not perform the transaction; or shall terminate the business relationship; and shall consider making a suspicious transaction report in relation to the customer.²⁸

[116] I therefore conclude that the Bank did not act unlawfully in reversing the sum of \$1,500,000.00 and Bamboo Springs is not entitled to the return of this sum. The Bank also did not act unlawfully in not clearing the other three transactions complained of, if these actions were in fact taken by the Bank, as opposed to the third-party processor.

Issue 6: Is the Bank entitled to the sum claimed as overdraft on the Account together with interest?

Bamboo Springs' Submissions

²⁶ Section 16(1)(d)

²⁷ Section 16(3)

²⁸ Sections 17(1), (4) and (6)

- [117] Bamboo Springs submits that the Bank is not entitled to the sum claimed as overdraft as it has failed to prove that the company owes that debt. There were more than sufficient funds in the Account to cover the money spent, and no overdraft facility should have been established.

The Bank's Submissions

- [118] The Bank submits that the relationship between banker and customer is that of debtor and creditor. The sums standing to the credit of the customer are a debt owing by the banker to the customer. As a consequence, the customer is not usually entitled to withdraw more funds than stand to its credit. However, the banker may choose to make additional funds available to the customer in which case the customer becomes the debtor and owes a debt to the banker that is commonly known as an overdraft. An overdraft may be agreed, or it may arise where the banker decides to honor a payment instruction where the customer does not have sufficient funds standing to its credit. The SBFSA at page 19 expressly provides that an overdraft can be created at the option of the Bank and that Bamboo Springs agrees to repay the overdraft at their prevailing rate of interest.
- [119] The Bank made several payments on the instruction of Bamboo Springs based on the expectation that it had sufficient funds standing to its credit to satisfy the payments. However, with the reversal of the credit card transaction, the Account did not have sufficient funds and became overdrawn. Bamboo Springs has had the benefit of the money advanced by the Bank. As a result, there is a debt due and owing from Bamboo Springs to the Bank. The Bank is entitled to recover these sums by virtue of the SBFSA and the operation of law.

Analysis

- [120] When Martin was questioned about the transactions (cash withdrawals, a cheque, and a wire transfer) which had led to the Account being overdrawn, he admitted that the transactions were familiar to him, that they were authorized by him, and the funds were

used by Bamboo Springs. However when he did the transactions there was money in the Account and it was not a case of insufficient funds, as the Bank had cashed the cheque, and he was able to make the withdrawals and used the money for business purposes. He claims that he was not aware that the Account was overdrawn, as Bamboo Springs had no overdraft facility with the Bank, and he was not aware that the bank could permit an overdraft even where there was no formal agreement to do so.

[121] I accept the Bank's submissions on this issue. Having determined that the Bank was entitled to reverse the sum of \$1,500,000.00, the sums paid out of the account prior to reversal would have placed the Account in overdraft upon reversal. The sums paid out by the Bank on Bamboo Springs behalf are therefore recoverable, and this is expressly stipulated in the terms of the SBFSA itself.

[122] On page 19 of the SBFSA, it states that the customer agrees that the Bank can deduct from the business accounts any debt, liability, obligation or any amounts including fees, charges, costs, or expense that the customer owes to the Bank without prior notice to the customer as well as the amount credited to the customer's business account or paid to the customer pursuant to any instruction regardless of whether or not the Bank has received settlement in respect of such instruction if, in the Bank's sole and absolute discretion, such instruction is in any way whatsoever related to a fraudulent item, forged endorsement, or an item with an endorsement error, insufficient funds, account closed, funds not cleared, irregular signature or an item for which the Bank may incur a loss if payment of credit thereof is not reversed together with all related costs associated with such a charge to the business account. It further states that if any of the foregoing deductions create or increase an overdraft in the business account, the customer is still responsible for each charge, debt, or liability until the customer pays the amount owed in full. The customer promises to pay to the Bank immediately on request the amounts of any overdraft along with overdraft charges then currently due. Thus, it is an express term of SBFSA that the overdraft could be created in the manner in which it was and notwithstanding, Bamboo Springs would be liable for repayment of the sum.

