

IN THE COURT OF APPEAL OF BELIZE AD 2021
CIVIL APPEAL NO 25 OF 2018

CAYE INTERNATIONAL BANK LIMITED

Appellant

v

ROSEMORE INTERNATIONAL CORP.

Respondent

BEFORE

The Hon Madam Justice Minnet Hafiz Bertram
The Hon Mr Justice Murrio Ducille
The Hon Mr Justice Lennox Campbell

Justice of Appeal
Justice of Appeal
Justice of Appeal

Mr. Rodwell Williams SC along with Darinka Munoz for the appellant
Ms. Priscilla Banner for the respondent

26 October 2020 and 26 February 2021

HAFIZ BERTRAM JA

Introduction

[1] Caye International Bank Limited ('Caye Bank') is an international bank operating in Belize and offers banking services to international clients. Rosemore International Corp ('Rosemore') is a company registered in Panama and a customer of Caye Bank. The sole signatory for the account of Rosemore is Jason Christopher Connor ('Connor').

[2] Rosemore brought a claim against Caye Bank for the sum of US\$175,000.00 which it claimed had been deducted from its account without authorization and in breach of its contract with Caye Bank. Alternatively, that Caye Bank negligently transferred the

money to a fraudster who posed as Connor. Abel J heard the claim and on 30 May 2018 gave judgment in favour of Rosemore. Caye Bank appealed against the entire decision of the trial judge. On 26 October 2020, this Court heard the appeal against the judgment of Abel J and reserved judgment.

Brief background facts

[3] Rosemore brought the claim against Caye Bank as first defendant and Yaron David Walter ('Walter') as the second defendant. Walter is a resident of Canada and the recipient of the funds wired to him by Caye Bank at Carpathia Credit Union in Winnipeg Canada. A default judgment was entered on 26 October 2016, against Walter who took no part in the proceedings. The judgment against him was not satisfied and Rosemore continued its claim against Caye Bank.

[4] Rosemore in an application letter dated 25 July 2011, applied to Caye Bank for a corporate bank account under the name of "*Rosemore International Corp – Jason Christopher Connor*". Rosemore identified its email address as admin@rosemore.com and the beneficial owner of the account as "Jason Christopher Connor" whose email address was jconnor@rosemore.com. Connor communicated with Caye Bank with either one of the emails. Both had the domain name of "@rosemore.com." Any emails that were sent to admin@rosemore.com were automatically forwarded to email address jconnor@rosemore.com. Additionally, the Bank had Connor's telephone number on its record.

[5] Connor was the sole signatory for the account as shown by a "Resolution of Directors Regarding Bank Account" on Caye's Bank letter head. A signature card with Jason Connor's name and his signature was attached to the resolution.

[6] Rosemore submitted several documents to Caye Bank when it made the application to open the account including an '*Indemnity for Facsimile & E-mail Instruction*' ('Indemnity Agreement'), a Depository Agreement dated 8 July 2011, entered into between Caye Bank and Rosemore, Instruction Schedule: Authorized Signature, signature card and copy of passport for Connor.

[7] On or about 30 September 2011, Rosemore was assigned account number 11341. Between the period of 2011 and 2015 Rosemore made two deposits in the sum of US\$229,683.91. Rosemore gained interest over the years on the deposits.

[8] Connor did one wire transfer using email address jconnor@rosemore.com for the sum of US\$1,915.76 since opening the account. This could not be done using the online system. He was informed by Caye Bank that he had to make the request via email/or by fax. This was done as instructed.

[9] On 23 April 2015, Connor received a 'low priority' email message at admin@rosemore.com from Caye Bank and more specifically from fgraniel@cayebank.bz, being the email account of Florangely Graniel, who was at that time an employee of Caye Bank. (At the time of trial, she was no longer an employee of Caye Bank and was not called to give evidence). Connor was informed via that email that he had a new message in his online banking account and instructions were provided as to how the message would be viewed. In that email was a link which said "*Click here to log in to your user password account to view the message.*" Connor thereafter made several attempts to log on to his account but was unsuccessful. It turned out that the message was sent by Ms. Graniel to inform Connor that a wire transfer for US\$175,000.00 had been processed. Had he seen that message, the funds may have been recovered from the fraudster.

[10] On 28 April 2015, Connor informed Caye Bank via email that he was unable to access his account. He did not receive a response to that email from Caye Bank. Between the period April 2015 to the end of July 2015, Connor made several attempts to log in to his account but was unsuccessful. Connor sometime thereafter made contact with Mr. Gregory Gill, Systems Administrator of Caye Bank and informed him that he could not log in to his online account. The internet banking account was eventually disabled due to excessive attempts to log in. An email sent to Connor from Caye Bank showed that the last successful log in was 22 April 2015. Connor testified that he did not log in to his account on that date which was the day before he received the low priority email from Caye Bank.

[11] Over three months later, on 11 August 2015, after Caye Bank reset the online account, Connor was able to successfully log in and immediately saw an unauthorized transaction for which Rosemore's account was debited the sum of US\$175,000.00. The statement on the account showed that Caye Bank wire transferred US\$175,000.00 to Walter, the second defendant. Connor immediately brought to the attention of Caye Bank the unauthorized transaction.

[12] The transaction was dated 23 April 2015, and was initiated by a message which Caye Bank received from Rosemore's online banking account. Connor's evidence was that he did not make a request for the wire transfer to Walter. Connor emailed Caye Bank employees and made telephone calls trying to get the matter resolved, but to no avail.

[13] After the claim commenced, in further discoveries in 2016, Caye Bank provided further information regarding the transaction. This showed that Caye Bank received the request for the wire transfer of US\$175,000.00 to Mr. Walter from the Online Banking System Net-Teller. The confirmation of the wire transfer was then sent to jason1rosemore@gmail.com, an email address unknown to Connor. The evidence showed that it was not Connor's email address and that it was not an address on Caye Bank's record for Rosemore. Further, this address did not have Rosemore's domain name (@rosemore.com).

[14] Caye Bank filed a report with the Financial Intelligence Unit in Belize and attempted to get the funds from Carpathia Credit Union in Canada where the funds were credited to the account of Walter. Caye Bank, by its witness, Dean Roches, testified that their attempts to recall the funds were futile as it had been four months since the transfer and it took a long time for the transaction to be brought to the attention of Caye Bank. The evidence showed that Connor was unable to log in to his account and Caye Bank took over three months to resolve this problem.

The claim

[15] All efforts made by Rosemore to recover its money from Caye Bank were futile and therefore Rosemore filed its claim on 30 March 2016, claiming the following:

- (a) Damages for breach by Caye Bank of the expressed and implied terms of the Depository Agreement dated 8 July 2011 entered into between Caye Bank and Rosemore, whereby in April 2015, Caye Bank wrongfully and unlawfully and without the authorization or consent of Rosemore, deducted the sum of US\$175,000.00 from its account;
- (b) In the alternative, damages for negligence caused by Caye Bank since Rosemore sustained losses and incurred expenses by reason of the negligence of Caye Bank in wiring the funds to Walter;
- (c) Further and/or in the alternative, an order directing that Walter return the funds on the basis that he had been unjustly enriched and has unlawfully converted the sum of US\$175,000.00 to his use; and
- (d) Interest and cost.

[16] Caye Bank counterclaimed for an order for specific performance of the undated contract of indemnity. In the alternative, damages for breach of contract.

Decision of Abel J

[17] In order to determine the issues raised in the matter, the trial judge examined the contractual arrangements between Caye Bank and Rosemore, and the procedures for electronic wire transfer. The trial judge had to determine whether Caye Bank (the international bank) or Rosemore (the customer), had to bear the loss, where a fraudster had been successful in perpetrating the alleged fraud.

