

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

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2016/0005

BETWEEN:

RBTT BANK CARIBBEAN LIMITED

Appellant/Respondent

and

**[1] JOHN NICHOLSON
[2] GARNET WILLIAMS**

Respondents/Counter-Appellants

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel
The Hon. Mr. Gerard St. C. Farara

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

Appearances:

Mr. Stanley John, QC with him, Mr. Akin John for the Appellant/Respondent
Mr. Richard Williams and Ms. Danielle France for the Respondents/Counter-Appellants

2021: January 12;
March 22.

Civil appeal – Banking law – Banker and customer relationship – Negligence – Quincecare duty of care - Breach of duty of care owed by bank – Whether the learned judge erred in finding the bank negligent – Contributory negligence – Customer’s duty to take reasonable precautions to prevent ATM card from being stolen – Whether learned judge erred in finding the respondents contributorily negligent – Special damages – Whether learned judge erred by reducing the damages claimed by respondents on the basis of contributory negligence – Causation – Whether damage suffered would still have occurred if bank had not breached its duty of care

In 2001, Mr. John Nicholson (“Mr. Nicholson”) opened a chequing account with RBTT Bank Caribbean Limited (“RBTT” or “the bank”). He later made Mr. Garnet Williams (“Mr. Williams”) a signatory to that account and gave him access to the account.

Subsequently, Mr. Nicholson gave Mr. Williams the ATM card ("the card") and the corresponding PIN written on a piece of paper. In July 2007, Mr. Williams noted that the card had gone missing and reported this to RBTT and requested that RBTT place a stop on the card. At the time of making the report, no money had been missing from the account. However, in November 2007, it was discovered that \$139,560.00 had been withdrawn from Mr. Nicholson's account by the estranged wife of Mr. Williams. On some occasions, the daily withdrawals by her far exceeded the daily limits that were imposed by the bank and this was without the bank's detection. The evidence revealed that all of the withdrawals had been made by her subsequent to the date on which Mr. Williams had made the report to RBTT of the card being misplaced. RBTT denied that it was asked by Mr. Williams to take any specific action in relation to the card.

Messrs. Nicholson and Williams subsequently filed a claim alleging breach of duty in negligence against RBTT and sought special damages in the sum of \$139,560.00, interest at the rate of 6% per annum, damages and costs. RBTT denied the claim and counterclaimed against Mr. Nicholson for breach of contract, and against both Mr. Nicholson and Mr. Williams for negligence, seeking the same sum of \$139,560.00 as special damages, plus general damages and costs. The learned judge upon assessing the evidence, found that both the claim and counterclaim were made out and held that all parties had contributed equally to Messrs. Nicholson and Williams' loss. Consequently, the learned judge ordered that RBTT re-credit Mr. Nicholson's bank account a reduced sum of \$69,780.00, being half the sum of the \$139,560.00 in damages claimed, along with prescribed costs and interest at the rate of 6% on the sum awarded.

Dissatisfied with the decision of the learned judge, RBTT appealed and Messrs. Nicholson and Williams counter-appealed to this Court, on several grounds, which have been crystallised into three issues for this Court's determination, namely: (i) whether the learned judge erred in finding that RBTT was negligent; (ii) whether the learned judge erred in finding that Messrs. Nicholson and Williams were contributorily negligent; and (iii) whether the judge erred by reducing the damages claimed by Messrs. Nicholson and Williams on the basis of contributory negligence.

Held: dismissing the appeal; allowing the counter appeal; and making the orders set out in paragraph 56 of the judgment, that:

1. It is settled law that a party is liable in negligence if it breaches a duty of care which is owed to another thereby causing damage. The test to determine whether a party owes a duty of care to another requires that: (i) there is reasonable foreseeability of damage; (ii) a relationship of proximity exists between the wrongdoer and the person damaged; and (iii) it is just, fair and reasonable to impose a duty of care.

Caparo Industries plc v Dickman [1990] 1 All ER 568 applied.

2. Firstly, it was undoubtedly foreseeable that Messrs. Nicholson and Williams were likely to suffer loss and that the account would have been at risk of fraudulent activity where no action was taken by RBTT to secure the account,

despite Mr. Williams' report of the missing card and his request that the bank put a stop on the card. Secondly, there was a sufficiently proximate relationship in existence between the bank and Messrs. Nicholson and Williams on which to ground a duty of care. The evidence shows that Mr. Williams was made a signatory to Mr. Nicholson's account, giving him authority to negotiate the chequing account with the bank. Thirdly, the duty of care owed by a bank to its customer can be extended to the unauthorised use of ATM cards and to providing a reasonably efficient security system as part of its services to the customer. There is no doubt that RBTT owed this duty of care to Messrs. Nicholson and Williams and that it breached its duty of care by failing to act on Mr. Williams' report that the card and the PIN had been misplaced and by failing to act on his request to put a stop on the card in order to secure the account. Given the totality of the circumstances, it was just, fair and reasonable for the judge to have imposed a duty of care on the bank.

Attorney General of the British Virgin Islands v Hartwell (Craig) (2004) 64 WIR 103 applied; **McEvoy v Belfast Banking Co Ltd.** [1935] AC 24 applied; **Barclays Bank plc v Quincecare Ltd and another** [1992] 4 All ER 363 applied; **Paget's Law of Banking** 13th Edition and 14th Edition applied.

3. The element of causation is an essential aspect of all torts. Indeed, causation is relevant in circumstances where loss or damage is asserted. In cases where a claimant seeks to prove that a defendant has caused loss or damage, the commonly propounded 'but for' test is applicable. This test requires that the claimant proves that, but for the defendant's tortious conduct, the claimant would not have suffered the damage. In the appeal at bar, the evidence is clear that 'but for' the negligence of RBTT, Messrs. Nicholson and Williams would not have suffered the loss of the money on the account. Had RBTT performed its duty with reasonable care and skill by putting the stop on the card when Mr. Williams requested it to do so, and further by detecting the irregular withdrawals, the account would have been safeguarded against the fraudulent activity. Evidently, RBTT's breach of its duty was the proximate cause of the loss occasioned to Messrs. Nicholson and Williams.

Rawle Hannibal v The BVI Health Services Authority [2017] ECSCJ No. 10, (delivered 13th December 2019) followed; **Sienkiewicz v Greif (UK) Limited** [2011] UKSC 10 applied.

