

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**ANTIGUA AND BARBUDA**

**ANUHCVP2018/0021**

**BETWEEN:**

**SHAISTA TRADING COMPANY LIMITED d.b.a. DIAMOND REPUBLIC**

Appellant/Counter Respondent

**and**

**FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LTD.**

Respondent/Counter Appellant

**Before:**

The Hon. Dame Janice M. Pereira, DBE  
The Hon. Mde. Gertel Thom  
The Hon. Mr. Paul Webster

Chief Justice  
Justice of Appeal  
Justice of Appeal [Ag.]

**Appearances:**

Mr. Hugh Marshall and Ms. Chantal Thomas for the Appellant/Counter Respondent  
Mr. James Bristol, QC with him, Ms. Eleanor Solomon for the Respondent/Counter Appellant

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2021: February 12;  
April 26.

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*Civil appeal — Approach of appellate court to factual findings of a trial judge — Whether chargeback to appellant properly effected for amount representing purchase price of diamond ring in accordance with Merchant Services Agreement — Whether respondent had justification for effecting chargeback on the basis of misdescription of ring — Whether respondent on the evidence had satisfied the prerequisites for effecting chargeback under Merchant Services Agreement — Whether Court of Appeal ought properly to consider allegations of unjust enrichment and fraud not pleaded in the court below*

Shaista Trading Company Limited (“Shaista”) operates a jewellery store in the name of Diamond Republic. Shaista and First Caribbean International Bank (Barbados) Ltd (“FirstCaribbean” or “the Bank”) entered into a Merchant Services Agreement (“the Merchant Agreement”) which allowed Shaista to accept credit and/or debit card payments from its

customers and to use First Caribbean's point of sale terminal to request authorisation of these transactions. First Caribbean in turn, has a contractual relationship with financial services corporations such as MasterCard, enabling it to process these transactions. That relationship is governed by the Card Association Rules and Regulations which are incorporated into the Merchant Agreement by reference.

On 6<sup>th</sup> November 2013, Mr. Cyrus Chenoy ("Mr. Chenoy") purchased an 18-karat white gold diamond ring from Diamond Republic for US\$4,500.00 using a MasterCard credit card. He received an invoice and an appraisal (the "First Appraisal") of the ring which stated the estimated value of the ring as US\$7,950.00. A week later, Mr. Chenoy emailed Diamond Republic informing them that he had the ring inspected and requested further information about the diamond. He also informed that the invoice erroneously described the ring as 14 karats and requested a new invoice. Mr. Chenoy then requested details on the laser inscribed identification number, colour and clarity of the diamond. Subsequently, a representative of Diamond Republic supplied Mr. Chenoy with a corrected invoice and a second appraisal (the "Second Appraisal") which stated that the ring was of a different clarity and valued at US\$9,950.00. Mr. Chenoy subsequently emailed Diamond Republic asserting that they had indicated that if he obtained an independent appraisal valuing the ring lower than US\$9,000 - US\$10,000, they would accept the return of the ring and issue a refund. Mr. Chenoy later emailed Diamond Republic attaching an independent appraisal which valued the ring at US\$6,595.00. Diamond Republic refuted Mr. Chenoy's assertions and refused to issue a refund since the value of the ring as stated in the independent appraisal was not lower than the purchase price.

Consequently, Mr. Chenoy submitted a MasterCard Expedited Billing Resolution Process Form ("the Dispute Form") under reason code 4853 of the MasterCard Chargeback Guide ("reason code 4853") to his bank, requesting a chargeback of the purchase price of the ring on the basis that it was not as described. The Dispute Form was submitted to First Caribbean. FirstCaribbean then informed Diamond Republic of the chargeback claim and advised that if it wished to rebut the claim, it should do so by a certain date. Diamond Republic sought to rebut the chargeback claim by stating that Mr. Chenoy should have been satisfied with the purchase and there was no reason to issue a refund. First Caribbean found that Diamond Republic's response was inadequate as it failed to address the concerns raised by Mr. Chenoy in the Dispute Form. Accordingly, FirstCaribbean effected the chargeback. Following the chargeback, Diamond Republic by email requested that Mr. Chenoy return the ring by mail. There was no response to this email by Mr. Chenoy and the ring was never returned. First Caribbean also made 'good faith' attempts on behalf of Shaista to make contact with Mr. Chenoy but was unsuccessful.

Subsequently, Shaista filed a claim in the court below against First Caribbean contending that First Caribbean breached the Merchant Agreement by effecting the chargeback with full knowledge (or ought to have known) that the ring was not returned or made available to Shaista and sought payment in the sum of US\$4,500.00. The learned judge dismissed Shaista's claim on the basis that it failed to address Mr. Chenoy's claims in the Dispute Form.

Shaista appealed the decision of the learned judge. Shaista contended that the learned judge erred in failing to find that there was no material misdescription of the ring as asserted

in the chargeback, and in failing to consider whether First Caribbean had satisfied the prerequisites under reason code 4853. Shaista also argued that the learned judge, in effect, allowed it to be deprived of the ring and the purchase price, contrary to the principles of unjust enrichment and allowed a fraud to be perpetrated. First Caribbean filed a counter notice of appeal asserting, among other things, that Shaista had misstated the prerequisites for a chargeback by adding to the phrase “or made the goods available” the words “for pick up”, thereby deviating from its pleaded case. The broad issue which arose for this Court’s determination is whether the learned judge erred in concluding that FirstCaribbean had not breached the Merchant Agreement by effecting the chargeback to Shaista.

**Held:** allowing the appeal and setting aside the judgment of the learned judge; dismissing the counter appeal; and making the orders set out at paragraph 57 of the judgment, that:

1. The purpose of pleadings is to make clear the general nature of the case. Pleadings need not be extensive as much of the specific detail of a party’s case will be set out in the witness statements. In this case, Shaista’s pleadings were sufficient to make the general nature of its case obvious to First Caribbean. The inclusion of the words ‘for pick up’ has not transformed the general nature of Shaista’s pleaded case - which is that, First Caribbean breached the Merchant Agreement by effecting a chargeback in circumstances where the ring was neither returned by Mr. Chenoy nor made available to be returned to Shaista. There is no material or qualitative difference between ‘whether the goods were made available’ and whether the goods were made available ‘for pick up’. In any event, both expressions are used in the Merchant Agreement under its section 3.24 and in a witness statement filed on behalf of Shaista. There is therefore no basis for contending that Shaista deviated from its pleaded case.

**Eastern Caribbean Flour Mills Limited v Ormiston Ken Boyea** St. Vincent and the Grenadines Civil Appeal No. 12 of 2006 (delivered 16<sup>th</sup> July 2007, unreported) followed; **Saint Lucia Motor and General Insurance Co. Ltd v Peterson Modeste** Saint Lucia HCVAP2009/008 (delivered 11<sup>th</sup> January 2010, unreported) followed; **McPhilemy v Times Newspapers Ltd.** [1993] 3 All ER 775 applied.

2. Based on the Merchant Agreement, for First Caribbean to have justification for effecting the chargeback, it ought to have been satisfied that the ring did not conform to Diamond Republic’s description. On the evidence, First Caribbean did in fact have justification for issuing the chargeback as the ring did not conform to the description. This evidence, which included the style code inscription on the ring and the style code reflected on the invoice as well as the First Appraisal and the independent appraisal, raised discrepancies as to the description of the ring and its estimated appraised value. These in turn raise the question as to what ring, in terms of quality, Mr. Chenoy had in fact purchased. Whether this misdescription was material or minor is immaterial as no qualification of the expression is provided in the Merchant Agreement.
3. Notwithstanding that FirstCaribbean had justification for effecting the chargeback, the Bank was required to go further. It ought to have also satisfied itself that the

prerequisites for effecting the chargeback listed in reason code 4853 had been met, including that Mr. Chenoy returned the goods or made the goods available to Shaista for pick up. There is no doubt, given the clear and unequivocal evidence, that the ring had not been made available by Mr. Chenoy for pick up. The email correspondence between Mr. Chenoy and Diamond Republic, the Dispute Form and the oral evidence of the witnesses do not demonstrate that information was provided by Mr. Chenoy as to any dates or location for making the ring available for pick up, or otherwise. It was not open to the learned judge to infer that because the reason for the chargeback had been made out that the Bank had followed the prescribed procedures, without further determining whether the Bank had satisfied the prerequisites for effecting the chargeback. The learned judge's conclusion that First Caribbean had properly effected the chargeback to Shaista is therefore 'plainly wrong'. Accordingly, FirstCaribbean breached the Merchant Agreement in effecting the chargeback to Shaista.

**Watt (or Thomas) v Thomas** [1947] 1 All ER 582 applied; **Ming Siu Hung and others v J F Ming Inc and another** [2021] UKPC 1 applied; **Piglowska v Piglowski** [1999] 1 WLR 1360 applied; **Biogen Inc v Medeva Plc** [1997] R.P.C. 1 applied; **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 applied; **Kathryn Ma Wai Fong v Wong Kie Yik et al** BVIHCMAP2018/0001 and BVIHCMAP2018/0002 (delivered 27<sup>th</sup> March 2019, unreported) followed; **Yates Associates Construction Company Ltd v Blue Sand Investments Limited** BVIHCVAP2015/0004 (delivered 5<sup>th</sup> October 2018, unreported) followed.

4. As a general rule, allegations which were not pleaded or canvassed in the court below cannot be raised for the first time before the Court of Appeal. This is particularly so where the allegations sought to be raised concern misconduct as there is a greater need for particulars to be given which explain the basis for these allegations. In this case, the allegations of fraud and unjust enrichment were neither raised in Shaista's pleadings in the court below nor canvassed before the learned judge. Therefore, these allegations cannot properly be considered by this Court.

**Saint Lucia Motor and General Insurance Co. Ltd v Peterson Modeste** Saint Lucia HCVAP2009/008 (delivered 11<sup>th</sup> January 2010, unreported) followed.

## JUDGMENT

- [1] **PEREIRA CJ:** This is an appeal against the judgment of the learned judge dated 10<sup>th</sup> May 2018 dismissing a claim for breach of contract made by the appellant, Shaista Trading Company Limited d.b.a. Diamond Republic (“Shaista”), against the respondent, First Caribbean International Bank (Barbados) Ltd. (“First Caribbean” or “the Bank”). This appeal primarily concerns the issue of whether FirstCaribbean had properly effected what is known as a ‘chargeback’ to Shaista for an amount representing the purchase price of a diamond ring in accordance with the terms of a Merchant Services Agreement (“the Merchant Agreement”) in place between Shaista and First Caribbean. First Caribbean resists the appeal and has filed a counter notice of appeal, asserting additional grounds on which it contends that the judgment of the learned judge ought to be upheld.

### **Background**

- [2] The relevant factual background is largely undisputed. Shaista is a company registered in Antigua and Barbuda. It is engaged in the business of operating a jewellery store in the name of Diamond Republic which is located at 100 Heritage Quay Complex, a popular tourist shopping area. Any reference to Diamond Republic throughout this judgment is intended to be a reference to Shaista.
- [3] First Caribbean is a commercial bank operating in Antigua and Barbuda. Shaista is a customer of First Caribbean’s branch situated at Old Parham Road in the parish of Saint John, Antigua.
- [4] On 25<sup>th</sup> March 2010, Shaista and First Caribbean entered into a Merchant Agreement. The purpose of the Merchant Agreement is to allow Shaista, as merchant, to accept credit and/or debit card payment from its customers, to use First Caribbean’s point of sale terminal to request authorisation of credit and debit card transactions, and to deposit credit card sales drafts and/or debit services into its account with First Caribbean. First Caribbean in turn, has a contractual relationship with financial services corporations such as MasterCard, enabling it to process

these transactions. That relationship is governed by the Card Association Rules and Regulations which are incorporated into the Merchant Agreement by reference.

- [5] Under the Merchant Agreement, First Caribbean may effect a chargeback to Shaista which is a deduction from any payments due to Shaista or a charge against its bank account of the total amount of any sales drafts. This may be effected for a variety of reasons as outlined in the MasterCard Chargeback Guide which is part of the Card Association Rules and Regulations.
- [6] On 6<sup>th</sup> November 2013, an American cruise ship passenger, Mr. Cyrus Chenoy (“Mr. Chenoy”) and his wife, Mrs. Fiona Chenoy, visited Diamond Republic. Mr. Chenoy purchased an 18-karat white gold diamond ring for the sum of US\$4,500.00 using a MasterCard credit card issued by Citibank in the United States of America. Mr. Chenoy received an invoice at the time of the purchase. The invoice described the ring as a 14-karat white gold diamond ring for the sum US\$4,500.00. It also stated that all sales were final and that there would be no refunds, save for manufacturing defects. At the time of the purchase, Mr. Chenoy also received an appraisal (the “First Appraisal”) of the ring. The First Appraisal described the ring as an 18-karat white gold ring with princess cut and round brilliant diamonds. It stated that the appraised estimated value of the ring was the current market value of US\$7,950.00.
- [7] A week later, on 13<sup>th</sup> November 2013, Mr. Chenoy, who by then had returned to the United States of America, contacted Diamond Republic via email. He informed that he had the ring inspected by a jeweler and requested further information about the laser inscribed identification number on the diamond. Mr. Chenoy requested, among other information, details on the colour and clarity of the diamond and a copy of the manufacturer’s certificate of the diamond. He also informed Diamond Republic that the invoice described the ring as 14 karats when it was in fact 18 karats and requested a new invoice.

- [8] On 20<sup>th</sup> November 2013, Mr. Chenoy sent another email to Diamond Republic requesting that his jeweller be provided with the dimension and depth of the diamond in the ring as well as contact information for the source of the diamond. On the same date, a representative of Diamond Republic, Mr. Kishor Rajpal ("Mr. Rajpal"), emailed Mr. Chenoy attaching a corrected invoice. A second appraisal ("the Second Appraisal") was also forwarded to Mr. Chenoy. The Second Appraisal described the ring as follows, "1 white gold ring stamped 18 kt. The ring contains 6 round brilliant cut diamonds and 3 princess cut diamond. The approximate total weight ... 1.71ct, ... The approximate colour and clarity ... are VS-2-S11 F-G" and gave an appraised value of US\$9,950.00.
- [9] Mr. Rajpal again emailed Mr. Chenoy on 21<sup>st</sup> November 2013. He informed Mr. Chenoy that he had spoken with Mr. Chenoy's jeweller about the laser inscribed identification number on the diamond, among other things, and that he was unable to provide the original manufacturer's certificate for the diamond because the company had gone out of business.
- [10] On 22<sup>nd</sup> November 2013, Mr. Chenoy replied to Mr. Rajpal's email. He informed that he was awaiting the appraisal value and certificate for the ring from his jeweller, Mr. James V. Joliff ("Mr. Joliff"). Mr. Chenoy also stated that he recalled Mr. Rajpal mentioning when he initially purchased the ring and during subsequent telephone conversations that, if he got an independent appraisal done in the United States and the ring's value was appraised for a lower value than Diamond Republic's appraised value of 'US\$9,000.00 - US\$10,000.00', Diamond Republic would accept return of the ring and refund Mr. Chenoy the purchase price.
- [11] Subsequently, on 24<sup>th</sup> November 2013, Mr. Chenoy sent Mr. Rajpal an email attaching the independent appraisal of Mr. Joliff. Mr. Joliff's findings upon inspection of the ring were that it was an 18-karat white gold ring with a round brilliant cut diamond accent setting area and tapered measuring 1.77 mm in width by 1.16 mm

thick at the lowest point of the shank. Mr. Joliff appraised the estimated value of the ring at US\$6,595.00.

- [12] On 26<sup>th</sup> November 2013, Mr. Rajpal responded to Mr. & Mrs. Chenoy by email. He refuted Mr. Chenoy's claims and informed that he in fact stated that if the appraised value proved to be less than US\$4,500.00, Diamond Republic would issue a refund. Mr. Rajpal then stated that since Mr. Joliff's appraised value of the ring was not lower than US\$4,500.00, Diamond Republic would not issue a refund.
- [13] Upon receipt of Mr. Rajpal's email, Mr. Chenoy contacted Citibank and informed them of a dispute. He caused a MasterCard Expedited Billing Resolution Process Form ("the Dispute Form") to be submitted under reason code 4853 of the MasterCard Chargeback Guide. In the Dispute Form, Mr. Chenoy requested a chargeback of the purchase price of the ring on the basis that the ring was not as described.
- [14] The Dispute Form was submitted to First Caribbean. On 19<sup>th</sup> December 2013, First Caribbean brought the Dispute Form to Diamond Republic's attention along with a letter which stated that Mr. Chenoy had requested a chargeback of the purchase price of the ring on the basis that the ring was not as described. It was accompanied by: a copy of Diamond Republic's invoice; copies of the First and Second appraisals provided by Diamond Republic; a copy of Mr. Joliff's appraisal report; and a copy of the email correspondence dated 26<sup>th</sup> November 2013 from Mr. Rajpal to Mr. and Mrs. Chenoy. First Caribbean advised Diamond Republic that its bank account may be debited for the amount of US\$4,500.00, ostensibly representing the purchase price of the ring paid by Mr. Chenoy. The Bank also advised Diamond Republic that, if it wished to rebut the claim to the chargeback, it should do so by 1<sup>st</sup> January 2014.
- [15] On 30<sup>th</sup> December 2013, Diamond Republic, by email, sought to rebut the chargeback claim. The rebuttal stated that as Mr. Chenoy had the ring



independently appraised for US\$6,595.00 but had purchased the ring for only US\$4,500.00, he should have been satisfied with purchase and there was no reason to issue a refund.

[16] In early January 2014, Ms. Petra Griffith ("Ms. Griffith"), a chargeback dispute analyst employed by First Caribbean, began investigating Mr. Chenoy's claim to the chargeback. Ms. Griffith reviewed the conditions under reason code 4853 of the MasterCard Chargeback Guide. She considered the statements made in the Dispute Form where Mr. Chenoy contended: that he had attempted to resolve the matter many times from the date of purchase; that he called and emailed Diamond Republic requesting a return of the ring based on misrepresentations and Diamond Republic refused to cooperate to resolve the dispute; that when it became apparent that Diamond Republic would not remedy the situation, he requested a refund and wished to return the ring; however, Diamond Republic by email rejected the offer to return the ring for a refund; that the ring described on the invoice did not correspond with the ring purchased by him, and; that after the purchase, Diamond Republic provided a Second Appraisal for the ring which was different from the First Appraisal.

[17] Based on the documentation, Ms. Griffith determined that the dispute was valid. She considered that Diamond Republic's response failed to address, much less rebut, the chargeback claim based on misdescription of the ring. Having formed the view that the rebuttal was inadequate, on 8<sup>th</sup> January 2014, Ms. Griffith sent an email to Diamond Republic advising that its response failed to address the concerns raised by Mr. Chenoy in the Dispute Form. As a consequence, on 10<sup>th</sup> January 2014, she caused Diamond Republic's bank account to be debited in the sum of US\$4,500.00, thereby effecting the chargeback.

[18] On 14<sup>th</sup> January 2014, after the chargeback was effected, Mr. Rajpal sent an email to Mr. Chenoy which was subsequently forwarded to Mr. Lennox Thomas, First Caribbean's Merchant Service Representative. In that email, Mr. Rajpal provided the details of a FedEx account and a mailing address in New York, United States of

America for returning the ring. He also asked Mr. Chenoy to return the ring within the next 5 days and to have the ring insured before mailing it. On 20<sup>th</sup> January 2014, Mr. Rajpal sent another email. Despite the email being addressed to Mr. Chenoy, it was in fact sent to Diamond Republic in error. There is no evidence tending to show that this error was corrected and this further email was sent to Mr. Chenoy. Mr. Chenoy did not respond to Mr. Rajpal's email of 14<sup>th</sup> January 2014 or any subsequent emails.

- [19] Mr. Chenoy having not returned the ring, First Caribbean made in their words 'good faith attempts without prejudice' between 10<sup>th</sup> March 2014 and 18<sup>th</sup> July 2014 on behalf of Diamond Republic to get into contact with him. However, First Caribbean was unable to contact Mr. Chenoy.
- [20] On 20<sup>th</sup> March 2015, as a consequence of the chargeback being effected and the ring having not been returned, Shaista filed a claim in the court below against First Caribbean contending that First Caribbean breached the Merchant Agreement by effecting the chargeback with full knowledge (or ought to have known) that the ring was not returned or made available to Shaista and sought payment in the sum of US\$4,500.00 or the equivalent of EC\$12,150.00, damages, costs and interest.
- [21] The learned judge, having considered the Merchant Agreement, the email correspondence between Mr. Chenoy and Diamond Republic as well as the oral evidence of Ms. Griffith, dismissed Shaista's claim and awarded costs to First Caribbean. The learned judge considered that First Caribbean had followed the prescribed procedures under the Merchant Agreement for effecting a chargeback. She stated that First Caribbean had submitted the Dispute Form to Shaista requesting that Shaista provide reasons why the chargeback should not be effected. The learned judge observed that Shaista's rebuttal focused on the fact that Mr. Chenoy got value for his money as he paid less than the appraised estimated value stated in Mr. Joliff's appraisal, but failed to address Mr. Chenoy's claims in the

Dispute Form relating to the differences in the appraisals. She therefore concluded that Shaista's claim could not prevail.

### **The Appeal**

[22] Shaista, being dissatisfied with the judgment of the learned judge, appealed to this Court advancing four grounds of appeal. By those grounds, Shaista complains that the learned judge erred in failing to consider whether First Caribbean had satisfied the prerequisites under reason code 4853 of the MasterCard Chargeback Guide before effecting the chargeback to Shaista. Shaista further contends that the learned judge erred in failing to find that there was no material misdescription as asserted in the chargeback. There is a further complaint that the learned judge erred in, in effect, allowing Shaista to be deprived of the ring and at the same time permitting its account to be debited for the price of the ring, contrary to the principle of unjust enrichment. This was however not pleaded in the court below. Shaista also advances that the learned judge erred in allowing a fraud to be perpetrated on it by the loss of both the ring and the purchase price; however, this was also not pleaded and appears to have been raised belatedly in Shaista's written submissions on this appeal. These complaints can be conveniently stated as the singular issue of whether the learned judge erred in concluding that First Caribbean had not breached the Merchant Agreement by effecting the chargeback to Shaista.

[23] In response to Shaista's appeal, First Caribbean filed a counter notice of appeal, advancing four additional grounds on which the judgment of the learned judge should be affirmed. I will address the counter appeal later in the judgment.

### **Submissions on behalf of Shaista**

[24] Learned counsel for Shaista, Mr. Hugh Marshall, first argued that the learned judge erred in concluding that FirstCaribbean had satisfied the prerequisites for effecting a chargeback to Shaista, in the face of clear evidence to the contrary. Mr. Marshall

referred the Court to reason code 4853 of the MasterCard Chargeback Guide, particularly the section titled 'Prerequisites to Process a 4853 Chargeback' which stated, as a precondition for effecting a chargeback, that 'the cardholder returned the goods or informed the merchant the goods were available for pick up'. Learned counsel stated that the evidence before the learned judge, including the email correspondence between Mr. Chenoy and Shaista, the Dispute Form and the evidence of Ms. Griffith, demonstrate that the ring was not made physically available at a particular date and location for pick up as was required under reason code 4853 of the MasterCard Chargeback Guide. He therefore submitted that the prerequisites for effecting a chargeback were not satisfied and that it was not open to the learned judge to conclude that the chargeback had been properly effected.

[25] Mr. Marshall then argued that the learned judge erred in failing to conclude that there was no material misdescription as asserted in the chargeback. Learned counsel referred the Court to the evidence of Ms. Griffith as contained in the transcript of the proceedings in the court below. He stated that Ms. Griffith, upon being asked whether she could identify anything in relation to the description of the ring on the Dispute Form which is inconsistent with the invoice issued to Mr. Chenoy, was unable to identify any inconsistencies.<sup>1</sup> Mr. Marshall submitted that on the evidence there was no material misdescription of the ring and therefore First Caribbean had no justification or basis for effecting the chargeback.

[26] Mr. Marshall further submitted that the learned judge, in concluding that the chargeback had been properly effected, in effect allowed Mr. Chenoy to perpetuate fraud on Shaista by the loss of both the ring and the purchase price. He referred the Court to **Lazarus Estates Ltd. v Beasley**<sup>2</sup> and **Dubai Islamic Bank PISC v Paymentech Merchant Services Incorporated**<sup>3</sup> in support of his submission. Learned counsel also argued that the learned judge erred in allowing Shaista to be deprived of the ring and the purchase price contrary to the principle of unjust

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<sup>1</sup> See p. 117 of the Transcript of Proceedings, Record of Appeal, Bundle 2.

<sup>2</sup> [1956] 1 All E.R. 341.

<sup>3</sup> [2000] EWHC 228.

enrichment. Mr. Marshall referred to the decision of this Court in **Featherwood Trading Limited v Fraunteld Management Limited**<sup>4</sup> in support of his submission.

### **Submissions on behalf of First Caribbean**

- [27] Learned Queen's Counsel on behalf of First Caribbean, Mr. James Bristol, contended that First Caribbean had justification for effecting the chargeback to Shaista on the basis that the ring was not as described. He referred the Court to the witness statement of Shaista's director, Mr. Asmatulah Jan, which he stated demonstrated that the ring was not as described. Mr. Bristol also argued that Shaista's submissions in relation to fraud and unjust enrichment were not part of its pleaded case in the court below and cannot now be raised on appeal. He maintained that the allegations of fraud and unjust enrichment were not advanced against First Caribbean but against Mr. Chenoy who is not a party to the proceedings and therefore ought not to be considered by this Court.
- [28] In countering Shaista's submission that the prerequisites had not been satisfied, Mr. Bristol stated that Shaista had misstated the prerequisites for a chargeback by adding to the phrase "or made the goods available" the words "for pick up", thereby deviating from its pleaded case as set out in its statement of claim and in its answer to the request for further information. He submitted that Shaista should be confined to its pleaded case that 'the ring was not made available'.
- [29] Mr. Bristol contended that evidence relied on by First Caribbean in considering the chargeback and the evidence before the learned judge, in particular the email correspondence dated 26<sup>th</sup> November 2013 between Mr. Chenoy and Shaista, suggested that Mr. Chenoy had 'made the ring available' but Shaista refused to accept return of the item. He submitted that it is not open to Shaista to now contend that the ring was not made available, having refused Mr. Chenoy's initial request for a refund and only offered to take back the ring and refund the purchase price in its

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<sup>4</sup> (2013) 85 WIR 308.

email correspondence dated 14<sup>th</sup> January 2014, that is, after the chargeback had been effected by the Bank.

- [30] Learned Queen's Counsel further submitted that Shaista's rebuttal to Mr. Chenoy's complaints in the Dispute Form did not effectively address those complaints and therefore that these were in effect admitted. Mr. Bristol stated that Shaista failed to avail itself of the contractual dispute resolution procedure by rebutting Mr. Chenoy's complaints in the Dispute Form, and ought not to be permitted to raise matters which ought to have been raised by way of a rebuttal to the chargeback claim. He maintained that the evidence before the learned judge supported the conclusion that the chargeback had been properly effected and the judge's decision ought not to be disturbed.

### **Discussion**

**Issue - Whether the learned judge erred in concluding that First Caribbean had not breached the Merchant Agreement by effecting the chargeback to Shaista**

- [31] Before addressing the issue, it is necessary to make plain that Shaista's appeal primarily seeks to challenge several findings of fact made by the learned judge. The principles governing appellate intervention with respect to the review of findings of fact, the evaluations of those facts and the inferences drawn from them by a trial judge are well established. Indeed, there is a strong stream of jurisprudence which has been consistently applied, having been first laid down in **Watt (or Thomas) v Thomas**.<sup>5</sup> These authorities emphasise the reluctance of appellate courts to interfere with a judge's findings of primary fact, particularly when these findings depend largely upon the trial judge's assessment of witnesses he or she has seen and heard give evidence. As Lord Briggs stated quite recently in the decision of the Privy Council in **Ming Siu Hung and others v J F Ming Inc and another**.<sup>6</sup>

"It is necessary...to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which

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<sup>5</sup> [1947] 1 All ER 582.

<sup>6</sup> [2021] UKPC 1 at para. 20.

should normally follow from the judicial determination of the parties' dispute is not rendered ineffective by undue appellate activism. The general reasons for appellate restraint are well summarised by Lewison LJ in his well-known judgment in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, para 114, as follows:

'114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC 1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325; *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court..."

[32] Lord Hoffman, in the decision of the House of Lords in ***Piglowska v Piglowski***,<sup>7</sup> referring to ***Biogen Inc v Medeva Plc***,<sup>8</sup> explained the rationale underpinning the need for appellate caution when reviewing findings of primary fact and the evaluation of those facts made by a trial judge. At page 1372 of the judgment, His Lordship stated:

"The appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc v Medeva Plc* [1997] R.P.C.1, 45:

'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance...of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation'."

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<sup>7</sup> [1999] 1 WLR 1360 at p.1372.

<sup>8</sup> [1997] R.P.C. 1 at p. 45.

[33] Lord Hodge, in the judgment of the Board in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**,<sup>9</sup> cautioned that the Court of Appeal ought first to be satisfied that the trial judge was ‘plainly wrong’ before interfering with the judge’s findings of primary fact or his or her evaluation of facts. His Lordship explained that the issue of whether the trial judge was ‘plainly wrong’ directs the appellate court to consider whether it was permissible for the trial judge to make the findings of fact which he or she did in the face of the evidence as a whole. In other words, the court is required to identify a mistake in the judge’s evaluation of the evidence that is sufficiently material to undermine his or her conclusions. Indeed, a quintessential example of circumstances in which the appellate court ought properly to interfere with the trial judge’s findings of fact is where the judge failed to properly analyse the entirety of the evidence.

[34] The above guidance has been consistently applied in a number of decisions of this Court such as in **Kathryn Ma Wai Fong v Wong Kie Yik et al**<sup>10</sup> as well as in **Yates Associates Construction Company Ltd v Blue Sand Investments Limited**<sup>11</sup> where Blenman JA stated the principle as follows:

“The Court of Appeal should apply restraint not only to the judge’s findings of fact but also to the evaluation of those facts and the inferences drawn from them. It is axiomatic that the critical question which is before this Court is whether there was evidence before the learned trial judge from which she could properly have reached the conclusions that she did or whether, on the evidence, the reliability of which it was for her to assess, she was plainly wrong.”

[35] Bearing in mind the approach of the Court of Appeal to findings of fact as propounded by the authorities referred to above, it is perhaps useful to restate the issue for determination as whether the learned judge’s finding that First Caribbean had properly effected the chargeback to Shaista was plainly wrong having regard to the entirety of the evidence in the court below.

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<sup>9</sup> [2014] UKPC 21.

<sup>10</sup> BVIHCMAP2018/0001 and BVIHCMAP2018/0002 (delivered 27<sup>th</sup> March 2019, unreported).

<sup>11</sup> BVIHCVAP2015/0004 (delivered 5<sup>th</sup> October 2018, unreported).



[36] It is first necessary, however, to address Mr. Bristol's submission that Shaista has deviated from its pleaded case by misstating in its submissions the prerequisites for a chargeback under reason code 4853, by adding to the phrase "or made the goods available" the words "for pick up", and that this Court should instead consider the prerequisite as being whether 'the goods were made available' to Shaista. While much has been made by learned Queen's Counsel of the fact that the words 'for pick up' did not form part of Shaista's pleaded case in the court below, it is well established that the purpose of pleadings is to make clear the general nature of the case. As Barrow JA stated in **Eastern Caribbean Flour Mills Limited v Ormiston Ken Boyea**:<sup>12</sup>

"The pleader makes allegations of facts in his pleadings. Those alleged facts are the case for the party...The 'pleadings should make clear the general nature of the case,' in Lord Woolf's words which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleadings must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand mean pleading with an extensive amount of particulars, because witness statements are intended to serve the requirements of providing details or particulars of the pleaders' case."

[37] Further support for this proposition can be found in the judgment of the Court of Appeal in **Saint Lucia Motor and General Insurance Co. Ltd v Peterson Modeste**.<sup>13</sup> At paragraph 19 of the judgment, this Court cited with approval the modern approach stated by Lord Woolf MR in **McPhilemy v Times Newspapers Ltd**:<sup>14</sup>

"The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statement will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by

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<sup>12</sup> St. Vincent and the Grenadines Civil Appeal No. 12 of 2006 (delivered 16<sup>th</sup> July 2007, unreported) at para. 43.

<sup>13</sup> Saint Lucia HCVAP2009/008 (delivered 11<sup>th</sup> January 2010, unreported).

<sup>14</sup> [1993] 3 All ER 775 at pp.792-793.

each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.”

[38] It is clear from the authorities that what is required from the pleadings is sufficient detail to make the general nature of a party’s case clear to the other side. Indeed, pleadings serve the useful purpose of delineating the boundaries of the case being advanced so as to avoid a party being ambushed. However, pleadings need not be extensive. Much of the specific detail of a party’s case will be set out in the witness statements which are exchanged in advance of the trial.

[39] In this case, Shaista’s pleadings, particularly its Answer to the Request for Further Information, particularises the breach of the Merchant Agreement as ‘[First Caribbean] carried out a chargeback with full knowledge that the goods were not returned, nor made available to [Shaista], or ought to have known that the goods were not returned, nor made available to [Shaista]’. While it is true that the words ‘for pick up’ were not stated in Shaista’s pleadings, in my view, the pleadings were sufficient to make the general nature of Shaista’s case obvious to First Caribbean. Put another way, the inclusion of the words ‘for pick up’ has not somehow transformed the general nature of Shaista’s pleaded case - which is that, First Caribbean breached the Merchant Agreement by effecting a chargeback in circumstances where the ring was not returned by Mr. Chenoy nor was made available to be returned to Shaista. Indeed, to my mind, there is no material or qualitative difference between ‘whether the goods were made available’ and ‘whether the goods were made available for pick up’ in the circumstances of this case. Moreover, both expressions are used in the Merchant Agreement under its section 3.24.1 the material portions of which are set out later below.

[40] In any event, as articulated in **Eastern Caribbean Flour Mills** and **McPhilemy**, witness statements are intended to provide further details of the pleader’s case. In

the witness statement of Mr. Rajpal<sup>15</sup> filed on behalf of Shaista, Mr. Rajpal refers to reason code 4853 and states as one of the three prerequisites for effecting a chargeback that 'the cardholder returned the goods or informed the merchant the goods were available for pick up'. Mr. Rajpal then states that he did not believe the above requirements were met as 'Mr. Chenoy did not return the ring. Moreover, [Mr. Chenoy] did not make any attempts to return the ring or make it available for collection'. This contention having been plainly set out in the witness statement of Mr. Rajpal, there is no doubt that First Caribbean would have been cognizant of the case it was required to meet in the court below from the moment that witness statements were exchanged. In my view, if this Court were to accept Mr. Bristol's submission on this point, it would be adopting too sterile an approach to the question of sufficiency of the pleadings. Accordingly, I find no merit in Mr. Bristol's submission.

[41] I will now address whether the learned judge's finding that First Caribbean had properly effected the chargeback to Shaista was open to her on the evidence in the court below.

[42] It is undisputed that reason code 4853 which is incorporated into the Merchant Agreement governs the basis or justification on which a chargeback may be effected. One such basis or justification is where the goods purchased by a customer cardholder did not conform to their description. Section 3.24.1 of the Merchant Agreement provides as follows:

"3.24.1 Proper Use of Message Code 4853

Customers may use message code 4853 if the cardholder engaged in the transaction and returned goods or services (or made them available) to the merchant for any of the following reasons. (my emphasis)

- Goods and Services Did Not Conform to their Description. The goods or services did not conform to the merchant's description, or the goods were of different quality, quantity, color, size or health of a plant or animal. For example: -

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<sup>15</sup> See paras. 33-34 of the Witness Statement of Rajpal Kishor, Record of Appeal Bundle 2 at pp.55-56.

...

A cardholder states that the specified color, size or quantity is not as describe as detailed by the merchant.

...

#### **Prerequisites to Process a 4853 chargeback**

- The cardholder engaged in the transaction.
- The cardholder returned the goods or informed the merchant the goods were available for pick up. (my emphasis)
- The cardholder contacted the merchant to resolve the dispute and the merchant refused to adjust the price, repair or replace the goods or other things of value, or issue credit.
- The documentation must provide sufficient detail to enable all parties to understand the nature of the dispute.

Waiting Time Prior to Processing a 4853 Chargeback. To allow the merchant an opportunity to process a credit, the issuer must wait 15 calendar days prior to charging back for 4853 from the following dates:

- The date goods were returned, or
- The date services were cancelled.

The only exception to the 15-day period is if the waiting period would exceed the 120 calendar day chargeback time frame.”

Reason code 4853 in essence provides that for First Caribbean to have justification for effecting the chargeback, it ought to have satisfied itself that the ring did not conform to Diamond Republic’s description. But its duty to the merchant under the Merchant Agreement does not end there. Before processing or effecting the chargeback by debiting Shaista’s bank account, the Bank was also required to satisfy itself that the prerequisites listed in reason code 4853 had been met, including that Mr. Chenoy returned the goods or made the goods available to Shaista for pick up. Before delving into the question as to whether the Bank, on the evidence, had discharged this further duty, I will first address Mr. Marshall’s complaint that the learned judge failed to find that there was no material misdescription, in so far as this complaint relates to the Bank’s justification for effecting the chargeback.

[43] This is a short point. Having considered the evidence before the learned judge, it was clearly open to the judge to conclude that First Caribbean had justification for issuing the chargeback for the reason that the ring did not conform to the description. Whether the misdescription was material or minor is immaterial as no qualification of the expression is provided in the Merchant Agreement. In the Dispute Form, Mr. Chenoy stated that he had received an invoice and an appraisal of the ring at the time of purchase and identified several discrepancies between the description of the ring as reflected in the invoice and in the appraisal. These include the style code inscription on the ring which did not correspond with the style code reflected on the invoice. Furthermore, after the purchase, Diamond Republic provided Mr. Chenoy with the Second Appraisal. The Second Appraisal stated that the diamond in the ring was of a different clarity from the First Appraisal provided at the time of the purchase. Mr. Chenoy then had the ring independently appraised by Mr. Joliff. Mr. Joliff's findings as to the clarity of the diamond were different from the clarity stated in the Second Appraisal. Diamond Republic's appraised estimated value of the ring as stated in the Second Appraisal is US\$9,950.00 and Mr. Joliff's appraised estimated value is US\$6,595.00. These discrepancies, in my view, raise the question as to what ring in terms of quality Mr. Chenoy had in fact purchased.

[44] Although Mr. Marshall sought to persuade this Court by referring to the evidence of Ms. Griffith, who was unable to identify any inconsistencies in the description of the ring between the invoice and the Dispute Form,<sup>16</sup> it was clearly open to the learned judge to prefer and draw inferences from the documentary evidence referred to in the paragraph above which suggested misdescription, over the evidence of Ms. Griffith. In my view therefore, there is no basis for Shaista's contention that the learned judge erred in failing to find that there was no material misdescription of the ring. Accordingly, FirstCaribbean had justification for issuing the chargeback to Shaista.

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<sup>16</sup> See n.1.

[45] As stated previously, however, this is not the end of the matter. I now return to the question of the Bank's further duty to discharge the prerequisites specifically, whether the evidence adduced was sufficient on which it could reasonably be concluded that Mr. Chenoy had either returned the ring, or had made it available for pick up. It is common ground between the parties that Mr. Chenoy had not returned the ring to Shaista. Thus, the nub of this issue concerns whether, on the evidence before the court below, the ring was made available for pick up or collection by Shaista. Having considered the evidence, it is pellucid that it was not open to the learned judge to find that Mr. Chenoy had made the ring available to Shaista for pick up.

[46] While Mr. Bristol sought to persuade the Court that as Shaista had provided no adequate response by way of rebuttal to the chargeback it cannot now contend that the Bank improperly effected the chargeback, it does not automatically follow that Shaista's insufficient rebuttal absolves the Bank from being satisfied that the prerequisites had been met before effecting the chargeback by debiting Shaista's bank account. At the time of effecting the chargeback, the Bank had considered the Dispute Form, documentary material, as well as certain email correspondence between Mr. Chenoy and Shaista. However, to my mind, it does not appear that the Bank made the decision to effect the chargeback primarily on the basis of the documentary material but rather on the basis of Shaista's insufficient rebuttal. Having examined the Dispute Form, there is nothing which suggests that Mr. Chenoy had made any attempts to make the ring available to Shaista for pick up at a particular date and location. Further, during cross-examination Ms. Griffith, the chargeback agent on behalf of the Bank, accepted that on the documentation provided and reviewed by her, there was no information as to any dates or location provided by Mr. Chenoy for satisfying the prerequisite of having made the ring available for pick up by Shaista.

[47] Additionally, there is nothing contained in the series of email correspondence between Mr. Chenoy and Shaista which suggests that Mr. Chenoy had made the

ring physically available for pick up notwithstanding the prior discussions between Mr. Rajpal and Mr. Chenoy about a refund. Mr. Bristol's submission that the email correspondence between Shaista and Mr. Chenoy dated 26<sup>th</sup> November 2013 indicates that Mr. Chenoy had made the ring available for pick up but Shaista refused to accept the item, is flawed. This, in my view, is materially different from a request being made to return the goods in the context of the chargeback process being effected by the Bank pursuant to the terms of the Merchant Agreement. Indeed, the email dated 26<sup>th</sup> November 2013 provided no details of the date and place that the ring was to be made available to Shaista for pick up and was sent prior to the Bank entering the picture and the dispute resolution procedure under the Merchant Agreement, as between the Bank and its customer merchant, becoming engaged. What is more compelling is that, in the face of Shaista's email dated 14<sup>th</sup> January 2014, which provided Mr. Chenoy with details of a FedEx account and a mailing address for returning the ring, albeit after the chargeback had been effected by the Bank, there was no response from Mr. Chenoy.

[48] In my view, considering the email correspondence cumulatively, it was not open to the learned judge to find that the Bank had followed the prescribed procedures and conclude that because the merchant had failed to satisfactorily address the claims in the Dispute Form that its claim, without more, failed. In my view, she was required to go further and address the specific issue of whether, on the evidence, it was reasonable to conclude that the Bank had discharged its duty under the prerequisites.

[49] In short, it was not open to the learned judge, having concluded (in my view rightly) that the Bank had a justifiable basis for effecting a chargeback, to treat this conclusion as being also a fulfillment of the prerequisites as she appears to have done. She was required to undertake a two-stage analysis: firstly, to determine whether the basis or justification for the chargeback had been established. If the answer to that question was "yes" then secondly, she was required to examine and evaluate what evidence there was for the purpose of determining whether the

prerequisites for acting on the justification established in the first stage had been satisfied. I have been unable to find in the judgment where the learned judge addressed her mind to this second stage of the process in her analysis. It is on this issue that in my view the learned judge fell into error. A finding in respect of the first stage does not automatically lead to a similar finding or provide an answer in respect of the second stage.

[50] I am accordingly driven to the conclusion that she made no finding at all on this crucial second stage of the process although it was necessary to do so if Shaista's claim were to fail. Had she done so, she ought reasonably to have concluded, based on the state of the documentary evidence and the answers given in oral testimony on behalf of the Bank, that the Bank had not fulfilled the prerequisites which required being satisfied objectively, that the ring had been made available for pick up by Shaista before effecting the chargeback. The evidence before the court on this aspect was unsatisfactory for the purpose of absolving the Bank of this duty under the Merchant Agreement. I am in no doubt that the learned judge failed to properly analyse and evaluate the documentary evidence before her on this aspect of the matter.

[51] Furthermore, the learned judge's conclusion, although failing to address this specific issue, runs counter to the oral evidence of the main witness for First Caribbean, Ms. Griffith, who during cross-examination,<sup>17</sup> stated that although she had believed at the time of processing the chargeback that the ring had been made available for pick up, there was in fact no occasion on which the ring was made available. This evidence remained uncontroverted.

[52] In my view, given the clear and unequivocal evidence, the reasonable inference to be drawn is inescapable which is that the ring had not been made available for pick up. It was not open to the learned judge to infer as she seems to have done, that because the basis or reason for the chargeback had been made out that the Bank

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<sup>17</sup> See p. 109 of the Transcript of Proceedings, Record of Appeal Bundle 2.



had followed the prescribed procedures as she found at paragraph 39 of her judgment, without further determining whether the Bank had in fact satisfied or complied with the preconditions termed “prerequisites” before effecting the chargeback. Accordingly, the learned judge’s finding that First Caribbean had properly effected the chargeback to Shaista is plainly wrong. It follows that the chargeback had been effected by First Caribbean in breach of the Merchant Agreement, the prerequisites for processing the chargeback having not been satisfied.

- [53] This brings me to address Shaista’s allegations of fraud and unjust enrichment. As alluded to earlier, these are short points. It is well-settled that, as a general rule, allegations which were neither pleaded nor canvassed in the court below cannot be raised for the first time before the Court of Appeal.<sup>18</sup> This is particularly so where the allegations sought to be raised concern misconduct. In **Saint Lucia Motor and General Insurance Co. Ltd**, this Court observed that generally the more serious the allegations of misconduct, the greater is the need for particulars to be given which explain the basis for the allegations. At paragraph 16 of the judgment, this Court stated that:

“Notwithstanding the fact that CPR does not contain a specific rule with regard to the manner in which allegations of fraud are to be pleaded, the principle that where an allegation of fraud is made particulars must be given, is a long and well settled principle which does not require restating in CPR for giving it force. In *East Caribbean Flour Mills Limited v Ormiston Ken Boyea*:

‘...as a general rule; the more serious the allegation of misconduct, the greater is the need for particulars to be given which explains the basis for the allegations. This is especially so where the allegation being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud’.”

- [54] In my view, the allegations of fraud and unjust enrichment, having neither been raised in Shaista’s pleadings nor canvassed before the learned judge, cannot properly be considered on this appeal. It is worth mentioning here that the allegation

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<sup>18</sup> See: *Bennette Roach v National Development Foundation Montserrat Limited* MNIHCVAP2018/0002 (delivered 28<sup>th</sup> January 2021, unreported) at para. 16; *Mary Makhoul v Cicely Foster and Anor* ANUHCVP2009/0014 (delivered 23<sup>rd</sup> February 2015, unreported) at para. 39.

of fraud had not even been foreshadowed in Shaista's notice of appeal, but was raised for the first time in Shaista's written submissions. In my considered view, such an approach to advancing one's case is ill-advised and ought not to be followed.

- [55] In light of the foregoing, it is clear that the learned judge erred in concluding that the Bank had not breached the Merchant Agreement by effecting the chargeback to Shaista. As a result, she erred in dismissing Shaista's claim. I would accordingly, allow Shaista's appeal.

### **The Counter Appeal**

- [56] During the hearing of the appeal, it became apparent that learned Queen's Counsel Mr. Bristol argued the points raised in First Caribbean's counter notice of appeal in his response to Shaista's appeal. Therefore, it is unnecessary to consider the matters raised therein separately, these having already been taken into account on Shaista's appeal. Suffice it to state that, in view of the proposed disposition on Shaista's appeal, First Caribbean's counter appeal must be dismissed.

### **Conclusion**

- [57] For the reasons outlined above, I would make the following orders:
- (1) Shaista's appeal against the judgment of the learned judge dated 10<sup>th</sup> May 2018 is allowed and the judgment is set aside.
  - (2) First Caribbean shall, within 14 days of the date of this judgment, credit Shaista's bank account with the sum of US\$4,500.00 or the equivalent sum in Eastern Caribbean dollars, representing the purchase price of the ring and damages for breach of the Merchant Agreement.

(3) First Caribbean shall pay prescribed costs to Shaista in the court below and such costs on the appeal to be no more than two-thirds of the prescribed costs in the court below.

(4) First Caribbean's counter appeal against the judgment of the learned judge is dismissed; and

(5) First Caribbean shall pay prescribed costs to Shaista on the counter appeal being no more than two-thirds of the prescribed costs in the court below.

[58] I am grateful to learned counsel for their submissions which were of much assistance.

I concur  
**Gertel Thom**  
Justice of Appeal

I concur.  
**Paul Webster**  
Justice of Appeal [Ag.]

**By the Court**

**Chief Registrar**