[18] The trial judge relied on the witness statement from Connor in support of the claim and two expert reports from Rosemore, one from Genoveva Marin, a handwriting expert and one from Mervyn Iles, a banking expert on fraud. Caye Bank relied on the witness statements from Dean Roches and Tricia Villanueva, employees of Caye Bank. Also an expert report from Mark C Hulse, an accountant who gave evidence about banking procedures in Belize. There was no evidence from Ms. Graniel, the former employee, who processed the wire transfer.

[19] The issues determined by the trial judge, as agreed by the parties (except for (d) were:

- “a. Did Rosemore authorize Caye Bank to wire transfer to the second Defendant the sum of US\$175,000.00?
- b. Alternatively, was Caye Bank negligent in wiring the sum of US\$175,000.00 to the second defendant thereby causing loss to the Claimant?
- c. Is Rosemore entitled to damages in the sum of US\$175,000.00, plus interest and costs?
- d. Is Rosemore, in the circumstances of this case, estopped from obtaining judgment in the sum of BZ\$369,587.59 or the equivalent in currency of the United States of America against the first Defendant, having obtained a judgment in the said sum against the second Defendant?
- e. Is Caye Bank entitled to be indemnified by Rosemore in accordance with the undated contract of Indemnity for Facsimile & E-Mail Instruction executed by the authorized signatory of Rosemore in circumstances where Caye Bank acted on the instructions with the identification ‘EARWIG’ in effecting the wire transfer and has suffered expense and loss?”

[20] Two more issues were later identified by the parties as being central after being urged to do so by Abel J. Those were: (a) “Whether Rosemore, via its agent Connor, did in fact authorize Caye Bank to wire transfer to the 2nd defendant the sum of US\$175,000.00?” and (b) “Whether Caye Bank breached or departed from the mutually accepted standards in processing the wire request to transfer the claimed sum?”

[21] By an order dated 30 May 2018, perfected on 5 July 2018, the trial judge made the following orders in favour of Rosemore:

- “1. Damages for breach by Caye Bank of the expressed and implied terms of the Depository Agreement dated 8 July 2011 entered into between Rosemore and Caye Bank, whereby on or about April 2015, Caye Bank wrongfully and unlawfully and without the Claimant's authorization or consent, deducted the sum of US\$175,000.00 from Rosemore's account;
2. In the alternative, damages in the sum of US\$175,000.00 for negligence caused by Caye Bank in that Rosemore sustained such losses by reason of the negligence of Caye Bank, its agents and/or servants in wiring Rosemore's funds in this amount to the 2nd Defendant;
3. Directing Caye Bank, jointly and severally with the 2nd Defendant, Yaron David Walter, to return the funds in the sum of US\$175,000.00 to Rosemore;
4. Interest pursuant to section 166 of the Supreme Court of Judicature Act in the sum of BZ\$14,555.09 as claimed in the Claim Form;
5. Interest pursuant to section 167 of the Supreme Court of Judicature Act after judgment in the sum of BZ\$58.36 per day until the sums are paid in full;
6. Costs as agreed between the parties in the sum of BZ\$65,000.00;
7. Security for costs held by the 1st Defendant on behalf of the Claimant to be returned forthwith.”

The Appeal

[22] Caye Bank appealed the whole decision of the trial judge. It filed ten grounds of appeal and later abandoned ground 9. Ground 10 was a general ground which was that the decision of the trial judge was unreasonable and against the weight of the evidence. The other eight grounds of appeal were as follows:

1. The trial judge erred in law in finding that there was no evidence presented to the court by Caye Bank which in any way suggested that Rosemore did authorize the transfer of the sum of US\$175,000.00;

2. The judge erred in law in finding that “*the transaction was processed by Caye Bank at the behest of a third party, Yaron David Walter, who was not the account holder*” so that “*Caye Bank is liable to repay Rosemore.*”
3. The trial judge erred in law in finding that Caye Bank breached the contractual obligations to Rosemore;
4. The trial judge erred in finding that Caye Bank did not specifically plead “*that the breach of confidential information must have been on Rosemore’s side,*” since the issue was expressly raised at paragraph 9(f) of Caye’s Bank amended defence;
5. The trial judge failed to properly construe clause 14 of the Depository Agreement in light of the realities of doing business as an international bank. The clause, inter alia, provided that “*No third party requests will be processed.*” The judge erred in finding that there was a third party request processed by Caye Bank notwithstanding his acceptance that the signature on the wire transfer request was a representation of the signature of the account holder, who was not a third party;
6. The trial judge failed to consider the evidence from Caye Bank that it was Rosemore’s internal security systems that was breached or compromised thereby resulting in the fraudster using personal log-in credentials to gain access to Rosemore’s online account;
7. The trial judge failed to consider the evidence of the expert, Mark Hulse in respect of the standards of accepting and carrying out electronic wire transfer instructions that prevail in Belize;
8. The trial judge took into consideration inadmissible hearsay evidence and concluded therefrom that Caye Bank received and effected the “*unauthorized transaction*” based on instructions received via the email address jason1rosemore@gmail.com, which was not an authorized email address for Rosemore;

[23] The relief sought by Caye Bank was for the Order of Abel J dated 30 May 2018, to be set aside and for judgment to be entered for Caye Bank in respect of the claim and on the counterclaim.

[24] In written submissions for Caye Bank, it was stated that although the appeal had been divided into several grounds, it can be described holistically as the Bank taking issue with the trial judge's interpretation and application of the evidence before him. Further, if the trial judge had interpreted and applied the evidence accurately the outcome ought to have been different.

Ground 1: Whether Rosemore authorized Caye Bank to wire transfer the sum of US\$175,000.00 to Walter.

[25] Mr. Williams SC submitted that the trial judge erred in law in finding that there was no evidence presented to the court by Caye Bank which in any way suggested that Rosemore did authorize the transfer of the sum of US\$175,000.00. In my view, this ground ought properly to be disposed of under the issue of authorization as agreed at the pre-trial review and determined by the trial judge.

[26] The ground of authorization covers issues of fact and law. The trial judge interpreted several clauses of the Depository Agreement and the Indemnity Agreement, and made findings on facts and law. The judge stated that to arrive at a conclusion in relation to the issues, when considered in the context of the contractual provisions, a question of fact was raised. These controlling provisions are:

The Depository agreement between Caye Bank and Rosemore

[27] Clauses 2, 14, and 51 of the Depository Agreement were considered by the trial judge. These clauses state:

Clause 2

"Bank may rely upon any signature on the signature card in the payment of funds and in all other transactions in connection with the Account. Account Holder agrees to sign a new signature card upon request. The number of required signatures on a check or other withdrawal shall be no more than one Account

Holder's signature which appears on the application, unless otherwise agreed by the Account Holder and upon written notification thereof on the signature card."

Clause 14

"Account Holder may, upon verification of signature or upon identification satisfactory to the Bank, authorize wire transfers to and from the Account. All outgoing wire transfers must be from accounts on which the Account Holder is an owner. No third-party requests will be processed."

Clause 51

"The Bank shall not be liable to Account Holder for any action taken or not taken by it under the terms of this document unless directly caused by the Bank's gross negligence or willful misconduct."

The Indemnity Agreement between Caye Bank and Rosemore

[28] The trial judge also considered the Indemnity Agreement executed between Rosemore and Caye Bank which provides:

"In consideration of you agreeing to accept telex/fax/e-mail instructions from me/us with the identification of EARWIG ... and acting on such instructions I/we hereby undertake

- (a) To indemnify you from and against all actions, proceedings, costs, claims, demands, expenses or losses that you may suffer or sustain by reason or on account of you having accepted such instructions.
- (b) That you shall be entitled to debit our account with the amount of any payments you make in respect of having accepted such instructions.
- (c) On demand to provide funds to meet all payments under such instructions."

[29] The learned trial judge under the heading of '**The Facts**' found that Rosemore did not authorize the transfer. He stated:

“[174] No evidence has been presented to this court by Caye Bank which in any way suggests that Connor did authorize the transfer of this sum or was in any way implicated in its transfer. In the absence of any such evidence this court has determined that it has no alternative but to find that Connor did not authorize the transfer of the sum of US\$175,000.00 to the 2nd Defendant, Yaron David Walter or was in any way implicated in such transfer. Quite apart from the position which this court considers it is obliged to arrive at, in any event this court is quite satisfied, having seen and heard the witness Connor and upon consideration of all the other evidence in the case, that Rosemore did not authorize, and was not implicated in the transfer of the sum of US\$175,000.00.”

[30] Under the heading of ‘Determination’ Abel J determined that having looked at the clear terms of the Depository Agreement and applying it to the facts of the case, it was obvious that Rosemore did not authorize the wire transfer, *“whether or not the signature was satisfactorily verified and whether or not the procedures or processes utilized by Caye Bank were satisfactory (either objectively or subjectively) to Caye Bank.”* He further determined that someone other than Rosemore, most likely Walter, *“as a third-party to the contractual arrangement between Rosemore and Caye Bank, had its/his request processed in the transfer of the US\$175,000.00., from the account of Rosemore. This is clearly in breach of the Depository Agreement between the parties.”* Having considered all the relevant evidence before him, the judge concluded that Connor did not send the “Outgoing Wire Transfer Request” to Caye Bank and as such the wire transfer in the sum of US\$175,000.00 was sent to Walter without the authorization of Rosemore.

[31] Learned senior counsel, Mr. Williams argued that Abel J erred when he found that Caye Bank did not present any evidence to show that Rosemore authorized the transaction. He submitted that the finding was incredulous since the entire thrust of the case was that at the time of the transaction Caye Bank had assured itself that the transaction was authorized by Rosemore.

[32] Counsel further submitted that the judgment of the trial judge at paragraphs 170 and 171 showed that he considered matters outside of immediate circumstances and focused solely on whether Connor himself actually gave the authorization. It was

contended that this was irrelevant because it has nothing to do with the circumstances surrounding the transaction. He argued that authorization was a matter to be assessed and adjudged according to the Bank's perspective. Further, that the evidence of Ms. Villanueva showed the circumstances surrounding the transaction and so the judge should have considered only these limited circumstances. It was further argued that whether or not a transaction was authorized would be determined by the internal procedures for due diligence and verification of identification, created by the Bank and agreed with the customer in the contract between the bank and customer.

[33] Ms. Banner, in response, submitted that the submission made by Caye Bank on authorization is a corruption of the trial judge's statement since the true statement made was that, *"No evidence has been presented to this court by Caye Bank which in any way suggests that Connor did authorize the transfer of this sum or was in any way implicated in its transfer."* This is in fact the statement of the judge as seen at paragraph 174 of the judgment.

[34] Ms. Banner further argued that the trial judge did not accept the position of Caye Bank which was supported by hearsay evidence. That Ms. Graniel, the former employee of Caye Bank who was not called to testify was the only person who communicated with the person making the request for the wire transfer and apparently providing an alternate email address for use by Caye Bank. Also, that Mr. Roches and Ms. Villanueva, the witnesses for Caye Bank, could not provide any evidence with respect to the actual person who requested the transaction.

[35] As for the submission that the trial judge should have considered only *"circumstances surrounding the transaction"*, Ms. Banner submitted that Caye's Bank position was incomprehensible since the parties had agreed that an issue for determination by the court was whether Connor had in fact authorized Caye Bank to deduct US\$175,000.00 from Rosemore's account and wire same to Walter. As such, the trial judge properly considered the totality of the evidence instead of considering hearsay evidence from the witnesses for Caye Bank. Ms. Banner further contended that the acceptance by the judge of Ms. Villanueva's honest and genuine belief that the request came from Connor, could not be determinative of the matter.

Discussion

[36] The trial judge had to assess the totality of the evidence before him in order to determine which party had to bear the loss. I respectfully disagree with the argument by counsel for Caye Bank that the question of authorization had to be assessed and adjudged according to Caye Bank's perspective. In my view, the judge would have erred if he had not assessed the totality of the evidence, including the contractual arrangements between Caye Bank and Rosemore.

[37] The trial judge had no evidence before him as to whose security arrangement had been breached causing Walter, who was allegedly the fraudster, to enter into Caye Bank's portal through the use of Rosemore's password, EARWIG. He stated that *"the possibility exists that Caye Bank's security arrangement may have been breached (by it operating a less than strong and effective system of protection as found by the banking expert Mr. Iles)." See (para 181).* But this was only a possibility and as such a determination could not have been made on that basis. It was open to Caye Bank to defend itself or by its counterclaim, by proving that its system was not breached. Abel J correctly stated that where a bank had acted unlawfully, in breach of the mandate given to it, by paying out monies without the authorization of the client, it falls on the Bank to show that it has a defence. In the case of **The Bank of Bermuda Limited v Pentium (BVI) Limited & Lanclave Limited**, the Court of Appeal, British Virgin Islands, Civil Appeal No. 14 of 2003, (relied upon by Abel J) Saunders CJ, as he was then, stated that it was insufficient for a Bank merely to point to the weakness of the case for the customer and to put the customer to "strict proof" to establish allegations made by them, instead of putting forward a case that could cast doubt on the allegations put forward by the customer. In the instant matter, there was no evidence that the internal security arrangement of either party had been breached, only possibilities.

[38] The contractual provisions between the parties did not fully cover Caye Bank from fraud, as occurred in the instant matter. Clause 2 of the Depository Agreement provides that the Bank may rely upon any signature on the signature card in the payment of funds and in all other transactions in connection with the Account. The signature on the wire transfer was not the signature of Connor as proved by the evidence of Connor

and Ms. Marin which was accepted by the trial judge. Clause 14 provides that the Account Holder may, upon verification of signature or upon identification satisfactory to the Bank, authorize wire transfers to and from the account. The verification method used by Caye Bank was not reasonable as there were visible differences between Connor's signature which is on the signature card and the signature on the wire transfer form. No other identification was requested by the Bank, such as a copy of Connor's passport picture page to compare with records on file at Caye Bank.

[39] Caye Bank contended that it had an honest belief that the transaction was on the instructions of Rosemore on the face of the request and in light of the verification process. Further, whether or not a transaction was authorized was determined by the internal procedures for due diligence and verification of identification. The judge determined that the mere subjective satisfaction of Caye Bank was not the true test that had to be applied in interpreting the Depository Agreement. He accepted the evidence of banking expert, Mr. Iles that Caye Bank was not reasonable in its verification and identification. The trial judge found that the submission of Caye Bank was a weak position to take in such a serious claim and it was irrelevant in the interpretation of the Depository Agreement. The judge said that the *"mere subjective satisfaction of Caye Bank is not the true test in interpreting the Depository Agreement and the process of its verification of the signature or identification of Connor's signature but whether Caye Bank was reasonable in its verification and identification."*

[40] I am in agreement with the trial judge that the true test was whether Caye Bank was reasonable in its verification and identification. Further, it was reasonable for the judge to find based on his assessment of the evidence of Ms. Marin and Mr. Iles that the verification and identification was not reasonable and satisfactory.

Signature on wire request – assessment of evidence by trial judge

[41] Abel J found that Connor was credible when he testified that he did not know Walter and did not authorize the transaction. He accepted the evidence of the handwriting expert, Ms. Marin and determined that the evidence supported the testimony of Connor that the signature on the authorization form for the wire transfer request was not his signature as shown on the authorization card of Rosemore.

[42] Ms. Marin was appointed, by an order of the court, as an expert handwriting witness in the proceedings to give an opinion as to whether the purported signature of Connor affixed to the outgoing wire transfer request dated 22 April 2015, in the opinion of the expert, was a repetition of the signature of Connor. She was instructed by Rosemore to give her opinion as to “*whether the purported signature of Jason Christopher Connor affixed to the Outgoing Wire Transfer Request dated 22nd April 2015 is in your opinion a true representation of the signature of Jason Christopher Connor.*” She thereafter requested original comparable signatures of Connor in order to do her examination. She prepared a report dated 26 July 2017. Her opinion was as follows:

“Based entirely on physical examination of the photographic copy of the questioned document QD1, ... and comparison to all specimen signatures including the most representative specimen signature on the photographic copy of similar document, outgoing wire transfer request dated 22.06.2012 – K11, **I am of the opinion that QD1 contained a collection of observable physical construction differences to the signatures to lead me to opine that the signature was not a true representation of Jason Connor signature.**”

Even though the signature on QD1 contained class characteristics of the general signature formation giving similar pictorial appearance, **I am of the opinion that it lacks individual characteristics and variations not consistent with those appearing on specimen signature** ... Line quality appeared to be poor, line endings appeared thicken, width of second portion of signature appeared as shaded, making the signature QD 1 appearing of different quality formation.”

[43] The trial judge accepted Ms. Marin’s opinion that the signature was not a true representation of Jason Connor’s signature. In my view, no reason had been shown by Caye Bank which would cause this Court to interfere with acceptance by the trial judge of the handwriting expert’s evidence (Ms. Marin) which supported the evidence of Connor.

[44] The trial judge was not oblivious as to Caye Bank's view on the issue of authorization. He considered the evidence of Ms. Villanueva which Caye Bank urged the court to rely on to persuade him that there was no authorization by Rosemore. Ms. Villanueva reviewed the wire transfer request and was satisfied that it was duly signed by Rosemore for six reasons, namely, (a) account number was correct; (b) name of Rosemore on the request; (c) the Indemnity password 'EARWIG'; (d) Authorized signature appeared to be that of Connor as shown on his passport and the signature card on record; (e) She noted that Florangely Graniel, the primary verification officer involved in the transaction wrote on the request form that the client called to confirm the wire and indemnity password on 22 April 2015 and had affixed her signature below the notation; and (f) She instructed Ms. Graniel to be sure to speak with the client via telephone confirming the transaction.

[45] Ms. Villanueva for all those reasons felt satisfied that all matters of proper security and procedure had been followed and gave her approval to proceed with the transaction. As stated above, Ms. Graniel did not give evidence and at the time of proceedings she was no longer an employee of Caye Bank. It had not been proven whether Ms. Graniel placed a call to Connor using his telephone number. It was obvious that this was not done as that call would have been placed to a telephone number which was on file for Rosemore and Connor would have been alerted about the unauthorized request by the fraudster to wire transfer funds from Rosemore's account.

[46] Ms. Villanueva's evidence was that she was of the honest belief that the transaction was duly authorized by Rosemore. Abel J accepted her testimony as to her honest belief, but weighed that evidence against what was proven by Ms. Marin and Connor, which was that the signature on the request form was not that of Connor. Further, there was no evidence as to how the fraudster was able to get his hands on Rosemore's account information and password. He noted that the password 'EARWIG' was no secret to Bank employees as shown by the evidence. This password had been used by Rosemore four years prior to the fraudulent transfer.

[47] The judge also considered but did not accept the evidence of Mr. Roches, the Executive Vice President of Caye Bank. Under cross-examination, he testified that "as

far as we have determined the Claimant did authorize the transaction.” Mr. Roches’ evidence was that he cross-referenced all the relevant documents and observed that the signature and password appeared to be authentic and also had the honest belief that the transaction was duly authorized by Rosemore.

[48] In my view, the honest belief by Caye Bank was not sufficient to protect it as there were red flags that the request for the wire transfer may be fraudulent. These red flags included inconsistencies in the signature on the wire request form, the email address jason1rosemoremore@gmail.com was used for the transaction which was not on record for Rosemore, the Account Holder secure domain @rosemore.com was not used and the large amount of transfer was above the daily limit and in fact the yearly limit. Further, Caye Bank failed to make further enquiries such as placing a call to Connor’s telephone number on record. Even further, Caye Bank should have been put on inquiry when the person called the Bank in relation to the wire transfer. I would say that this was a glaring red flag as it was Caye Bank who should have placed a call to Connor.

[49] In my opinion, the trial judge properly assessed the evidence of the signature on the wire request form and rightly concluded that it was not the signature of Connor. The honest belief of Caye Bank was rightly rejected by the trial judge.

Bank Fraud Expert for Rosemore – Mr. Iles

[50] Mr. Iles’s evidence was that there were significant shortcomings in the control exercised by Caye Bank in effecting the payment to Walter. He was of the opinion that the large payment of US\$175,000.00 was out of character with the previous running of the account and this should have alerted the employees at Caye Bank. Further, Mr. Iles testified that he considered as significant that there was no evidence that any of the Caye Bank’s employee initiated a telephone call to Mr. Connor and thereby sought to properly identify him. Mr. Iles also considered as significant that Caye Bank relied on a four year old code ‘EARWIG’ which had been used before and recorded on a number of documents and records which in his opinion, fell below the standard he would have expected of a bank. Abel J considered the evidence of Mr. Iles to be credible and relevant.

[51] In my opinion, it was reasonable for the trial judge to accept the evidence of Mr. Iles. For instance in relation to the telephone call, it was shown that the fraudster called Caye Bank. Instead Caye Bank should have called Connor using his telephone number on record. The argument by Caye Bank that Mr. Iles does not know Belize standards cannot be accepted. The fraud in the instant matter was caused by an international fraudster at an International Bank (Caye Bank). The standards spoken of by Mr. Iles, in my view, are reasonable standards which were relevant for local and international banks.

Alternate email address

[52] There was also evidence before the judge which shows that the employee of Caye Bank, Ms. Graniel, who did not give evidence, communicated with the person who made the request for the wire transfer and that individual provided an alternate email address, jason1rosemore@gmail.com, to Caye Bank which was not on record for Rosemore's account. Though it was argued for Caye Bank that this was hearsay evidence, it is to be noted that Caye Bank itself relied on Ms. Graniel's notes to defend its case. Mr. Roches and Ms. Villanueva had not communicated with the fraudster/person who called the Bank about the wire transfer. That alternate email address showed up in the records of Caye Bank, in discoveries after the claim was filed. The evidence as shown by the trial judge proved that the confirmation of the wire transfer was sent to jason1rosemore@gmail.com.

Application of terms of agreement to facts

[53] In my view, the trial judge properly assessed all the relevant evidence which was before him and found that based on the terms of the Depository Agreement and applying it to the facts of the case, Rosemore did not authorize the transaction. In my opinion, the judge was correct in concluding *"that at no time did Connor request that the transaction be effected or sent the "Outgoing Wire Transfer Request" to Caye Bank and as such the said wire transfer in the sum of US\$175,000.00 sent by Caye Bank to Yaron David Walter was sent without Rosemore's authorization."*

[54] Abel J believed the witness, Connor, and the evidence of the handwriting expert, Ms. Marin which supported Connor's evidence. Also, the judge accepted the evidence

of Mr. Iles. The argument that it was Caye Bank's honest belief that the transaction was the instruction of Rosemore cannot outweigh the factual finding. The fact remains that Caye Bank unlawfully authorized the transfer, if not, the account of Rosemore would not have been debited for the benefit of Walter, thereby causing a loss. Connor did not authorize the wire transfer for Rosemore. It is acknowledged that this is a most unfortunate situation for Caye Bank and the evidence showed that it had suffered loss before as a result of a fraudster hacking its online system.

[55] In my opinion, Caye Bank had not demonstrated to this Court that the decision reached by Abel J was one which "*no reasonable judge could have reached*" or that the "*decision cannot reasonably be explained or justified.*" See the case of **Stephanie Jones v Jessie Stephenson**, Civil Appeal No. 21 of 2016, Court of Appeal of Belize dated 22 June 2018 at paragraphs 11 to 13, which was relied upon by Ms. Banner in her written submissions.

Ground 2 – Transaction processed at behest of third party

[56] Caye Bank's submission was that the judge entered in the realm of "*mere conjecture*" in concluding that "*the transaction was processed by Caye Bank at the behest of a **third party**, Yaron David Walter, who was not the account holder*" so that "*Caye Bank is liable to repay Rosemore.*" The quoted words were stated by the judge at paragraph 177 under the heading of "Submissions." It was a submission made by Ms. Banner in the court below whereby she relied on the plain and literal meaning of Clause 14 that the Account Holder may authorize Caye Bank to conduct wire transfers to and from the Account, and that "third-party requests" will not be processed. She further submitted that as the transaction was processed by Caye Bank at the behest of a third party, it was liable to repay Rosemore.

[57] As stated above, the trial judge found that the evidence before the court proved that "*someone other than Rosemore, likely Walter as a **third party** to the contractual arrangement had his request processed in the transfer of the US\$175,000.00 from the account of Rosemore.*" Caye Bank in written submissions, argued that Walter never entered an appearance in the proceedings and there was no evidence that the unauthorized transfer was at the behest of Walter. Also, that the judge interpreted the

language in the Depository Agreement as it relates to “third party” transactions in such a way that is incongruent with the realities of international banks. In other words, counsel submitted that the trial judge formed a wrong view about the interpretation of “third party” in the context of the Depository Agreement, and the wrong view permeated his entire reasoning and analytic process so that every inference, judgment or finding made that was rooted in that wrong view, would also be incorrect. Further, that Caye Bank’s consistent evidence was that the particulars of the transaction for identification and verification purposes led them to formulate the view that the transaction was duly authorized.

[58] It was also contended for Caye Bank that the trial judge interpreted Clause 14 extremely too narrow to be reasonable and effective in the conduct of business at an international bank. That the correct interpretation was that the account holder was the account holder on paper so that any third party was any party not being the account holder on paper. That is, on paper, Rosemore was the account holder and on paper Connor was the lawful signatory. That when the request was received the named account holder on paper was Rosemore and on paper the signatory was Connor. Counsel submitted that it matters not whether the person who picked up the pen and signed Connor’s name on the wire request was Connor himself or an unknown person. Further, counsel contended that the fact remains that the signature was a representation of Connor’s signature which according to the Bank’s records was the lawful signatory and therefore not a third party.

[59] Ms. Banner in response submitted that the trial judge was correct when he inferred that Walter as beneficiary of the funds was at the behest of Walter. Counsel also contended that the judge was right to adopt the natural and ordinary meaning of the word “Third Party” in the Depository Agreement.

Discussion

[60] It has been proven that Connor did not authorize the transaction for Rosemore and that the signature on the wire request form was not a true representation of Connor’s signature. Caye Bank was duped into processing the wire transfer with a forged signature by someone other than Connor. In my view, that someone was a third party

as it was not Connor. The judge was therefore correct in giving the natural and ordinary meaning of the word “Third Party” in the Depository Agreement.

[61] The submission for Caye Bank, if I understand it correctly, is that a third party has to be a name other than Rosemore/Connor, regardless of credible evidence that there was no authorization by Connor. Caye Bank’s submission “*that it matters not whether the person who picked up the pen and signed Connor’s name on the wire request was Connor himself or an unknown person*”, cannot be accepted since it had been proven that it was a fraudster, most likely Walter, who requested the wire transfer and the money was sent to his account in Canada. Unfortunately, at the time, Caye Bank was unaware that it was dealing with a third party. Caye Bank had an obligation to verify the authenticity of the signature on the wire transfer, especially in today’s world where cyber crime is prevalent. It should verify the signature in the same way it verifies signatures on cheques. In my view, Caye Bank was of the belief that it was Connor because of the other reasons stated by Ms. Villanueva, such as the password “EARWIG” and that the request was made through Rosemore’s account. That evidence showed that there was a breach of the security system but, as to whose account was breached, that had not been proven. What had been proven was that Caye Bank authorized the transfer and debited Rosemore’s account. I agree with the submission of Ms. Banner that a third party is someone other than Rosemore. In my opinion, the judge correctly interpreted the meaning of ‘third party’ in the depository agreement and found that a third party to the contractual arrangement between Rosemore and Caye Bank had the wire request processed. This was a reasonable inference as the US\$175,000.00 was sent to Walter’s Credit Union account in Canada and this was not authorized by Rosemore.

Ground 3 - Whether the trial judge erred in law in finding that Caye Bank breached the contractual obligations to Rosemore.

[62] The trial judge stated the issue as “*Whether the Bank breached or departed from the mutually accepted standards in processing the wire request and to transfer the claimed sum.*” At paragraphs 193 and 194, under the heading of “*The Law*” the trial judge stated that the mutually accepted standards in processing the wire request was to be found in the contractual arrangement entered into by the parties which he had

already mentioned under the issue of authorization. (He had referred to Clauses 2 and 14 of the Depository Agreement).

[63] Further, the judge was of the view that **BA Holdings LLC v Heritage International Bank & Trust Limited**, Supreme Court of Belize, Claim No. 656 of 2013, was applicable because of the similarities between that case and the instant matter, and that banks and customers are bound by mutually agreed standards of identification. In that case, the account was operated online through the bank's website and communicated with its customers by email. Also, a transaction was done online which had been verified by the Bank using its verification procedures but without the PIC (password) from the customer. The transaction turned out to be fraudulent and in a claim for breach of the Depository Agreement, Benjamin CJ, as he was then, found that the Bank must bear the loss because it departed from the mutually accepted standards.

[64] In the instant matter, Abel J stated that he had already determined that there was no authorization by Rosemore and this factual finding was relevant to this issue, since Caye Bank had agreed to take instructions from Connor for Rosemore. He found that Caye Bank failed to take adequate steps to verify the transaction through the account holder's agent, Connor. In his view, the standard of identification was not simply subjective but what was objectively satisfactory to Caye Bank as an international commercial bank. In particular, as shown at paragraph 200, Abel J considered the cross-examination of Mr. Roches and the evidence of Mr. Iles, the bank fraud expert. He found the evidence of Mr. Iles to be credible, relevant and applicable, which was that Caye Bank failed to comply with "*reasonable, and therefore mutually, acceptable banking standards for the processing of on-line wire requests.*" Further, that Caye Bank did not adhere to international standards. The judge listed over twelve breaches which include: that there was no call made to Connor; failure to ensure that the communication regarding the wire transfer was only with Rosemore's secure domain name "@rosemore.com" and not with the low security public domain "gmail.com"; failure to properly inspect Wire Transfer Request Form and to observe possible visible inconsistencies in the signature on the form; failure to notice that for the first time since opening the account the email address jason1rosemore@gmail.com was used for the

unauthorized transaction and failure to verify that address; failing to notice that Rosemore only made an insubstantial wire from its account since it was opened in 2011 (US\$1,915.76); failing to give heightened security to the high value transaction of US\$175,000.00; and failure to ensure Rosemore/Connor received an alert or notification that Rosemore's password had been changed.

[65] Mr. Williams SC submitted that the trial judge correctly acknowledged that the contractual arrangement between the parties was the source of the "*mutually accepted standard*" for processing wire transfer requests. That there were mutually accepted standards of identification which were established by virtue of the Depository Agreement and any associated document such as the signature of Connor as evidenced by the signature card, copy of passport and the indemnity password 'EARWIG'.

[66] Senior counsel contended that Clause 2 of the Depository Agreement made it pellucid that Caye Bank was permitted to rely on any signature consistent with a signature on the signature card for the processing of transactions. As such, for the purpose of processing the transaction, the Bank was within its contractual boundaries to rely on the signature on the request, provided it was consistent with the signature on the signature card.

[67] Counsel further argued that Abel J accepted that the Bank and customer are bound by the mutually accepted standards of identification and relied on the case of **BA Holdings**. He argued that in that case the bank fell short of the agreed standard of identification and therefore, it can be distinguished from the instant matter, as Caye Bank abided by the mutually accepted standards and was not in breach of the contract.

[68] Mr. Williams further contended that International Commercial Banks in Belize are governed by the provisions of the ***International Banking Act, Cap 267***, and according to Mr. Roches their internal processes and procedures are checked and verified by the Central Bank of Belize. As such, he argued that, it can be inferred that the contractual standards of identification that existed at the time of the subject transaction were adequate to meet the standards as expected by the regulatory framework for banks in Belize.

[69] Ms. Banner in response submitted that the trial judge properly found that Caye Bank breached its contractual obligations to Rosemore as it was permitted to rely only on Mr. Connor's signature which appears on the signature card and it is proven by the expert evidence that Mr. Connor did not affix his signature to the wire transfer request. (Clause 2). In relation to Clause 14, Counsel submitted that it is only the account holder, Rosemore by its agent Connor, who may authorize Caye Bank to conduct wire transfers to and from the account. As such, Caye Bank had to ensure that the authorization had been received from the Account Holder and not from a third party.

[70] Counsel further argued that Caye Bank relied on **BA Holdings** to make the point that the Bank and customer are bound by mutually agreed standards of identification. However, the decision must be confined to its particular facts. Further, the decision of **Pentium (BVI)** showed that even where strictly speaking a bank may comply with its own procedures to verify payments on the basis of genuine belief, this is not sufficient.

Discussion

[71] Clause 2 of the Depository Agreement as discussed under ground 1 shows that Caye Bank may rely upon any signature on the signature card and it was proven that the signature on the wire request form was not the signature of Connor. (This issue of breach of contract is intricately linked to the issue of authorization). Mr. Williams correctly submitted that for the purposes of processing the transaction, the Bank was within its contractual boundaries to rely on the signature on the request, provided it was consistent with the signature on the signature card. However, the evidence proved otherwise. That is, the signature was not consistent with that on the card. There were possible visible inconsistencies.

[72] Clause 14 provides for verification of signature or upon identification satisfactory to the Bank, before authorization (by the Bank) of wire transfers from the account of the client. As discussed previously under the issue of authorization, the signature of Connor was not reasonably verified. Further, no other means of verification was done in relation to making contact with Connor. For example, identification satisfactory to the Bank could be Connor's passport (picture page) but this was not requested from him or

the placement of a telephone call to Connor. As such, it is my opinion, the trial judge correctly found that Caye Bank breached its contractual obligations to Rosemore.

Breach of implied terms of the contract (duty of care)

[73] There is an implied term of the Depository Agreement between Caye Bank and Rosemore that the Bank will observe reasonable skill and care in doing wire transfers. Banks owe a duty of care to their clients to refrain from making fraudulent payments and make reasonable enquiries as far as a reasonable banker would be expected to do to ensure that the payment is not fraudulent. Abel J accepted the opinion of Mr. Iles as to those inquiries which should have been made in the instant matter.

[74] In the alternative claim for negligence, Abel J relied on the discussion of the then Chief Justice in **BA Holdings LLC**, in so far as it concerned the relationship of banker and customer, and the correlation between breach of contract and negligence. The judge stated that based on the said discussion, and the facts and determinations which he had already made, *“Caye Bank acted in breach of its duty to Rosemore and, in the alternative to breach of contract, finds that Caye Bank is liable in negligence and is responsible for the loss and damage to Rosemore occasioned thereby, which in the circumstances of the present case, amounts to the sum of US\$175,000.00.”*

[75] In **BA Holdings LLC**, the trial judge (the then Chief Justice) relied on several authorities which included **Absa Bank Limited v Daniel Joseph Hanley** [2013] ZASCA 183, Supreme Court of Appeal of Africa, in his discussion for breach of the depository agreement. In relation to negligence, the judge relied on **Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd. et al** [1985] 3 WLR 317, where Lord Scarman dealt with the relationship of banker and customer and the correlation between breach of contract and negligence. The judge also relied on **Barclays Bank Plc v Quincecare Ltd.** [1992] 4 All ER 363 at 376-377 per Steyn J.

[76] In my view, the **Quincecare** authority is useful in so far as it relates to duty of care between a bank and its customer. This duty arises when banks are asked to make payments in circumstances in which there are reasonable grounds to suspect a possible

fraud. In such cases, Banks owe a duty of care to their clients to refrain from making payments and make further inquiries.

[77] Steyn J in **Quincecare** said at page 376:

“It is an **implied term** of the contract between the bank and the customer that the bank will **observe reasonable skill and care** in and about executing the customer's orders. Moreover, notwithstanding what was said in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1985] 2 All ER 947 at 957, [1986] AC 80 at 107, a banker may in a case such as the present be sued in tort as well as in contract: see *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 571. But the duties in contract and tort are coextensive, and in the context of the present case nothing turns on the question whether the case is approached as one in contract or tort.

.....

In my judgment 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....”

[78] In relation to the statutory position, Mr. Williams correctly submitted that International Commercial Banks in Belize are governed by the provisions of the **International Banking Act**. The provisions in the Act were not the subject of challenge in the instant matter and is indeed applicable. A relevant provision in relation to this matter is section 24(3) of the **International Banking Act** which provides:

“ Every director and officer of a licensee, in exercising the powers and discharging the duties of that person's office, shall,

.....

(b) ***exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.***” (emphasis added)

[79] In the instant matter, the question to be asked is whether Caye Bank exercised the care, diligence and skill that a reasonable prudent person would exercise in comparable circumstances. To answer this question, it is necessary to examine whether Caye Bank had reasonable grounds for believing that the wire request was fraudulent. As shown in **Quincecare**, this is not to say that there must be proof of fraud. A Bank is not expected to be like detectives.

[80] Learned counsel, Ms. Banner contended that Caye Bank failed to exercise reasonable care in debiting funds from Rosemore’s account notwithstanding its contractual undertaking that no third party requests would be processed. She relied on **Absa Bank**. (The principle of that case was accepted in **BA Holdings**). In **Absa Bank** the court had to consider whose negligence or carelessness was the real, direct or proximate cause of the loss.

[81] Ms. Banner also relied on **Bullen and Leake & Jacob’s, Precedents of Pleadings**, 14th Edition at 5-05 which shows that where a bank makes an unauthorized payment from its customer’s account, it has no right of indemnity against its customer.

[82] Counsel for Caye Bank submitted that **Absa Bank** is only persuasive and is not binding on this Court. Further, there were red flags in that case but in the instant case there were no red flags. That Connor allowed his password to be used, whether intentionally or not, and that is the reason why the wire transfer was done. As such, it is Connor’s negligence or carelessness that is the direct cause of the loss of funds.

[83] In my opinion, Caye Bank was ‘put on inquiry’ as there were red flags in the request for the transfer that should have caused Caye Bank to make reasonable inquiries. A Bank is a regulated entity and it plays an important part in uncovering financial crimes and money laundering and it should therefore always be alert to potential fraudulent transactions. In the instant matter, the amount requested to be transferred should have alerted Caye Bank and put it on inquiry since this was the first

time that a request for a large amount had been made from Rosemore's account in its years of banking with Caye Bank. The signature of Connor on the card is only one form of verification and the signature on the wire request form was not a true representation of his signature, though Caye Bank believed it was his signature. The wire transfer request falsely showed Connor's name as transferor. The large amount of the transfer should have put the bank on alert to make further inquiries about it from Connor himself. There was no call back placed to Connor's telephone number on Caye Bank's record to verify the significant amount of the transfer. The call made to Ms. Graniel by someone, most likely the fraudster, cannot be verification of the wire request. Although a note was placed on file to call Connor (Instructions from Villanueva to Graniel) it had not been proven by Caye Bank that this was done.

[84] Further, Caye Bank had not proven that the fraudulent transaction had taken place due to Rosemore's fault. Rosemore's account was maintained by Caye Bank and as such Caye Bank was responsible for the safety and security of the account. One question that should be asked is who was in a position to prevent the forgery. The only possible answer is Caye Bank. It owed a duty of care to its customers and as such it must exercise due diligence when executing requests from its account holders. In my opinion, the employees of Caye Bank failed to exercise the care, diligence and skill that a reasonable banker would exercise in comparable circumstances. It was therefore, reasonable for the trial judge to determine that Caye Bank failed to comply with reasonable and mutually accepted banking standards for the processing of online wire transfer requests thereby breaching the contractual agreement between the parties.

BA Holdings case distinguished

[85] Mr. Williams argued that in **BA Holdings LLC**, the bank fell short of the agreed standard of identification but, the instant matter can be distinguished since Caye Bank abided by the mutually accepted standards and was not in breach of contract. In my view, each case must be determined on its own facts. Indeed, the PIC code was not used in **BA Holdings LLC** and it was a way of verification. In the instant matter, although the code 'EARWIG' was used, the fact remains that the signature on the wire transfer request was not that of Connor. Further, it had been proven that "EARWIG"

was a four year old code and several officers of Caye Bank were aware of the code which had been used once before to make an insubstantial wire transfer. Also, there was no evidence that Caye Bank had any internal anti-fraud controls.

Pentium (BVI) case

[86] Caye Bank also argued that it was possible that Rosemore's password to the Bank's portal was breached. But, this was a suggestion without proof. In the matter of **Pentium (BVI)**, the Bank had to show that it had a real prospect of defending the claim, not merely attacking the evidence of the claimant that it was self serving or uncorroborated. In my view, Abel J correctly determined that Caye Bank's case had not been sufficiently pleaded or made out and that it merely pointed to the weakness of Rosemore's case. Caye Bank had not shown that it had a real prospect of defending the claim.

Indemnity point

[87] Ms. Banner argued that where a bank makes an unauthorized payment from its customer's account, it has no right of indemnity against its customer. I am in agreement with counsel. Caye Bank cannot be protected by the Indemnity executed between Rosemore and Caye Bank. The trial judge determined that the whole basis of the indemnity was for the purpose of Caye Bank acting on the instructions of Rosemore. In my view, this was a correct interpretation by the trial judge. It had been proven that Caye Bank **had not** acted on the instructions of Rosemore. Instead, it acted on the instructions of a third party. Therefore, it was reasonable for the trial judge to determine that where Caye Bank makes a payment without authorization from Rosemore, it would have no right of indemnity.

Grounds 4 & 6: Whether there was a breach of confidential information on Rosemore's side

[88] These two grounds can be conveniently disposed of together. Caye Bank asserts that the trial judge erred in finding that Caye Bank did not specifically plead "**that the breach of confidential information must have been on Rosemore's side.**" This assertion led to the other issue that the judge failed to consider the evidence from Caye Bank that it was Rosemore's internal security systems that was breached or compromised

thereby resulting in the fraudster using personal log in credentials to gain access to Rosemore's online account.

[89] Abel J at paragraph 204 determined that he could not accept that the breach of confidential information must have been on Rosemore's side. That this *"was not clearly put to the witness of fact for Rosemore (Connor), was not specifically pleaded for Caye Bank, and was never, in this court's view of the case, expressly part of Caye Bank's case."*

[90] The contention for Caye Bank was that it was expressly its case that Rosemore's systems and security features must have been breached or compromised as shown at paragraph 9(f) of the amended defence. Further, that the Bank led circumstantial evidence in support of this averment. Counsel contended that Rosemore's system was compromised since the request came from Connor's online portal with the Bank where Connor's log in credentials would have been used to access the online portal. It was argued that since the password was created by Connor, and the judge accepted it was not him, then the person who submitted the request had Connor's credentials. Also that the credentials are unknown to Bank personnel so the inference to be drawn is that Connor's system was compromised. Counsel argued that there was sufficient circumstantial evidence to show that the invasion was not perpetrated on the Bank's side but on Connor's side.

[91] Ms. Banner in response submitted that the trial judge was correct as Caye Bank actually pleaded that, *"the transfer was wholly caused or contributed to by the negligence of the Claimant as it was the duty of the Claimant to ensure the confidentiality of its indemnity password and to ensure that the password was kept safe."*

Discussion

[92] A perusal of the pleadings showed that the judge made an accurate statement because it was not specifically pleaded that that breach of confidential information must have been on Rosemore's side. At paragraph 9(f) of the amended defence, Caye Bank pleaded that the Indemnity password of the authorized signature had been and remain confidential and it means that the third party obtained the password from Connor. Further, that the transfer was wholly caused or contributed by the negligence of Rosemore as it

was the duty of Rosemore to ensure the confidentiality of its indemnity password and to ensure it was kept safe.

[93] Even though there was no specific pleadings on this issue and no evidence was led to prove whose system was breached, Abel J addressed it at paragraphs 180 and 181 of his judgment since it could have shed light on how the fraudster gained access to Caye Bank's online portal. The judge was clear that there was no evidence which proved whose system was breached. He said the following on the issue:

“[180] This case may have been easily determined, one way or another, if there was clear evidence either suggesting that Rosemore's internal security arrangement had been breached, or, on the other hand, Caye Bank's internal security arrangement had been breached. In either such case this court would be in a firmer position to say that Rosemore or Caye Bank, having allowed or permitted such a breach, the former, the customer, may be deemed to have authorized the transaction in question, or the latter, the bank, allowed or permitted the breach into its own system for which the customer ought not to be found liable. Either such case would in the view of this court be clear.

[181] Unfortunately, on the facts and circumstances of the present case, as found by this court, there is no such clarity. There is some suggestion (but apparently no evidence) that Rosemore's security arrangement may have been breached (enabling the fraudster to enter into Caye Bank's portal by use of Rosemore's password), and the possibility exists that Caye Bank's security arrangement may have been breached (by it operating a less than strong and effective system of protection as found by the banking expert Mr. Iles).

[94] The judge then proceeded to address the actual threat which was posed by a fraudster and that the contractual provisions between the parties did not fully address fraudulent transactions. At paragraph 185, the judge addressed the lack of evidence in relation to the issue of breach of the security system. He said the following:

“[185] It seems to this court that the fatal flaw of Caye Bank’s case is that it stopped short of seriously suggesting or even attempting to prove or proving (on a balance of probabilities or otherwise) that Rosemore internal security arrangement has been breached, or that it was in some way at fault, in that it allowed the 2nd Defendant, as a potential fraudster, access to its account with Caye Bank.”

[95] In my view, the submission for Caye Bank that there was sufficient evidence to show that the invasion was perpetrated on Connor’s system was without merit. The issue as to the breach of the security system was a matter that could have been proven by experts in the field of information technology. The banking experts who were brought before the court were not experts in such field and therefore, could not prove that the system was breached. Caye Bank’s case was focused on proving (by its honest belief) that the wire transfer was authorized by Connor.

[96] In reply submissions, counsel for Caye Bank argued that the fact that Connor allowed his password to be used, whether intentionally or not, was the reason why the request was sent to Caye Bank. Therefore, it was Connor’s negligence or carelessness that is the direct cause of the loss of funds. In my view, this was a bare assertion without any proof. There was no iota of evidence before the trial judge that Connor gave his password to a third party as submitted by Caye Bank or that he was negligent with his password. These grounds are therefore without merit.

Ground 5: Failure to properly construe clause 14 of Depository Agreement

[97] Caye Bank stated that the trial judge failed to properly construe clause 14 of the Depository Agreement in light of the realities of doing business as an international bank. That the judge erred in finding that there was a third party request processed by Caye Bank notwithstanding his acceptance that the signature on the wire transfer request was a representation of the signature of the account holder, who was not a third party.

[98] In my view, Clause 14, which provides that “... **No third-party requests will be processed,**” was adequately addressed under grounds 2 and 3. However, it must be

repeated for sake of clarity that Abel J did not accept that the signature on the wire transfer request was a representation of the signature of the account holder, Connor.

[99] Counsel for Caye Bank under this ground submitted that Caye Bank was not expected to have a handwriting analyst on stand-by to conduct a signature analysis before processing a wire transfer and as such the standard which was expected of the Bank was the standard with which there was compliance. It is to be expected that a Bank would not operate with a handwriting expert on stand-by. However, it has to be reasonable in its verification procedures and in the circumstances, it should have done what any other prudent banker would have done. It should be noted that the handwriting expert confirmed that a review of the wire request form with the naked eye clearly demonstrates that there was an outstanding difference between the signature of the fraudster and Connor's signature. The conclusion by Caye Bank that the signature was an accurate representation of Jason Connor's signature, as discussed before, was an error. It was not Connor's signature as found by the trial judge. The wire request was for US\$175,000.00, which was a substantial amount and there were red flags which the Bank should have queried and failed to do so. I respectfully disagree with counsel that there was no breach of Clause 14 by Caye Bank, even if it was an imposter.

Ground 7: Failure to consider evidence of expert witness, Mark Hulse

[100] Caye Bank contended that the trial judge failed to consider the evidence of the expert, Mark Hulse in respect of the standards of accepting and carrying out electronic wire transfer instructions that prevail in Belize. Counsel argued that while the banking expert, Mr. Iles is a very experienced Banker, he is not experienced in banking in Belize. Further, that Mr. Hulse was familiar with banking in Belize.

[101] Counsel argued that according to Mr. Hulse the process of receiving instructions and processing a wire transfer was essentially the same between Caye Bank and other banks in Belize. Counsel relied on the conclusion by Mr. Hulse that Caye Bank had systems for adequate due diligence and verification procedures. Further, that the Depository Agreement governed the relationship between the parties and under the agreement, signature verification was allowed to process wire transfer transactions.

Counsel further argued that the trial judge failed to acknowledge the limitation of Mr. Iles and failed to consider the opinion of Mr. Hulse who provided a Belizean perspective.

[102] Ms. Banner in response to this ground set out in great detail the testimony of Mr. Iles, an international banking expert, specifically in the field of bank fraud. Mr. Iles filed two reports, the initial report and the other based on questions posed by counsel for Caye Bank. Counsel summarized Mr. Iles report concerning controls and procedures which are usually in place. Counsel thereafter submitted that when the parameters stated by Mr. Iles are reviewed in light of the evidence, there were more than sufficient issues with the transaction which demonstrated the breach of contract by the bank and its gross negligence in the handling of the transaction at issue in this case.

[103] I don't find it necessary to review the parameters in light of the evidence. But one parameter that I must mention is the telephone call back. Whether it is international standards or Belize standards, a phone call to Connor using his telephone number on file would have prevented this fraud by Walter. Mr. Iles opinion on this is as follows:

"7.12 ... [In] the circumstances, I would have expected a senior official in Caye to have contacted Mr. Connor directly by telephoning him using the number provided when the account was opened and then identifying him with appropriate security questions before asking him to confirm the genuineness of the Wire Transfer. Alternatively, Caye should have originated an email using either of the two rosemore.com email addresses asking him to contact the bank and then positively identifying him before questioning him regarding the payment. I have seen no evidence of Caye initiating either of these actions; the two conversations with a person, (presumably Ms. Graniel) regarding the payment appear to have been the result of incoming calls."

[104] I have discussed above that there was an incoming call from someone but no evidence of an outgoing call to Connor from Caye Bank.

[105] In my opinion, the trial judge did not fail to consider the evidence of Mr. Hulse. It is seen from the judgment that the trial judge was satisfied with the evidence of Mr.

lles, who had experience in bank fraud, and whose evidence he found to be relevant and credible.

[106] In relation to the submission by Ms. Banner that this was a case of gross negligence, this had not been made out by the evidence. There was negligence but not gross negligence.

Ground 8: Instructions received from jason1rosemore@gmail.com inadmissible hearsay evidence.

[107] The submission for Caye Bank was that the trial judge took into consideration inadmissible hearsay evidence and concluded therefrom that Caye Bank received and effected the “*unauthorized transaction*” based on instructions received via the email address jason1rosemore@gmail.com, which was not an authorized email address for Rosemore.

[108] As discussed previously, the trial judge after considering the evidence of Mr. Roches and Mr. lles found that Caye Bank failed to comply with reasonable, and therefore, mutually accepted banking standards for the processing of online wire requests. He found that Caye Bank failed to be alerted that for the first time since opening the account, the email address jason1rosemore@gmail.com had been used for the unauthorized transaction and this was not the email address on record for Rosemore. Further, Caye Bank took no steps to verify the said email address once it was provided to Caye Bank by the third party for the purpose of sending confirmation that the funds had been wired.

[109] Caye Bank gave no evidence as to the manner in which it received the email address of jason1rosemore@gmail.com. The trial judge stated that it was through disclosure of documents that it was shown that confirmation of the wire transfer was sent by a Caye Bank employee to jason1rosemore@gmail.com, an email address unknown to Connor. Mr. Roches during cross-examination accepted that there was no evidence before the court as to where the email address came from. He stated that he had received a copy of an email which showed that the unauthorized email (jason1rosemore@gmail.com) had been used for confirmation of the wire transfer. Ms.

Graniel who made the transfer had not been called to give evidence as discussed previously. Mr. Roches and Ms. Villanueva gave evidence based on their personal knowledge and bank records. This email was part of the bank records and it was also considered by Mr. Iles, the banking expert. Therefore, it was proper for the trial judge to consider the unauthorized email address.

[110] In relation to the unauthorized email address, Mr. Roches testified that the “*wire confirmation was emailed to the bank first and then it was copied, paste then forwarded to email address mention above.*” He clarified the communication was sent to jason1rosemore@gmail.com. He testified using electronic bank records kept in the regular course of business. Caye Bank in its submissions placed great emphasis on the fact that Mr. Roches did not write the email. In my view, the fact that he had not written the email was irrelevant. The email was copied to him and so he was able to testify about the copy sent to him. However, he could not say how the bank received that email address to send the confirmation. No other employee of Caye Bank was called to give evidence to shed light on the communication in relation to the unauthorized email address. Mr. Roches admitted during cross-examination that a gmail.com address is an insecure form of communication and a more secure form is a domain name. If the Bank had exercised reasonable care and skill, it would have observed the unauthorized email address used by the fraudster.

[111] As such, I am of the opinion that the evidence considered by the trial judge and the conclusion reached by him in relation to the email address jason1rosemore@gmail.com, was not inadmissible hearsay evidence.

Ground 10 – Decision contrary to the weight of the evidence.

[112] In my opinion, the points raised under this ground have been adequately addressed under the previous grounds.

Conclusion

[113] For all those reasons, I would propose the following orders:

- (1) The appeal be dismissed.

- (2) The order of the trial judge dated 30 May 2018, confirmed.
- (3) The respondent (Rosemore International Corporation) is entitled to the cost of the appeal. This costs order is provisional, to be made final after seven days. In the event either party should apply for a contrary order within the period of seven days from the delivery of this judgment, the matter of costs shall be determined on written submissions to be filed by the parties in ten days from the date of the application.

HAFIZ BERTRAM JA

DUCILLE JA

[114] I have had the opportunity of reading in draft, the judgment of Hafiz Bertram JA and I agree with her reasons for judgment and the orders proposed therein.

DUCILLE JA

CAMPBELL JA

[115] I have read the draft judgment of Hafiz Bertram JA and I agree with her reasons for judgment and the orders proposed by her.

CAMPBELL JA