[123] The law also permits the Bank to grant an overdraft facility at its discretion where the customer gives a payment instruction with insufficient funds in its account to cover the said instruction. If the Bank chooses to honour the payment, an overdraft is created on the Bank's usual terms and conditions as to overdrafts. The case of **Office of Fair-Trading v Abbey National Plc**²⁹, expresses the relevant principles:

"[64] Prima facie a customer is not in breach of his contract with his bank if he gives instructions to make a payment without having the necessary funds or facility to cover the payment (whether at the time when the instructions are given by the customer or when they are received by the bank or both). He is taken to be requesting overdraft facilities: Lloyds Bank plc v Independent Insurance Co Ltd [2000] QB 110 at p 118G, [1999] 2 WLR 986, [1999] 1 All ER (Comm) 8 per Waller LJ. The nature of the contractual rights and obligations that arise in these circumstances was authoritatively explained by Goff J in Barclays Bank v WJ Simms & Cooke (Southern) Ltd [1980] QB 677 at p 699 C-H, [1979] 3 All ER 522, [1980] 2 WLR 218 as follows:

'... If however a customer draws a cheque on the bank without funds in his account or agreed overdraft facilities sufficient to meet it, the cheque on presentation constitutes a request to the bank to provide overdraft facilities sufficient to meet the cheque. The bank has an option whether or not to comply with that request. If it declines to do so, it acts entirely within its rights and no legal consequences follow as between the bank and its customer. If however the bank pays the cheque, it accepts the request and the payment has the same legal consequences as if the payment had been made pursuant to previously agreed overdraft facilities; the payment is made within the bank's mandate, and in particular the bank is entitled to debit the customer's account, and the bank's payment discharges the customer's obligation to the payee on the cheque.'"

[124] Applying these principles, I conclude that the Bank is entitled to the sum claimed as being overdrawn on the Chequing Account.

Issue 7: Did the Bank have any fiduciary obligations to Bamboo Springs?

Bamboo Springs Submissions

[125] Counsel for Bamboo Springs argued that the Bank is an established institution with a strong base of financial resources and expertise. The Bank's representations and the

²⁹ [2008] EWHC 875 (Comm)

terms of the SBFSA placed it in the position of a financial advisor, in which Bamboo Springs reposed its trust and confidence, as Bamboo Springs was a new, inexperienced company with unqualified directors who lack business finance expertise. Martin went to the Bank in search of financial assistance and relying on the Bank's advice, he committed Bamboo Springs to a contract intended to be for the mutual benefit of both parties. The Bank represented itself and Bamboo Springs viewed the Bank as a partner equipped with the relevant expertise to guide it through the investment process; in particular, the process of securing financing on prudent and beneficial terms. Thus, the Bank owed Bamboo Springs fiduciary obligations. She relies on the authority of **Daly v Sydney Stock Exchange**³⁰ where it was held that a stockbroker acting as an 'investment adviser' was found to be a fiduciary to the extent of his advice. Counsel says it is also authority for the proposition that a fiduciary is under an obligation to disclose all relevant obligations to its trustee.

The Bank's Submissions

- [126] Counsel for the Bank relied on the Privy Council in **National Commercial Bank v Hew**³¹ to say that the relationship between a banker and its customer was not one of trust and confidence and, without more, does not give rise to fiduciary obligations. There the Privy Council noted that it was possible to create a relationship of trust and confidence where a bank specifically undertook to provide advice to a customer and did in fact provide that advice. Bamboo Springs seeks to rely on the following statement in the SBFSA as creating a fiduciary duty: ***“as your financial partner we know how to use our extensive industry knowledge and global expertise to help you navigate the ever-changing marketplace”***. A close reading of the statement does not indicate any specific undertaking by the Bank to advise Bamboo Springs, and the Bank never provided any credit facilities to Bamboo Springs. These were provided to third parties and cannot form the basis of a claim by Bamboo Springs against the Bank.