4. The defence of contributory negligence is available whenever a claimant's own negligence contributes to the damage of which he complains. This means that blame would be apportioned to the claimant and any damages awarded would be reduced. Generally, the appellate court is slow to interfere with a trial judge's apportionment of blame in a negligence claim unless it concludes that the apportionment is plainly wrong. In the case at bar, it is clear that the damage suffered was caused solely by the bank's breach of duty of care. It cannot be said that any alleged breach of the Cardholder's Agreement by either Mr. Nicholson or Mr. Williams contributed to the damage suffered by them.

Further, Mr. Williams, through his actions, took reasonable care to guard against any undue risk which would occasion any loss of funds on the account. It follows that the learned judge erred in finding that they were contributorily negligent. The learned judge ought to have ordered RBTT to re-credit the account in favour of Messrs. Nicholson and Williams with the sum of \$139,560.00 which was the full sum withdrawn from the account, and to pay interest at the rate of 6% per annum on the said sum.

Commonwealth Caribbean Tort Law Kodilinye G, Commonwealth Caribbean Tort Law, 5th edn, (Routledge 2015) considered; **Jones v Livox Quarries Ltd.** [1952] 2 QB 608 considered; **Attorney General v Collingford John et al** [2018] ECSCJ No. 248 (delivered 20th September 2018) followed; **Pride Valley Foods Ltd v Hall & Partners and another** 76 ConLR 1 applied; **Davies v Swan Motor Co (Swansea) Ltd; (Swansea Corporation and James, Third Parties)** [1949] 1 All ER 620 applied; **Jennings v Norman Collison (Contractors) Ltd** [1970] 1 All ER 1121 applied.

JUDGMENT

Introduction

- [1] **BLENMAN JA:** This is an appeal by RBTT Bank Caribbean Limited (“RBTT” or “the bank”) against the decision of the learned judge by which the judge held that RBTT was liable in negligence and awarded damages in favour of Messrs. John Nicholson and Garnet Williams (“Mr. Nicholson” and “Mr. Williams” or collectively “Messrs. Nicholson and Williams”) on their claim. There is also a cross appeal by Messrs. Nicholson and Williams against the decision of the learned judge which awarded judgment in favour of RBTT on its counter claim, finding Mr. Nicholson liable for breach of contract and both he and Mr. Williams liable in contributory negligence. Consequently, the learned judge ordered RBTT to pay a reduced sum of \$69,780.00, being half the sum of the \$139,560.00 in damages claimed by Messrs. Nicholson and Williams, along with interest and prescribed costs on the sum awarded. Both RBTT and Messrs. Nicholson and Williams, being aggrieved by the decision of the learned judge, have challenged it on several grounds.

- [2] I will now provide a synopsis of the factual background in order to place the appeal in context.

Background

- [3] RBTT is a financial institution which conducts the business of commercial banking with its registered office located at South River Road, Kingstown, St. Vincent. Mr. Nicholson is a British citizen who is ordinarily resident in both the Grenadine Island of Bequia and the United Kingdom. He is also the friend and employer of Mr. Williams, who is a mason by trade. On or about 3rd March 2001, Mr. Nicholson opened a chequing account numbered 0207204696 ("the account") at the Port Elizabeth Bequia branch of RBTT. He was also given an ATM card for convenient access to the account, without having to go directly to the bank and had signed a Cardholder's Agreement for that purpose. Prior to leaving on a trip to England in June 2007, Mr. Nicholson had put Mr. Williams in charge of building his house in Bequia. Importantly, in order to facilitate easy access to the funds to carry out the works on his house, he also made Mr. Williams a signatory to his account. He gave Mr. Williams the ATM card ("the card"), the corresponding PIN written on a piece of paper and a cheque book for access to funds on the account. Mr. Nicholson alleges that upon his return from England in September 2007, Mr. Williams informed him that the card had gone missing and that previously Mr. Williams had reported this to RBTT and requested that RBTT place a 'hot wire' or stop on the card. Mr. Williams also indicated to Mr. Nicholson that at the time he made the report no money was missing from the account.
- [4] On 5th November 2007, when Mr. Nicholson went to the bank, he requested a balance on his account and discovered that a substantial sum of money was missing. After speaking with the bank manager, Mrs. Donnet Simmons, Mr. Nicholson further discovered that the withdrawals had been made with the card and Mrs. Simmons placed an immediate stop on the card. By that time \$139,560.00 had been withdrawn from Mr. Nicholson's account. The bank subsequently alerted Mr. Nicholson that it was Mrs. Venna Williams, the estranged wife of Mr. Williams, who had withdrawn the money, having been recognised on the ATM's CCTV camera making a withdrawal with the card on 2nd November 2007. The evidence

revealed that all the withdrawals had been made by her subsequent to the date on which Mr. Williams had made the report to RBTT of the card being misplaced. The withdrawals had also been for large sums of money at a time and there were several transactions carried out by Mrs. Williams in excess of the maximum daily amounts, yet the bank did not observe any of the suspicious transactions.

The Claim and Counterclaim Below

- [5] Messrs. Nicholson and Williams subsequently filed a claim alleging breach of duty in negligence against RBTT seeking special damages in the sum of \$139,560.00, interest at the rate of 6% per annum, general damages and costs. RBTT denied the claim and counterclaimed against Mr. Nicholson for breach of contract, and alternatively for negligence, seeking the same sum of \$139,560.00 as special damages, plus general damages and costs for both claims. RBTT also counterclaimed against Mr. Williams similarly for the sum of \$139,560.00 as special damages for negligence, plus general damages and costs. Messrs. Nicholson and Williams denied the allegations against them in RBTT's counterclaim.

The Evidence Below

- [6] In the court below, Mr. Williams gave evidence that in or around July 2007, a few days after his estranged wife visited his daughter at his home, he noticed that the card and the piece of paper with the PIN were both missing. He indicated that once he made this discovery, he immediately went to the bank and enquired of the teller, Ms. Jasmine Tannis, whether any withdrawals had been made from the account and Ms. Tannis told him that no withdrawals had been made since March 2007. Mr. Williams gave further evidence that he then told Ms. Tannis that he could not find the card and, being unaware of whether it was misplaced or stolen, he told her to place a 'hot wire' or stop on the card and that he would report back to her if he found it. He did not report back to Ms. Tannis since he did not find the card.
- [7] RBTT, however, asserted in its evidence that it had not received a written notice of any loss, theft or cancellation of the card, as was required by the Cardholder's

Agreement. The bank also alleged that Mr. Williams, contrary to his evidence, never reported the loss of the card to RBTT but simply mentioned that he had misplaced his ATM card and would look for it again to make sure and revert to the bank. One of its main contentions was that any notice ought to have been given by Mr. Nicholson. RBTT contended that it was not asked to take any specific action in relation to the card and it was under the impression that Mr. Williams was referring to his own personal account, and not to Mr. Nicholson's account. RBTT therefore denied that it was under any duty to put a stop on the card since it had no reason to do so.

The issues in the court below

[8] The learned judge formulated the issues which arose as follows:

- (i) was there a negligent act or omission by RBTT; if so, was there loss sustained by the claimants as a natural result of the negligent act or omission?
- (ii) was Mr. Nicholson in breach of the Cardholder's Agreement; and/or was there a negligent act or omission on the part of Mr. Nicholson and/or Mr. Williams; if so, was the loss sustained by the claimants a natural result of Mr. Nicholson's breach of contract, and/or a natural result of negligence of both Mr. Nicholson and Mr. Williams?

The Judgment below

[9] Upon assessing the evidence, the learned judge found that both the claim and the counterclaim were made out and held that all parties had contributed equally to Messrs. Nicholson and Williams' loss. Having determined that RBTT was not wholly liable, the judge consequently reduced the damages claimed. She ordered that RBTT re-credit the bank account, in favour of Messrs. Nicholson and Williams, with \$69,780.00, being only half the sum withdrawn from the account, and pay prescribed costs and interest at the rate of 6% on the sum awarded.

[10] The learned judge's reasons are found at paragraphs 45, 46, 51 and 54 to 56 of her judgment and are reproduced as follows:

"[45] Remarkably, Ms. Tannis was not called to give evidence, (although she made a witness statement), and thus, Mr. Williams' version of what transpired when he presented himself at the bank on whatever day, and mentioned the card missing, remains unchallenged. In these circumstances, I find that the bank was negligent in not placing a stop or 'hot wire' as Mr. Williams called it, on the card. The natural result was the loss of \$139,560.00 subsequently swindled from Mr. Nicholson's account number 02070496.

[46] Significantly, the evidence demonstrates a certain pattern of withdrawals for which the bank has no explanation as to why it did not detect that something was wrong. From the 16th July 2007, monies were being drawn from the account regularly (sometimes three times per day in sums of \$2,500, \$4000.00, \$4173.00, \$2500.00 and then continued in pattern of withdrawals of \$2500.00 down to the 12th September 2007. This, to my mind was an unusual pattern of withdrawals that should have put the bank on notice that the monies may have been withdrawn by an unauthorized user. This shows a weakness or laxity in the bank's system and controls. I am of the opinion that the bank was negligent in failing to detect an unusual pattern of withdrawals which would have put the bank on notice as to the possible unauthorised and or fraudulent use of the card. The natural result is the loss of \$139,560.00 from account 0207204696.

...

[51] The essence of the agreement is that Mr. Nicholson has a duty to take reasonable precautions to prevent his card from being stolen and used by a thief. So where, as in this case, Mr. Nicholson gives out his card and PIN to Mr. Williams, he will, in my opinion have acted negligently and or in breach of contract. In the circumstances, he cannot be heard to say that he was not negligent or in breach of the card holder's agreement. The agreement stipulates that the PIN is an authorizing signature. That can be rephrased to say it is an authorising or an electronic signature. When the card and PIN are used at the ATM, they are considered to be in the safe keeping of the customer.

...

[54] Looking at the evidence in its totality, I find as a fact that both parties contributed equally to the loss sustained by the claimants [Messrs. Nicholson and Williams]. Mr. Nicholson and Mr. Williams contributed to the losses sustained by them by Mr. Nicholson's failure to adhere to the contractual terms imposed by the bank in the Cardholder's Agreement; by transferring his card and PIN to Mr. Williams, contrary to the Cardholder's Agreement, by not informing the bank that he had made arrangement for Mr. Williams to use the card and PIN in his absence from the state; by not

checking his statements regularly and alerting the bank of irregularities in a timely manner. I do not discount Mr. Sargeant's [counsel for Messrs. Nicholson and Williams in the court below] submission that it was unfair for the bank to require the Code be committed to memory, or for the notification of a missing/misplaced card to be in writing. There seems to be much force in that submission and the submissions on the issue of unfair contract terms.

[55] In relation to Mr. Williams, I find that he contributed to the loss by his failure to take proper precautions to secure and protect the card and PIN, or by his failure to place it in a location where it would be not expected to be found; by not notifying Mr. Nicholson in a timely manner that the card and PIN were missing or misplaced; and by not reverting to the bank to confirm that he did not find the card and PIN, until when he and Mr. Nicholson met with the branch manager Mrs. Simmons in November 2007.

[56] As regards the bank, I find that it contributed to the loss of Mr. Nicholson and or Mr. Williams by not placing a stop on the card to stop all future transactions after being informed by Mr. Williams that the card and PIN were missing/misplaced; by not making enquiries of Mr. Williams as to gather specific information with a view to protecting the account; by the lax manner in which the report by Mr. Williams was treated; by its failure to detect a pattern of withdrawals during the period July 16th 2007 and 12th September 2007, so as to raise suspicion that the account had been compromised."

[11] For the above reasons given, the learned judge ordered as follows:

"1. The Defendant RBTT Caribbean Limited, do re-credit account number 0207204696, in favour of John Nicholson and or Garnet Williams, the Claimants in this action with the sum of \$69,780.00 being half of the amount stolen from the said account.

2. The Defendant RBTT Caribbean Limited do pay the Claimants John Nicholson and or Garnet Williams costs as prescribed on the sum of \$69,780.00.

3. The Defendant RBTT Caribbean Limited do pay to the Claimants John Nicholson and or Garnet Williams post judgment interest on the sum of \$69,780.00 at the rate of 6% per annum from the date of delivery of a sealed copy of this judgment to date of full and final payment."

Issues arising in the Appeal and Counter Appeal

- [12] As alluded to earlier, being dissatisfied with the decision of the learned judge, RBTT appealed and Messrs. Nicholson and Williams counter-appealed to this Court, on several grounds. The grounds have been condensed into the following issues:
- (i) whether the learned judge erred in finding that RBTT was negligent;
 - (ii) whether the learned judge erred in finding that Messrs. Nicholson and Williams were contributorily negligent; and
 - (iii) whether the judge erred by reducing the damages claimed by Messrs. Nicholson and Williams on the basis of contributory negligence.

Appellant's Submissions

- [13] Learned Queen's Counsel, Mr. Stanley John, submitted that the learned judge erred in determining the claim made by Messrs. Nicholson and Williams, by proceeding on an analysis of the facts without first setting out the legal parameters for establishing the duty of care which was imposed on RBTT. In those circumstances, he argued that the judge erred since the threshold requirement of identifying whether, as a matter of law, there was a duty of care imposed on RBTT, and the extent of that duty, did not feature in the judge's analysis.
- [14] Mr. John also underscored the fact that one of the definitive findings of the learned judge was that the Cardholder's Agreement governed the rights and duties between the bank and Mr. Nicholson. He submitted that, therefore, to the extent that the basis of the judge's decision is a breach of a duty of care, that duty of care can be said to hinge, in relation to Mr. Nicholson, on the contract created by the Cardholder's Agreement. He stated that the judge's determination, based on the Cardholder's Agreement, that Mr. Nicholson had a duty to take reasonable precautions to prevent his card from being stolen or used by a thief was in stark

contrast to the basis on which she made a finding of breach of duty and negligence on the part of RBTT.

[15] Mr. John asserted that this approach by the learned judge was improper, given her acceptance of the efficacy of the Cardholder's Agreement and her application of it in the context of the counterclaim. He insisted that the bank account and the Cardholder's Agreement are generally related, but remain distinct as between the bank and Messrs. Nicholson and Williams, and in this regard, it is a crucial fact that only Mr. Nicholson had signed the Cardholder's Agreement. He maintained therefore that any instruction to the bank to put a stop on the card ought to have come from Mr. Nicholson, being the only person authorised to so instruct, and ought properly to have been put in writing in accordance with the Cardholder's Agreement. In absence of this, the bank would not have had a duty to put a stop on the card in the circumstances.

[16] Alternatively, Mr. John argued that even if there had been a breach of duty by RBTT in negligence, no loss was suffered by either Mr. Nicholson or Mr. Williams since the money taken from the account was not money belonging to either of them, in law, based on the debtor/creditor relationship which exists between a bank and its customer. He sought to rely on **Foley v Hill**¹ in support of this argument. Purporting to rely further on **Joachimson v Swiss Bank Corporation**,² Mr. John was adamant that Messrs. Nicholson and Williams have inappropriately sought damages in negligence for losses suffered, as opposed to making a demand to recover the debt consistent with the applicable practice in law.

[17] He asserted therefore that there was no basis in law for the judge's finding that Messrs. Nicholson and Williams had suffered loss due to RBTT's breach of its duty of care to them. Mr. John sought further to distinguish the circumstances in the case at bar from those where the customer gives a specific order to the bank, for example

¹ (1848) 2 HLC 28, 9 ER 1002.

² [1921] 3 KB 110.

for the payment of money or the issuance of cheques. In the latter circumstances, he submitted, the bank acts as an agent for the customer and what is termed as the Quincecare duty of care may arise based on the principles emanating from **Barclays Bank plc v Quincecare Ltd and another**³ which were affirmed in **The Federal Republic of Nigeria v JP Morgan Chase Bank NA**⁴ and **JP Morgan Chase Bank NA v The Federal Republic of Nigeria**.⁵ He argued therefore that it is only where the Quincecare duty of care arises that the instance of loss may properly be established by the customer in the context of negligent actions by a bank. He insisted that in the peculiar circumstances of the case at bar, there were no instructions of the **Quincecare** kind given by Mr. Nicholson or Mr. Williams, and therefore the funds remained the property of the bank.

- [18] Accordingly, Mr. John urged this Court to allow the appeal and dismiss the counter appeal, having challenged the correctness of the learned judge's approach in imposing a duty of care in tort on RBTT, and further contending that in any event that duty of care does not exist in the circumstances.

Respondents' Submissions

- [19] Learned counsel, Mr. Richard Williams ("learned counsel Mr. Williams"), argued that the judge was correct to hold that the bank had breached its duty of care to Messrs. Nicholson and Williams and was therefore liable for the losses which they suffered. He submitted that there is no weight to RBTT's assertion that Mr. Nicholson's failure to make a report in writing, to the extent that it breached the Cardholder's Agreement, excluded liability on the part of the bank for the loss sustained. He insisted that there was no force to this point and, relying on **Paget's Law of Banking**, asserted that the Cardholder's Agreement remains subject to the common law test of reasonableness and therefore the duty of the bank to put a stop on the card would not have been ousted in the circumstances.

³ [1992] 4 All ER 363.

⁴ [2019] EWHC 347 (Comm).

⁵ [2019] EWCA Civ 1641.

[20] Learned counsel Mr. Williams further advocated that the bank would have had an independent obligation, under its banker and customer relationship, with Messrs. Nicholson and Williams, to act with reasonable skill and care to protect the bank account from instances of fraud. He sought to rely on the cases of **Attorney General of the British Virgin Islands v Hartwell (Craig)**,⁶ **Royal Products Ltd. v Midland Bank Ltd and Bank of Valletta Ltd**,⁷ and **Quincecare** in support of this submission. He argued therefore that, once the bank was put on notice that Mr. Nicholson's card was being used in an 'unauthorised manner' then, a duty would have arisen for RBTT to take reasonable steps to secure Mr. Nicholson's account, that is, to put a stop on the card to prevent further unauthorised use.

[21] Learned counsel Mr. Williams further argued that despite any contractual relations which may have existed between the bank and Mr. Nicholson, RBTT would have still owed a duty of care to both Messrs. Nicholson and Williams since it was reasonably foreseeable that RBTT's failure to exercise reasonable care and skill in dealing with Mr. Williams' oral report, by putting a stop on the card, would have caused them to suffer loss. He reiterated that the bank would have been under an obligation not to act dishonestly or recklessly by failing to make inquiries which an honest and reasonable man would make. He sought to rely on **Caparo Industries plc v Dickman**,⁸ **Attorney General of the British Virgin Islands v Hartwell (Craig)** and **Royal Products Ltd v Midland Bank Ltd and Bank of Valletta Ltd** in support of this submission. In addressing the bank's assertion that Mr. Williams would not have been authorised to instruct the bank to put a stop on the card, learned counsel Mr. Williams argued that it was of no moment that the primary account holder was Mr. Nicholson. He maintained that by the bank's own admission, Mr. Williams was an authorised signatory to the bank account and, relying on **McEvoy v Belfast Banking Co Ltd**,⁹ argued that once a person has signing authority on an account, he/she may negotiate that account through actions

⁶ (2004) 64 WIR 103.

⁷ [1981] Com LR 93.

⁸ [1990] 1 All ER 568.

⁹ [1935] AC 24.

such as making demands or putting a stop on the account. He was adamant therefore that, in this regard, the general implied contractual duties between bank and customer would apply to Mr. Williams as well.

[22] Learned counsel Mr. Williams also argued that the judge's finding of contributory negligence on the part of Messrs. Nicholson and Williams was misguided. His short submission on this point was that whether or not Mr. Nicholson had committed a breach of the Cardholder's Agreement, or whether both he and Mr. Williams had acted negligently, it cannot be said that any of their acts or omissions in the circumstances caused the loss which they sustained. He insisted that the loss was caused by the failure of the bank to take the requisite steps to put a stop on the card, and further due to the failure of the bank's security system to detect the irregular and unusual pattern of withdrawals which took place on the account. He argued that, in those circumstances, it was unreasonable for the learned judge to determine that either Mr. Nicholson or Mr. Williams was contributorily negligent in occasioning the loss of funds on the account.

[23] In light of the above, learned counsel Mr. Williams urged this Court to dismiss RBTT's appeal and allow the counter appeal by Messrs. Nicholson and Williams.

Discussion

Issue 1 – Whether RBTT was negligent

[24] While I agree with Mr. John that the learned judge did not fully set out the applicable legal principles to establish RBTT's duty of care, for reasons which will become apparent shortly, I do not agree with his submission that the judge's finding on this issue was incorrect or that there exists no legal basis for that finding.

[25] The principles that undergird the tort of negligence are well established and need no full recitation. It is settled law that a party is liable in negligence if it breaches a duty of care which is owed to another thereby causing damage. The modern approach is to be found in the three-staged test which is used to determine whether

a party owes a duty of care to another, as set out in the well-known authority of **Caparo**, and requires that: (i) there is reasonable foreseeability of damage; (ii) a relationship of proximity exists between the wrongdoer and the person damaged; and (iii) it is just, fair and reasonable to impose a duty of care.

[26] In relation to the limb of reasonable foreseeability, Lord Nicholls has helpfully set out the following applicable principles at paragraphs 20 and 21 of **Attorney General of the British Virgin Islands v Hartwell (Craig)**:

“[20] ... Negligence as a basis of liability is founded on the impersonal ('objective') standard of how a reasonable person should have acted in the circumstances. Shortfall from this standard of conduct does not always give rise to legal liability. In order to elucidate the circumstances in which shortfall will give rise to liability the courts have fashioned several concepts, such as 'duty of care'. This familiar phrase is legal shorthand. Expressed more fully, a duty of care is a duty owed in law by one person or class of persons to another particular person or class of persons. The duty comprises an obligation to take reasonable care to ensure that the person or persons to whom the duty is owed do not suffer a particular type or types of damage. Thus drivers of cars owe, among other duties, a duty to other road users to take reasonable care to avoid inflicting personal injury on the latter.

[21] Speaking generally, one of the necessary prerequisites for the existence of a duty of care is foresight that carelessness on the part of the defendant may cause damage of a particular kind to the plaintiff. Was it reasonably foreseeable that, failing the exercise of reasonable care, harm of the relevant description might be suffered by the plaintiff or members of a class including the plaintiff? 'Might be suffered' embraces a wide range of degrees of possibility, from the highly probable to the possible but highly improbable. Bearing in mind that the underlying concept is fairness and reasonableness, the degree of likelihood needed to satisfy this prerequisite depends upon the circumstances of the case. Reasonable foreseeability does not denote a fixed point on the scale of probability; see Lord Hoffmann in *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082 at 1091. **There must be reasonable foreseeability of a risk which a reasonable person would not ignore. The risk must be 'real' in the sense that a reasonable person 'would not brush [it] aside as far-fetched'**; see Lord Reid in *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound No 2)* [1967] 1 AC 617 at 643.” (emphasis mine)

[27] There is no basis upon which to impugn the judge's finding that Mr. Williams had notified the bank of the loss of the ATM card and had requested that the bank put a stop notice on the card. I consider the pronouncements of Lord Nicholls to be apposite and I adopt them as applicable to this case. I am fortified in the view that it was undoubtedly foreseeable that Messrs. Nicholson and Williams were likely to suffer loss and that the account would have been at risk of fraudulent activity where RBTT failed to put a stop on the card after being put on notice of its misplacement. The risk that the account, and by extension the money, was in danger of being fraudulently accessed cannot be said to be one which a reasonable person would not have foreseen. I agree with learned counsel Mr. Williams that once the bank was notified that Mr. Williams no longer possessed the card, and further that both the card and the PIN had been misplaced, it ought to have been apparent to RBTT that if nothing was done to secure the account to which the card is attached, the account would have been vulnerable to fraudulent access occasioning loss to Messrs. Nicholson and Williams. Despite RBTT's protestations that it was not so notified by Mr. Williams and that it was given no specific instructions in relation to the card, it cannot be ignored that the learned judge determined that 'Mr. William's version of what transpired when he presented himself at the bank on whatever day, and mentioned the card missing, remains unchallenged'.

[28] Further, I am of the opinion that it was reasonably foreseeable that they were likely to suffer loss where no action was taken by RBTT to secure the account. This is more so in the face of the unusual pattern of withdrawals from the account of the daily maximum amount on each withdrawal, which was taking place on a frequent basis per day after Mr. Williams' report to the bank. In fact, based on the evidence, it is clear that RBTT itself properly conceded that, despite the unusual pattern of the withdrawals, their system was incapable of picking up the irregularity since the bank was unable to track the frequency of ATM withdrawals.¹⁰ The laxity in the bank's security system would have created a real and obvious risk which a reasonable

¹⁰ See p. 171 of the Record of Appeal.

person would not have ignored, especially since the daily withdrawals exceeded the permissible maximum allowed.

[29] In relation to whether a relationship of proximity exists between Messrs. Nicholson and Williams and RBTT in the circumstances, I see no force in RBTT's argument that the bank had no duty to put a stop on the card where it had not received written notice, as required, from the only person to sign the Cardholder's Agreement. While the Cardholder's Agreement indeed governs the rights and duties of the bank and Mr. Nicholson as it relates to the use of the card, this appeal more sharply focuses on the bank's duty as it relates to the account to which the card is attached. The ATM card is simply a means of access to the funds in the account. The Cardholder's Agreement cannot therefore be said to restrict the bank's duty in the circumstances since the bank would have been required to act with reasonable skill and care to protect Mr. Nicholson's account itself.

[30] It is also of no moment that Mr. Williams is not in the strict sense a joint account holder on the account. The evidence, which has not been disputed by RBTT, shows that Mr. Williams was made a signatory to Mr. Nicholson's account, giving him authority to negotiate the said account with the bank. In **McEvoy**, Lord Atkin's pronouncements are instructive on the approach taken when a third party is given the right of demand on a bank account by the primary contracting party. He stated as follows:

"The suggestion is that where A deposits a sum of money with his bank in the names of A and B, payable to A or B, if B comes to the bank with the deposit receipt he has no right to demand the money from the bank or to sue them if his demand is refused. The bank is entitled to demand proof that the money was in fact partly B's, or possibly that A had acted with B's actual authority. For the contract, it is said is between the bank and A alone. My Lords, to this is to ignore the vital difference between a contract purporting to be made by A with the bank to pay A or B and a contract purporting to be made by A and B with the bank to pay A or B. In both cases of course payment to B would discharge the bank whether the bank contracted with A alone or with A and B. But the question is whether in the case put B has any rights against the bank if payment to him is refused. I have myself no doubt that in such a case B can sue the bank. The contract on the face of it purports to be made with A and B, and I think with them

jointly and severally. A purports to make the contract on behalf of B as well as himself and the consideration supports such a contract. If A has actual authority from B to make such a contract, B is a party to the contract ab initio. If he has not actual authority then subject to the ordinary principles of ratification B can ratify the contract purporting to have been made on his behalf and his ratification relates back to the original formation of the contract. If no events had happened to preclude B from ratifying, then on compliance with the contract conditions, including notice and production of the deposit receipt, B would have the right to demand from the bank so much of the money as was due on the deposit account.”¹¹

- [31] I can do no more than adopt the helpful and applicable pronouncements by Lord Atkin in **McEvoy**. I consider that Mr. Williams would without a doubt be considered as a person with authority to not only give RBTT instructions on the account but to also bring a claim against them for any negligent actions on their part relating to the account. I am therefore of the view that a sufficiently proximate relationship exists between the bank and Mr. Nicholson and also Mr. Williams on which to ground a duty of care.
- [32] Mr. John sought to distinguish the **Caparo** duty of care as being inapplicable to the banker and customer relationship, which he argued was more appropriately governed by the duty of care as set out in the specific context of **Quincecare**. If Mr. John’s assertion were to prevail, it would mean that, in the circumstances, RBTT could only owe a duty of care in tort to Messrs. Nicholson and Williams where the bank acted as their agent in transacting a specific order, such as the payment of money or the issuance of cheques. To state this proposition is sufficient for it to be rejected.
- [33] It is noteworthy that **Quincecare** examined the relationship between a banker and a customer in respect of the drawing and payment of the customer’s cheques against the money of the customer under the control of the banker. In **Quincecare**, Steyn J pronounced as follows on the duties of a bank to protect its customers from instances of fraud at page 376 of his judgment:

¹¹ Supra n. 9 at pp. 43 and 44.

“The critical question is: what lesser state of knowledge on the part of the bank will oblige the bank to make inquiries as to the legitimacy of the order? In judging where the line is to be drawn there are countervailing policy considerations. The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers. **In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company (see proposition (3) in *Lipkin Gorman v Karpnale Ltd* (1986) [1992] 4 All ER 331 at 349, [1987] 1 WLR 987 at 1006).** And, the external standard of the likely perception of an ordinary prudent banker is the governing one. That in my judgment is not too high a standard.” (emphasis mine)

[34] Steyn J stated further in **Quincecare** that ‘[his] observations are restricted to the relationship of banker and customer **in the context of a bank transferring money from a current account on the customer’s instructions**’ (emphasis mine). I do not however take this to mean that the principles in **Quincecare**, which require a bank to act with reasonable skill and care to combat fraud and protect its customers, are inapplicable in other contexts to establish a bank’s duty of care. To my mind, it simply expresses that Steyn J did not intend to establish any general rule as it concerns the extent of duties of a bank to its customers. **Quincecare** cannot therefore be applied as a means of restricting the extent of the bank’s duty of care in the context of the current appeal. On that basis, I do not agree with Mr. John that the duty to act with a reasonable standard of care, as established in **Quincecare**, applies only to circumstances where a customer provides a bank with instructions to transfer money.

[35] Furthermore, **Paget’s Law of Banking** provides support for my position where at paragraph 4.26 it states as follows:

“It is impossible to give an exhaustive list of the duties of care owed by banker and customer to each other because in any given case the court is concerned with the particular contract (largely expressed in a bank’s standard terms) or, in the case of an alleged duty of care in tort, the proximity of the parties, reasonableness and justice on the particular facts.”¹²

[36] **Paget’s Law of Banking** also provides useful guidance on a bank’s duty of care in the context of the unauthorised use of a customer’s card and PIN. The text provides at paragraph 17.264 that:

“Where the bank’s terms and conditions seek to make the customer liable for unauthorised use of his card and PIN, the customer may be able to claim that the bank had been negligent in the way that it allowed or facilitated such unauthorised use. **It is well established in the case of cheques that a bank owes its customer a duty of care in and about the execution of the customer’s mandate and it is submitted that a similar duty should also be extended to the use of ATM and EFTPOS cards. Thus, for example, the customer may be able to claim that the bank was negligent in failing to detect an unusual pattern of withdrawals which would have put it on notice as to the unauthorised use of the card.**”¹³ (emphasis mine)

[37] Further helpful guidance is provided at paragraph 22.55 as follows:

“The bank must install and maintain a reasonably efficient security system and must exercise reasonable care and skill to ensure that its equipment is operating properly. In cases where a bank sells or hires hardware, and possibly even software, to a customer, e.g. when providing corporate or institutional customers with direct access to BACS or CHAPS, the bank will be under a duty to supply equipment which is of satisfactory quality and fit for its purpose. The bank will be strictly liable for breach of such a duty; liability does not depend on establishing that the bank was negligent.”¹⁴ (emphasis mine)

[38] The above excerpts clearly contemplate the duty of care owed by a bank to its customers in the context as dealt with in **Quincecare**, and specifically advocates for the extension of that duty of care to the unauthorised use of ATM cards. Moreover, the duties the bank owes to its customers extend to providing a reasonably efficient

¹² Ali Malek QC & John Odgers QC, 14th Edition (Lexis Nexis 2015).

¹³ Mark Hapgood & John R. Paget, 13th Edition (Lexis Nexis 2007).

¹⁴ Ali Malek QC & John Odgers QC, 14th Edition (Lexis Nexis 2015).

security system as part of its services. In my considered view, the above guidance on the bank's duty within the context of the use or misuse of ATM cards is apposite and I adopt it as applicable to the case at bar. It is therefore clear that RBTT owed this duty of care to Messrs. Nicholson and Williams.

[39] I have no doubt that, in view of all the circumstances, it is just, fair and reasonable for the judge to have imposed a duty of care on the bank in the circumstances. I find that RBTT breached its duty of care to Messrs. Nicholson and Williams by failing to act on Mr. Williams' report that the card and the PIN had been misplaced, and further by failing to act on his request to put a stop on the card in order to secure the account. I agree with learned counsel Mr. Williams that, in circumstances where: (i) the bank was put on notice by Mr. Williams, who is a signatory of the account, that Mr. Nicholson did not have possession of the card; (ii) Mr. Williams notified the bank that the PIN had also been misplaced, making it clear to the bank that the account to which the card is attached was vulnerable to fraudulent activity; (iii) Mr. Williams requested that the bank put a stop on the card; and (iv) an unusual pattern of frequent withdrawals of substantial sums in excess of the daily maximum took place on the account after Mr. Williams made his report, a duty of care would have arisen for RBTT to act with reasonable skill and care to secure the bank account to which the card is attached. At the very least, the bank ought to have put a stop on the account.

[40] Having taken no steps to adequately investigate Mr. Williams' report of the misplaced card and PIN; failing to carry out Mr. Williams' instructions to put a stop on the card; and failing to inform Mr. Williams that the request would not be acceded to due to the bank's requirement for a written notice from Mr. Nicholson, RBTT undoubtedly breached its duty of care. This breach was exacerbated by the bank's further failure to detect the series of unusual withdrawals which were being made from the account through the card, after being alerted by Mr. Williams of the possible risk to the account. It cannot be accepted as reasonable for the bank to permit the sum of \$139,560.00 to be withdrawn from Mr. Nicholson's account in only three and

a half months without any form of enquiry or action on the bank's part. I am fortified in the view that the abovementioned breaches by RBTT were the natural causes of the loss suffered by Messrs. Nicholson and Williams.

- [41] For the sake of completeness, I must state that Mr. John's alternative proposition that no actual money was stolen from the account cannot be sustained. What is critical is the uncontroverted fact that the credit balance on the account was impaired as a consequence of the withdrawals. Furthermore, the evidence which was put before the learned judge indicated that Mr. Nicholson had, through his solicitor and by letter dated 21st November 2007, made a demand for the account to be re-credited since he was not liable for the loss of the money. In response, by letters dated 3rd January 2008 and 20th March 2009, RBTT rejected the demand and denied that the loss of the money was its fault. It is clear that Messrs. Nicholson and Williams are suing for the account, which has been negatively impacted by the loss of the funds due to RBTT's negligence and rejection of Mr. Nicholson's demand, to be re-credited with the sum of money withdrawn from the account. Mr. John's argument therefore cannot stand as being applicable to the circumstances of the case. What is of significance is the fact that, as a consequence of the unauthorised withdrawals, Messrs. Nicholson and Williams' account was negatively impacted.

Causation

- [42] For completeness, I would briefly examine the related matter of causation. The element of causation is an essential aspect of all torts. Indeed, causation is relevant in circumstances where loss or damage is asserted. It therefore stands to be determined whether RBTT's breach of its duty of care was the causative factor which occasioned the loss suffered by Messrs. Williams and Nicholson. In most cases where a claimant seeks to prove that a defendant has caused loss or damage, the commonly propounded 'but for' test is used. In **Rawle Hannibal v The BVI Health Services Authority**,¹⁵ this Court adopted the pronouncements of Lord

¹⁵ [2017] ECSCJ No. 10 (delivered 13th December 2019).

Phillips in **Sienkiewicz v Greif (UK) Limited**,¹⁶ which sets out the parameters of the 'but for' test. Lord Phillips stated as follows at paragraph 16 of his judgment:

"It's a basic principle of the law of tort that the claimant will only have a cause of action if he can prove, on a balance of probabilities that the defendant's tortious conduct caused the damage in respect of which compensation is claimed. **He must show that, but for the defendant's tortious conduct he would not have suffered the damage.** This broad test of balance of probabilities means that in some cases a defendant will be held liable for damage which he did not, in fact, cause. Equally there will be cases where the defendant escapes liability, notwithstanding that he has caused the damage, because the claimant is unable to discharge the burden of proving causation." (emphasis mine)

[43] In the present appeal, the critical question therefore is whether the damage suffered would still have occurred even if RBTT had not breached its duty of care. Applying the above principles, as enunciated by Lord Phillips, it is pellucid that Messrs. Nicholson and Williams would not have suffered the loss of the money on the account 'but for' the negligence of RBTT. The evidence is clear that there had been no loss of funds to the account at the point when Mr. Williams reported the card as missing and requested that a stop be placed on it. Had RBTT performed its duty with reasonable care and skill by putting the stop on the card when requested, and further by detecting the irregular withdrawals, the account would have been safeguarded against any attempts of fraudulent activity. I am therefore fortified in the view that RBTT's breach of its duty was the proximate cause of the loss occasioned to Messrs. Nicholson and Williams.

[44] Based on all that I have foreshadowed, I am of the view that the learned judge was correct in her finding that RBTT was negligent in failing to act on Mr. Williams' request to put a stop on the missing ATM card and further in failing to detect an unusual pattern of withdrawals from the account in the circumstances.

¹⁶ [2011] UKSC 10.

Issue 2 - Contributory Negligence

[45] The learned judge made several findings at paragraphs 54 and 55 of her judgment which framed her determination that Messrs. Nicholson and Williams had both contributed equally to the loss they sustained. It is however appropriate to first address the law on contributory negligence.

[46] The text **Commonwealth Caribbean Tort Law**¹⁷ provides an apt definition of contributory negligence. At page 379 of the text the author states:

“Contributory negligence is basically carelessness on the part of the claimant which combines with the defendant’s negligence or breach of duty in bringing about the claimant’s damage.

...

Contributory negligence does not involve any breach of duty owed by the claimant to the defendant, for it does not necessarily connote activity fraught with undue risk to others, but rather failure on the part of the person injured to take reasonable care of himself in his own interests.”

[47] In **Jones v Livox Quarries Ltd.**,¹⁸ which was cited with approval by this Court in **Attorney General v Collingford John et al**,¹⁹ Denning LJ adumbrated the following principles of contributory negligence as follows:

“Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. **A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself**; and in his reckonings he must take into account the possibility of others being careless.” (emphasis mine)

[48] In **Pride Valley Foods Ltd v Hall & Partners and another**,²⁰ the English Court of Appeal citing **Clerk & Lindell on Tort** stated that:

“**195.** The defence of contributory negligence is available whenever the plaintiffs own negligence contributes to the damage of which he complains (see para 3-10).

¹⁷ Kodilinye G, *Commonwealth Caribbean Tort Law*, 5th edn, (Routledge 2015), p. 379.

¹⁸ [1952] 2 QB 608.

¹⁹ [2018] ECSCJ No. 248 (delivered 20th September 2018).

²⁰ 76 ConLR 1.

196. It does not matter in this regard whether the operative fault of the claimant is prior, or subsequent, to the wrongdoing of the defendant. Broad common sense should be used to judge cause and effect on the facts of each particular case.”²¹

[49] Prior to 1945 and the introduction of the Law Reform (Contributory Negligence) Act, 1945 in the United Kingdom, if the claimant’s negligence was one of the causes of his own damage, he could not recover anything.²² However, today, it has also been settled that ‘if the plaintiff’s negligence was one of the causes of his damage,...[h]e gets reduced damages’,²³ as there is apportionment of blame by the court.

[50] As it relates to the case at bar, it cannot be said that it was reasonably foreseeable in the circumstances that money would have been fraudulently removed from Mr. Nicholson’s account in light of the actions taken by Mr. Williams on his behalf to prevent it. In so far as Mr. Williams had reported to RBTT the fact of the card and PIN not being in Mr. Nicholson’s possession and had requested that a stop be placed on the card before any money had been fraudulently withdrawn from the account, he would have taken reasonable care to guard against any undue risk which would occasion any loss of funds on the account. In the circumstances, I find that Mr. Williams, acting on Mr. Nicholson’s behalf, acted as a reasonable and prudent man would have by alerting the bank of the missing card and PIN as soon as he noticed they were gone. Therefore, the acts and omissions, as considered by the judge in paragraphs 54 and 55 of her judgment, which precede the loss of the money on the account, could not be said to have contributed to the damage sustained by Messrs. Nicholson and Williams. The evidence points undoubtedly to the loss of the funds being solely caused by RBTT’s negligence as set out above.

[51] In the circumstances, the judge’s finding of shared blame among the parties cannot stand. The question of whether a person is contributorily negligent is a mixed

²¹ Ibid at p. 33.

²² *Caswell v Powell Duffryn Associated Collieries* [1939] 3 All ER 730 *per* Lord Atkin.

²³ *Davies v Swan Motor Co (Swansea) Ltd; (Swansea Corporation and James, Third Parties)* [1949] 1 All ER 620 at p. 630.

question of law and fact. I find the pronouncements of Salmon LJ in **Jennings v Norman Collison (Contractors) Ltd.**²⁴ to be instructive on the court's approach to interfering with a judge's apportionment of blame in a negligence claim. Salmon LJ stated as follows at page 1126 of the judgment:

“It is very unusual for this court to interfere with an apportionment, and we are slow to do so. But we are entitled—indeed, I think it is our duty—to do so if we come to the conclusion that the apportionment is seriously wrong.”

- [52] Bearing this in mind, based on the foregoing, I am of the considered view that the learned judge erred in determining that both Messrs. Nicholson and Williams were contributorily negligent. The loss was caused solely by the failure of the bank to act with reasonable skill and care to take the requisite steps to secure Mr. Nicholson's account by placing a stop on the card when requested by Mr. Williams and by its failure to detect the unusual pattern of withdrawals on the account. To that extent, the judge erred further in awarding Messrs. Nicholson and Williams only half the sum claimed in the court below. In light of the above, the learned judge ought to have ordered RBTT to re-credit the account in favour of Messrs. Nicholson and Williams with the sum of \$139,560.00 which was the full sum withdrawn from the account, and to pay interest at the rate of 6% per annum on the said sum. This finding is dispositive of the entire appeal. The bank's appeal is therefore dismissed, and Messrs. Nicholson and Williams' counter-appeal succeeds. The damages awarded in the judgment in the court below are set aside and, in their stead, Messrs. Nicholson and Williams are entitled to be compensated in the sum of \$139,560. 00.

Issue 3 - Whether judge was correct to reduce damages

- [53] In so far as I have concluded on issue 2 above it is otiose to determine issue 3.
- [54] For the reasons I have given, therefore, it is apparent that Messrs. Nicholson and Williams succeed on their counter-appeal and that RBTT is unsuccessful on its appeal against the decision of the learned judge.

²⁴ [1970] 1 All ER 1121.

Costs

- [55] As it relates to costs, in so far as Messrs. Nicholson and Williams have succeeded in resisting RBTT's appeal and prosecuting their own counter-appeal, they are entitled to their costs in accordance with the principle that costs follow the event. Given my findings, the order by the learned judge for prescribed costs to be paid by RBTT to Messrs. Nicholson and Williams on the sum of \$69,780.00 must be set aside and replaced with an order for RBTT to pay Messrs. Nicholson and Williams prescribed costs on the sum of \$139,560.00 in the court below. In relation to defending the appeal and the counter-appeal Messrs. Nicholson and Williams are also awarded their costs, such costs being no more than two-thirds of the prescribed costs awarded on the sum of \$139,560.00.

Disposition

- [56] Given the totality of the circumstances, I would dismiss RBTT's appeal, allow Messrs. Nicholson and Williams' counter-appeal and accordingly make the following orders:
- (i) The damages ordered by the judge below in the sum of \$69,780.00 are set aside and substituted for the sum of \$139,560.00 together with interest at the rate of 6% per annum from the date of the judgment in the court below, which RBTT Caribbean Bank Limited shall re-credit to account number 0207204696, in favour of John Nicholson and/or Garnet Williams.
 - (ii) RBTT Caribbean Bank Limited shall pay to John Nicholson and Garnet Williams prescribed costs on the sum of \$139,560.00 in the court below.
 - (iii) RBTT Caribbean Bank Limited shall pay to John Nicholson and Garnet Williams costs on the appeal and on the counter-appeal, such costs being no more than two-thirds of the prescribed costs awarded on the sum of \$139,560.00.

[57] I gratefully acknowledge the assistance of all learned counsel in this appeal.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar [Ag.]