³⁰ (1986) 160 CLR 371

³¹ [2003] 63 WIR 183

[127] Counsel submitted that the Privy Council in **Hew** explained that courts have to be careful in imposing what amounts to fiduciary duties in commercial contracts. In doing so, the court runs the risk of frustrating commerce and terminating functional business practices. It was noted that the majority of cases giving rise to fiduciary duties arose in a situation where a customer of the bank was standing as surety in a transaction which was of no benefit to the customer. This is distinct from the present case where Bamboo Springs claims a fiduciary duty out of its relationship with the Bank on its own account. The situation does not fall within the accepted categories of fiduciary relationships. Care must be taken not to conflate a duty of care with the stricter fiduciary duty. While it is accepted that a bank owed certain duties of care to its customers, these duties are not fiduciary duties and do not support the creation of fiduciary duties.

[128] Counsel further says that contrary to Bamboo Springs' assertion, there was no legal partnership between the parties. A partnership is defined by sections 21 and 22 of the Commercial Code as "the relation which subsists between persons carrying on a business with a view of profit." The parties were not carrying on business in common and the Bank does not share in the profits, and bears none of the risks involved in Bamboo Springs' bottled water business. The absence of a partnership in accordance with article 21 of the Commercial Code means that the Bank does not owe Bamboo Springs any of the fiduciary duties owed by one partner to the other.

Analysis

[129] The Commercial Code in sections 21 and 22 respectively, sets out the definition of a partnership and the rules for determining whether a partnership exists, and this is the starting point:

"21. Definition of partnership

Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."

[130] None of the rules in section 22 are applicable to the present case as there is no joint or common property between Bamboo Springs and the Bank, no sharing of gross returns and

no receipt of a share of profits by the Bank in Bamboo Springs' business. It is clear that the parties were not carrying on business in common with each other with a view to profit. The Bank had absolutely no part in Bamboo Springs' business, and it has not given any indication that it expected or intended the Bank to share in its profits. The Bank was carrying on usual banking business offering financial products to its customers, of which Bamboo Springs was one. Therefore, no fiduciary duty can arise on the basis of partnership.

- [131] The case of **Bristol and West Building Society v Mothew**³² limits the circumstances in which a fiduciary relationship arises and cautions against imposition of fiduciary obligations in unwarranted cases, lest the utility of the obligation be defeated. In that case where a solicitor who had represented both parties to a transaction, overlooked material information, provided incorrect advice and was therefore found to have been negligent, it was held that this did not necessarily correlate to breach of fiduciary duty. Not every breach of duty amounts to breach of fiduciary duty, even where there is a fiduciary relationship as in that case, as between solicitor and client. In **Mothew**, Millet L.J. defined a fiduciary in this way:

*"...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..."*³³

- [132] The text **Underhill and Hayton: Law of Trusts and Trustees** provides a useful analysis of the situations in which fiduciary obligations have been said to arise, which aptly represents the law. In summary it is said that fiduciary duties are imposed in trustee-beneficiary relationships or may arise as a matter of law as a result of the parties relationship and may also be fact-based where duties are imposed on an ad-hoc basis according to the circumstances of the case. The text goes on to state that"

'.....a person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a

³² 1998 Ch.1

³³ At page 18

responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest.'.... Again, it often happens that one commercial party has significant power to affect the financial interests of another, but the courts rarely find that commercial relationships are fiduciary, and will only do so when there is strong evidence that one has agreed to act in the interests of the other². This reflects the courts' general attitude that they should not introduce uncertainty into commercial dealings by the 'over-ready use of equitable concepts such as fiduciary obligations'³, and that arm's-length commercial parties should be entitled (even encouraged) to act in their own self-interest, negotiate the best possible deal for themselves, and take whatever profit-making opportunities come their way⁴.'³⁴

- [133] The statement which Bamboo Springs relies on in the SBFSA does not create or indicate the existence of any partnership in Bamboo Springs' business. The industry to which the statement relates is the finance industry. Further, I accept that the statement does not indicate that the Bank undertook to act as financial advisor to and for the benefit of Bamboo Springs. I therefore conclude that the statement could not and does not give rise to any fiduciary duty that may be imposed where one party undertakes to act for and on behalf of, and to the benefit of the other. The statement could and should be more reasonably interpreted to mean that the Bank has an array of products and services designed to meet the varying business financial needs of customers, which the Bank may offer to customers based on those needs. Much more would have to be said, to constitute an undertaking by the Bank to assume the role of Bamboo Springs' financial advisor. The circumstances do not reveal any feature which elevated the relationship above that of the normal relationship of banker and customer, which is that of debtor and creditor. It is founded in contract and does not ordinarily without more, give rise to fiduciary obligations.

³⁴ Underhill and Hayton: Law of Trusts and Trustees - Division Three Trusts Imposed by Law - Chapter 9 Constructive Trusts - ARTICLE 27 Constructive trusts imposed on the profits of a breach of fiduciary duty - Paragraph 1 - The circumstances in which fiduciary duties are imposed

Issue 8: Was the Bank obligated to instruct Bamboo Springs of the need to have a financial expert present and to seek independent legal advice in relation to its transactions with the Bank?

- [134] It is clear that the arguments advanced by Bamboo Springs in relation to these matters concerned the loan, which I have already determined was not granted to the company. Bamboo Springs says the Bank exerted actual undue influence by virtue of its advantageous and financially superior position over the company and its directors, and having reposed trust and confidence in the Bank, the Bank took advantage of its superior position by luring the company into committing to the loan.
- [135] In response Counsel for the Bank submitted that in **NCB v Hew**, it was stated that there is no requirement generally for customers to obtain independent legal advice in relation to regular banking activities as the relationship is an arm's length commercial relationship and not a relationship of trust and confidence. Although the court noted that a duty may arise where a bank has given advice in relation to borrowing, the mere approval of a loan facility is not the provision of advice. In this case, no loan facility was given to Bamboo Springs and therefore no advice was given. Therefore, there was no requirement for independent legal advice.
- [136] Counsel stated that the Court must give consideration to commercial reality and practicality. To require independent legal advice in relation to every banking product would slow the pace of commerce immeasurably. There are no special considerations that arise in relation to the relationship between the Bank and Bamboo Springs to justify the imposition of this novel requirement. The Bank was not obligated to require that Bamboo Springs seek independent legal advice before opening the Chequing Account or applying for cash management services.
- [137] As I have already determined that no credit card or loan facility was made to the company, the arguments advanced by Bamboo Springs may only be considered in the context of the Account and the cash management services provided by the Bank. Bamboo Springs has not pleaded any improper or unfair action by the Bank or its officers that occurred at the time of entering the SBFSA, or obtaining the Chequing Account, or applying for the cash

management services, that could amount to coercing its directors to enter into these transactions. No evidence has been presented to show express conduct that would have overborne their will or amount to cheating or overreaching. Much more would have been required to establish a relationship of trust and confidence for the purpose of raising a presumption that the Bank abused the relationship and enticed Bamboo Springs to procure the two products which were granted to it, and that the company did not procure these services freely and voluntarily.

[138] It has not been shown that the two business products offered were somehow outside of normal banking practice, or that the Bank obtained any benefit, and more so an unfair advantage by so granting. As to any obligation on the Bank to advise Bamboo Springs to obtain independent legal advice, the authorities suggest that the presumption of undue influence may be rebutted by proving that the complainant had the benefit of independent legal advice before the transaction, but not that it is a general requirement otherwise.³⁵

[139] As there were no circumstances here, which would give rise to a presumption of undue influence, but simply an ordinary arm's length transaction between two independent parties, there was no obligation on the Bank to advise Bamboo Springs to obtain independent legal or financial advice.

Negligence

[140] Bamboo Springs pleaded particulars of negligence in relation to a loan made to the company. It has been determined that this was not the case, there was no loan granted to the company, and the issue only needs to be assessed in relation to the two business products offered. The cases establish that there is generally no duty upon a bank to advise a customer on the nature and effect of a proposed transaction unless the Bank undertook to provide advice. I have already concluded that the Bank did not undertake to provide financial advice to Bamboo Springs, no partnership was established and the

³⁵ See Hilda Elisabeth Stoutt et al v FirstBank Puerto Rico BVIHCVAP2010/016 (delivered 13th February 2012, unreported) at paragraph 35 and 36.

statement in the SBFSA does not have this effect. The only duty the Bank had was to carry out its contractual obligations to Bamboo Springs with reasonable care and skill³⁶.

[141] I agree that these were arm's length transactions between two business entities. The fact that the Bank may have had more financial knowledge and experience is inconsequential, as this will be the case with many or most persons who approach a bank for products and services. More importantly, the Chequing Account and merchant and cash management services provided, were solely for Bamboo Springs benefit. It was not a third party to the transaction who stood to lose, while gaining no benefit, and there was nothing unusual about the provision of these services.

[142] In the **Clement Lawrence and Cleopatra Ballantyne v First Saint Vincent Bank Ltd**³⁷ the three elements of the test to be applied in imposing a duty were stated thus: (1) reasonable foreseeability of damage; (2) a relationship characterized by proximity or neighbourhood between the wrongdoer and the person damaged; and (3) that the law would consider it fair, just and reasonable to impose a duty of care. The possibility of damage in providing the two services granted to Bamboo Springs was not reasonably foreseeable, and in all the circumstances it would not be just, fair or reasonable to impose such duty.

[143] To impose such duty would produce unnecessarily onerous obligations on the Bank, in providing these basic business services. I therefore conclude that no duty of care ought to be imposed on the Bank, as was done in **Clement Lawrence**.

Conclusion

[144] Based on all the foregoing, it is my considered opinion that Bamboo Springs' claim fails in entirety. There was no credit card facility of loan granted to the company. On the evidence the loan was granted to Septimus, Antonia and Christina. There is no evidence of any Pre-

³⁶ See *Mason and Another v Godiva Mortgages Ltd* [2018] EWHC 3227 (QB); *NCB v Hew* at paragraphs 13-22.

³⁷ SVGHCVP2014/0016 (24th February 2020) at paragraphs 17 – 18 of the judgment.

Incorporation Agreement in relation to the mortgage loan. Bamboo Springs was provided with business products, namely the Chequing Account and the merchant and cash management services which included a terminal for credit and debit card payments to the company. The Bank could not be found liable for fraud, undue influence, negligence, breach of contract or breach of fiduciary duty in relation to the Chequing Account or the merchant and cash management services offered to Bamboo Springs. The Bank did not act unlawfully in reversing the sum of \$1,500,000.00 from the Account and Bamboo Springs is not entitled to the return of the said sum. The Bank did not act unlawfully in not clearing the three other transactions complained of, rather, the Bank acted in accordance with the express terms of the SBFSA and in compliance with its obligations under the MLPA. On the other hand, Bamboo Springs, in conducting transactions outside the limits and conditions imposed by its contract with the Bank, and without providing satisfactory declarations of source of funds, and otherwise satisfying of the legality of the transactions, breached its agreement with the Bank. The Bank is therefore entitled to the overdraft sum claimed.

[145] Accordingly, I make the following orders:

1. The claim is dismissed.
2. Judgment is entered for the defendant on its counterclaim, for the sum of \$234,388.68 with interest on the principal balance of \$179,600.16 at the rate of 19% per annum from 24th September 2019 until the debt is paid in full.
3. Cost is awarded to the defendant to be assessed, if not agreed within 21 days.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar