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Caye International **Bank** Ltd v Rosemore International Corporation

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Jurisdiction: Caribbean States

Judge: Wit , Anderson , Rajnauth-Lee , Barrow , Burgess , Mr. Justice Burgess , Mr Justice Burgess

Judgment Date: 31 January 2023

Reported In: BZ 2023 CCJ 1

Docket Number: CCJ Appeal No BZCV2022/003

Court: Caribbean Court of Justice

PDF

Between
Caye International **Bank** Ltd
Appellant
and
Rosemore International Corp
Respondent

[2023] CCJ 4 (AJ) BZ

Before the Honourable:
Mr Justice Wit, JCCJ

Mr Justice Anderson, JCCJ

Mme Justice Rajnauth-Lee, JCCJ

Mr Justice Barrow, JCCJ

Mr Justice Burgess, JCCJ

CCJ Appeal No BZCV2022/003

BZ Civil Appeal No 25 of 2018

IN THE CARIBBEAN COURT OF JUSTICE

APPELLATE JURISDICTION

Banking – Banker/client relationship – Duty of **Bank** – Quincecare duty of care – Online Banking – Cyber Fraud – Cyber fraudster posing as **bank** customer and giving instructions – Unlawful deduction of funds by **Bank** from customer account without authorisation and consent – Whether **bank** under duty of care to make inquiries before transferring money.

Contract – Interpretation – Blairmont approach to contractual interpretation – Business common sense rule – Depository Agreement – Exclusion Clauses – Whether clear words are required to exclude liability for Quincecare duty of care – Indemnity Agreement – Whether **bank** indemnified for breach of Quincecare duty in the absence of clear words.

SUMMARY

The appellant, **Caye** International **Bank** Ltd (**'Caye Bank'**) is an international **bank** operating in Belize and providing online fund transfer services to its customers. The respondent, Rosemore International Corp (**'Rosemore'**), a company registered in Panama, was one of **Caye Bank's** online banking customers and an account holder pursuant to a Depository Agreement and an Indemnity Agreement between **Caye Bank** and Rosemore.

Caye Bank offered Rosemore, as it did for its customers, the use of the NetTeller **Bank** Management system, a secure online banking portal used to conduct online transactions. Rosemore, like each customer of **Caye Bank** who utilised the online banking service, was given two sets of unique credentials to access the online banking portal. The first credential was the NetTeller user ID and password. Rosemore, like each customer was first given a temporary password which was then changed by Rosemore upon first logging in, this new password was known

only by Rosemore. The second set of credentials was the Cash Management ID and password, likewise this password was changed by Rosemore upon first entering the online banking portal using the temporary password provided by **Caye Bank**. Similarly, this new password was known only by Rosemore.

Jason Connor was the sole authorised signatory on the account and the email addresses on file for Rosemore and Jason Connor respectively were admin@rosemore.com, and jconnor@rosemore.com, both email addresses used the domain name '@rosemore.com'.

The dispute between **Caye Bank** and Rosemore in this case is over the sum of USD175,000.00 ('the funds') which **Caye Bank** transferred on 23 April 2015 from Rosemore's account into an account located in Canada in the name of Yaron David Walter ('Walter'). **Caye Bank** claims that, at the time when the funds were transferred, it believed that the transfer was on the instruction of Rosemore. In fact, the instruction was an email account compromise, where the fraudster, Walter, had gained access to Rosemore's email and sent an email message that appeared to be a legitimate request from Rosemore. At the time the funds were transferred, the account history showed only two deposits in the total sum of USD229,683.91 between 2011 and 2015 and one withdrawal in the sum of USD1,915.76 in 2012.

This fraudulent wire transfer was first discovered by Jason Connor when he received a 'low priority' email from Florangely Graniel on 23 April 2015, informing him that he had a new message in his online banking account and instructions were provided as to how to view the message. Jason Connor was unable to view the message and on 28 April 2015 promptly informed **Caye Bank** of this. After several unsuccessful attempts to log on to Rosemore's online banking portal, Jason Connor was locked out. **Caye Bank** reset the online account and Jason Connor was only finally able to log on in August 2015. Upon logging on, he was notified of the unlawful transaction which he brought to the attention of **Caye Bank**. Mr Dean Roches, Director of **Caye Bank** on behalf of **Caye Bank** refused liability for the transaction as he was of the opinion that the transaction had been properly processed by **Caye Bank**.

On 30 March 2016, Rosemore initiated proceedings against **Caye Bank** and Walter claiming damages for breach by **Caye Bank** of the express and implied terms of the Depository Agreement in that **Caye Bank** wrongfully and unlawfully and without Rosemore's authorisation or consent, deducted the sum of USD175,000.00 from Rosemore's account, and in the alternative, damages for negligence by **Caye Bank**, its agents and/or servants in wiring Rosemore's funds to Walter. In its claim, Rosemore also sought, as an alternative, an order directing Walter to return the funds on the basis that Walter had been unjustly enriched and had unlawfully converted the sum of USD175,000.00 from Rosemore's account. Walter took no steps in the proceeding so that a default judgment was entered against him, and the claim continued against Caye Bank.

The High Court found that Caye Bank breached clause 14 of the Depository Agreement which provided that Caye Bank will not process requests from third parties as there was no evidence that Rosemore had authorised the transfer and that Caye Bank breached its implied duties to Rosemore to exercise reasonable skill and care. Caye Bank appealed to the Court of Appeal against the whole of the High Court judgment and the Court of Appeal upheld the judgment of the High Court finding that Caye Bank breached its *Quincecare* duty.

On 15 February 2022, Caye Bank appealed the decision of the Court of Appeal to the Caribbean Court of Justice ('CCJ'). To determine the appeal, the CCJ considered five main issues namely: (i) Whether Caye Bank breached clause 14 of the Depository Agreement. (ii) Whether Caye Bank was in breach of its *Quincecare* duty. (iii) Whether

clause 14 excluded Caye Bank's liability for breach of its *Quincecare* duty. (iv) Whether clause 51 excluded Caye Bank's liability for breach of its *Quincecare* duty. and (v) Whether the Indemnity Clause indemnified Caye Bank against liability for breach of its *Quincecare* duty.

The CCJ reviewed clause 14 of the Depository Agreement which provided that 'Account Holder may, upon verification of signature or upon identification satisfactory to 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.' In construing this clause, the Court adopted the modern, objective, and contextual approach to contractual interpretation, the *Blairmont* approach. In determining whether Caye Bank breached clause 14 the Court considered that Caye Bank in processing the transfer request was only obliged to check the signature on the wire transfer request with the signature on the signature card. The Court considered the evidence in the Courts below that the secondary verification officer employed with Caye Bank (i) checked that the wire transfer request contained Rosemore's account number and indemnity password; (ii) cross-checked the signature with the signature card on file for Rosemore and the passport of Jason Connor; and (iii) noted that the primary verification officer wrote on the wire transfer request that the client called to confirm the wire and indemnity password before authorising the transfer. Based on this evidence, the CCJ found that there was no evidence that Caye Bank did not properly follow the verification and identification process contemplated by clause 14. Given that the request was received by Rosemore's online banking account and contained Rosemore's secret identification details, it was not unreasonable for Caye Bank to assume that the request was Rosemore's.

Despite this finding on the issue, the Court found that Caye Bank was nevertheless subject to '*the Quincecare duty*' as outlined in the case *Barclays Bank plc v Quincecare Ltd*. Accordingly, this *Quincecare* duty consisted of a negative duty to refrain from executing a customer's order if the bank is 'put on inquiry' that its customer may be subject to a fraud; and a positive duty to do something more than simply not comply with a payment instruction. The Court found that Caye Bank was put on inquiry as to whether Caye Bank was being defrauded as there were a number of red flags namely: (i) the substantial amount requested to be transferred was suspicious given that the history of the account showed that there had been only one insubstantial withdrawal in the amount of USD1,915.76 in 2012 nor had Rosemore made payment to Walter before; (ii) the purpose being for the purchase of a property was not in line with the stated purpose of Rosemore namely computer, programming, and management consulting services to a couple of companies in the UK and prospectively to a new venture in Mexico; (iii) the request came from jason1rosemore@gmail.com, which was not the domain address on record for Rosemore; and (iv) there were observable differences between the signature on the wire transfer request form and Jason Connor's signature. The Court found that given the red flags, a senior official from Caye Bank ought to have contacted Jason Connor to verify the transaction, which was not done. The Court therefore held that Caye Bank breached its *Quincecare* duty to Rosemore.

In respect of the *Quincecare* duty, Counsel for Caye Bank submitted that clause 14 excluded the more onerous *Quincecare* obligation that the Bank might otherwise be under and limited it to one of verification of signature, or identification of the sender '*to its own satisfaction*'. In assessing whether clause 14 excluded the *Quincecare* duty, the Court applied the traditional and *Blairmont* approach to contractual interpretation. The traditional approach required an explicit reference to negligence in the wording of the term in order for negligence to be excluded. The *Blairmont* approach required the Court to consider whether a reasonable outside observer would think that Rosemore was likely to have agreed to giving up its valuable *Quincecare* right except by clear words in clause 14 to that effect. As clause 14 did not expressly exclude negligence or the *Quincecare* duty and the Court was of the

opinion that a reasonable observer would not believe that Rosemore agreed to give up its *Quincecare* right without clear words to that effect as it would be contrary to business common sense, the Court concluded that clause 14 did not exclude the *Quincecare* duty.

The Court also reviewed clause 51 of the Depository Agreement which stated that ‘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 wilful misconduct’. The Court held that it is arguable that this clause applied to exclude liability under clause 14. However, it could not be applied to the implied *Quincecare* duty as clear words were required to exclude an implied right such as that conferred on the customer by this duty, which only arises if a bank is ‘put on inquiry’ and which is of considerable value to the customer. As broadly worded clause 51 did not include clear words to this effect, the *Quincecare* duty was not excluded.

In relation to the Indemnity Clause, the Court applied a similar interpretational approach. The Court found that as the Indemnity Clause did not expressly indemnify for breach of the *Quincecare* duty it must therefore be interpreted as not indemnifying against such a liability. The CCJ therefore dismissed Caye Bank's appeal, confirmed the order of the Court of Appeal, and ordered that Caye Bank pay the cost of the appeal to Rosemore.

Cases referred to:

Barclays Bank plc v Quincecare Ltd [1992] 4 All ER 363; *Blairmont Rice Investments Inc v Kayman Sankar Co Ltd* [2021] CCJ 7 (AJ) GY, [2021] 5 LRC 433; *Canada Steamship Lines Ltd v The King* [1952] AC 192; *Caye International Bank Ltd v Rosemore International Corp* (Belize CA, 26 February 2021); *Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2022] EWHC 1447 (Comm); *JP Morgan Chase Bank NA v Federal Republic of Nigeria* [2019] EWCA Civ 1641; *Lipkin Gorman v Karpnale Ltd* [1992] 4 All ER 409; *Philipp v Barclays Bank UK plc* [2022] QB 578; *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2018] 1 WLR 2777; *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80; *Wood v Per Capita Insurance* [2017] AC 1173.

Appearances:

Mr Simon Christopher Peter Knox KC and Ms Sheena S Pitts for the Appellant

Ms Pricilla J Banner for the Respondent

JUDGMENT of The Honourable Justices Wit , Anderson , Rajnauth-Lee , Barrow and Burgess

Delivered by The Honourable Mr. Justice Burgess on 31 January 2023

JUDGMENT OF THE HONOURABLE Mr Justice Burgess , JCCJ:

1 This is an appeal from the Court of Appeal of Belize which parades in plain sight the menace cyber fraud poses for banks and their customers in online funds transfer transactions in this age of the internet. In this appeal, the online funds transfer transaction involved the appellant, Caye International Bank Ltd (Caye Bank or the Bank), an

international bank operating in Belize and providing online funds transfer services to its customers. The respondent, Rosemore International Corp (Rosemore), a company registered in Panama, was one of Caye Bank's online banking customers pursuant to a Depository Agreement and an Indemnity Agreement between Caye Bank and Rosemore.

2 The dispute between Caye Bank and Rosemore is over the sum of USD175,000.00 (the funds) which Caye Bank transferred on 23 April 2015 from Rosemore's account with that bank into an account located in Canada in the name of Yaron David Walter ('Walter'). Caye Bank claims that, at the time when the funds were transferred, it believed that the transfer was on the instruction of Rosemore. In fact, the instruction was an email account compromise, where the fraudster, Walter, had gained access to Rosemore's email and sent an email message that appeared to be a legitimate request from Rosemore.

3 Unfortunately, there is no comprehensive body of law, statutory or judicial, which defines the juridical nature of online fund transfer transactions or the rights and liabilities which flow from them. When faced with such jurisprudential lacunae, Courts in our legal system have fallen back on general principles of common law to fashion answers. Following this tradition, counsel for Rosemore has asked this Court to apply what is called the *Quincecare* duty of care first developed by Steyn J in the English High Court case of *Barclays Bank plc v Quincecare Ltd*¹ to impose liability on Caye Bank. Counsel's argument is that, as required by the *Quincecare* duty of care principle, there were enough facts and circumstances that ought to have put Caye Bank on suspicion that a fraud was being committed against Rosemore. Caye Bank, on the other hand, denies that the *Quincecare* duty of care is applicable in this case and contends that, even if it were, it is excluded by the provisions of the Depository Agreement and rendered ineffective by the Indemnity Agreement between Rosemore and itself.

4 Accordingly, this appeal raises for the first time in this Court novel issues on the extent and applicability of the *Quincecare* duty in online banking transactions and the extent to which that duty can be excluded or otherwise managed by terms in a contract. The answer to these questions is especially important to Belize which today is one of the largest leading centres

for international banking in the world. It is no doubt of considerable importance to other CARICOM jurisdictions as well.

Factual Background

5 The facts in this case are largely undisputed and are set out below. Where the facts remain in dispute, however, we relate them as advanced by both parties.

Rosemore and Caye Bank's Customer/Banker Relationship

6 Rosemore and Caye Bank's customer/banker relationship first began when Rosemore via application letter dated 25 July 2011, applied to Caye Bank for a corporate bank account under the name ' *Rosemore International Corp – Jason Christopher Connor*'. In its application, Rosemore identified its email address as,

admin@rosemore.com, and the beneficial owner of the account as Jason Christopher Connor ('Jason Connor') whose email address was jconnor@rosemore.com. For reasons to follow, it is noteworthy that both email addresses had the domain name '@rosemore.com'.

7 To open the account, Rosemore submitted the following additional documents: an 'Indemnity for Facsimile & E-mail Instruction' (Indemnity Agreement); a Depository Agreement dated 8 July 2011 between Caye Bank and Rosemore (Depository Agreement); Instruction Schedule: Authorised Signature; Signature Card; Online Application Form; Application for a Corporate Account; and a copy of Jason Connor's passport. 'Jason Christopher Connor' was the sole authorised signatory on the account, and he submitted to the bank a 'Resolution of Directors Regarding Bank Account' as proof of this.

8 Via letter dated 11 July 2011, Jason Connor wrote to Caye Bank explaining the nature of the business in which Rosemore engaged, and the expected activity on the account. According to the letter, Rosemore provided 'computer, programming, and management consulting services to a couple of companies in the UK, principally Mauve Solutions Ltd, and may also shortly be used to provide services to a new venture in Mexico'. Jason Connor further explained that 'billing will be on a monthly basis though a fairly large balance has been built up with the main customer, Mauve Solutions, which will result in an initial large deposit. Once this is paid, I expect consistent monthly deposits of a lower value with only a few transactions on the account each month.'

9 On 30 September 2011, Caye Bank opened the account for Rosemore and assigned the account number 11341. The terms of the parties' relationship were governed by the Indemnity Agreement and Depository Agreement which provided in the relevant parts as follows:

Indemnity Agreement

In consideration of you [Caye Bank] agreeing to accept telex/fax/e-mail instructions from me/us [Rosemore] 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 such instructions.
- c) On demand to provide funds to meet all payments under such instructions.

Depository Agreement

Clause 1

- (a) Depository Agreement shall govern the Account;
- (b) The "Account Holder" shall mean the ... corporation ... in whose name the account is opened ... This Agreement is binding upon each Account Holder and Bank...

Clause 2. Signatures:

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 Holders and upon written notation thereof on the signature card.

Clause 9. Withdrawals:

Withdrawal may be made by written order on forms approved by Bank, when signed by any one Account Holder. Withdrawals will first be made from collected funds and Bank may refuse any withdrawal request against uncollected funds. Withdrawals are subject to Bank's Funds Availability Policy of this Agreement, if any which is subject to change from time to time. Bank reserves the right to limit the amount of cash given back at any one time.

Clause 14. Wire Transfers:

Account Holder may, upon verification of signature or upon identification satisfactory to 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 21 D& E Accounts of Corporations, Associations and Partnerships

D. That Bank shall have no responsibility or duty to monitor such an Account or the use of funds paid from it, nor any liability for any act or omission by any person who signs the signature card;

E. That upon Account Holder's request, Bank may honor items bearing or purporting to bear reproductions or facsimile signatures of authorized signatories in the Account. Account Holder assumes all risks and responsibility for such procedure, including but not limited to, the risk that the facsimile signature may not be genuine.

Clause 51 Indemnities:

B. 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 wilful misconduct.

All communication to Caye Bank came from the email addresses provided and had a domain name of '@rosemore.com'. Jason Connor also provided Caye Bank with its telephone number.

Caye Bank's Online Banking Service

11 Caye Bank used NetTeller Bank Management, a secure online banking portal offered to customers, in providing its online banking service. As security measures, each customer of Caye Bank who utilises the online banking service is given two sets of unique credentials for the customer to access his online banking account. The first set of credentials is the NetTeller user ID along with the user password. The user password is changed by the customer after first entering the online banking portal using the temporary password provided by the bank. The user password created by the customer is known only to the customer. The second set of credentials is the CM (or Cash Management) ID along with the cash management password. The CM password is changed by the customer after first entering the online banking portal using the temporary password provided by the Bank. The CM password created by the customer is known only to the customer.

12 Rosemore was given a temporary password for its account and thereafter had access to Caye Bank's online system.

13 Between 2011 and 2015, Rosemore made two deposits in the total sum of USD229,683.91 and in 2012 made one withdrawal in the sum of USD1,915.76. The withdrawal that was made could not be made via the online system and Jason Connor was told that he had to make the request via email/or by fax. As instructed, Jason Connor used the email address jconnor@rosemore.com to make the withdrawal.

The Wire Transfer Transaction

14 On 22 April 2015, Caye Bank received a message with an attachment on its online banking platform. The message bore message ID 85182849, NetTeller ID982900000862, and Cash Management ID 'jconnor' which were Jason Connor's banking credentials. Tricia Villanueva, the then Operations Manager of Caye Bank and secondary verification officer on the transaction, testified that she reviewed the message and that she was satisfied that it was received from Jason Connor's online portal as the NetTeller ID and Cash Management ID, unique credentials given to customers of Caye Bank for online banking purposes, were those of Jason Connor. Additionally, the reference email on the message was admin@rosemore.com, which was Rosemore's official email address noted on its customer file.

15 The attachment to the message was an Outgoing Wire Transfer Request dated 22 April 2015. The request instructed and authorised the transfer of USD175,000.00 from Rosemore's Account to a beneficiary account in Canada in the name of Walter.

Tricia Villanueva testified that she reviewed the wire transfer request and was satisfied that it was duly signed and authorised by Rosemore for several reasons. Among these reasons was the fact that the request was on an official Caye Bank form on Caye Bank's letter head; that the form correctly stated Rosemore's account number 11341, and password EARWIG; that the signature on the request appeared to be that of the authorised signatory of Rosemore, and that the primary verification officer in this transaction had written on the request that the client had called to confirm the wire and the indemnity password.

17 It is to be noted here that Jason Connor testified that the signature on the transfer request was not his signature. His testimony was supported by the expert testimony of Ms Marin, a handwriting expert, who gave evidence that the signature on the request form was not the signature of Jason Connor as there were 'observable differences that were visible with the naked eye' between the signature on the request and Jason Connor's signature.

18 Tricia Villanueva also testified that she wrote instructions to Florangely Grael to speak with the client via telephone to confirm the transaction. Despite this instruction, there is no evidence that Florangely Grael or any other employee of Caye Bank ever made such a call.

19 Very importantly, after the claim commenced in the Supreme Court, Caye Bank provided discoveries which showed that the confirmation of the wire transfer was sent to jason1rosemore@gmail.com. Jason Connor testified that this was not his email address and that he had not heard of the email address before. As indicated earlier, this was not an official email address for Rosemore, nor did Rosemore use the domain name @gmail.com.

Jason Connor's Discovery of the Transaction

20 On 23 April 2015, Jason Connor, the only signatory on Rosemore's account received a 'low priority' email at admin@rosemore.com informing him that he had a message in his online banking account and provided instructions to view the message and the link to log in to his online banking account. The email message came from email address fgraniel@cayebank.bz, the email account of Florangely Grael, who was at the time an employee of Caye Bank and the primary verification officer dealing with the transaction. At the time of trial, Florangely Grael was no longer an employee of Caye Bank and was not called to give evidence.

21 Upon receipt of the message, Jason Connor made several attempts to log on to his online banking account but was unsuccessful. On 28 April 2015, he emailed Caye Bank to inform them of his difficulty in accessing his online banking account to review the message. Jason Connor did not initially receive any response to his email but continued unsuccessfully to attempt to log on to Rosemore's online banking account between the period April-July 2015.

22 Caye Bank's officers attempted on two separate occasions to re-issue log-in details to Jason Connor. On 28 July 2015, Jason Connor contacted Gregory Gill, Systems Administrator of Caye Bank, to inform him that the passwords which Caye Bank provided to him on 17 June 2015 to log on to Rosemore's online banking account

were unsuccessful as he was still unable to log on to Rosemore's online banking account. On the same 28 July 2015, Jason Connor was notified that due to his several unsuccessful attempts to log on to the Online Account, Rosemore's 'internet banking account has been disabled'. Jason Connor was also further notified that the last successful log on to the account was 22 April 2015, the day before the low priority message was received from Caye Bank. Jason Connor testified that he did not log on to Rosemore's online banking account on that day.

23 Caye Bank did not reset Rosemore's online banking account until 11 August 2015. Once Jason Connor successfully logged on to Rosemore's online banking, he instantly realised that there was an unauthorised debit of USD175,000.00 from Rosemore's account to Walter in Canada. Jason Connor's evidence was that he did not know Walter and that he, the sole signatory on Rosemore's account, did not authorise or consent to the transfer.

24 Jason Connor emailed Gregory Gill indicating that he was able to access Rosemore's account and notified him of the large unauthorised transfer on the account. Gregory Gill referred Jason Connor to Charlene Smith, an employee of Caye Bank.

25 On 12 August 2015, Jason Connor spoke with Charlene Smith on the telephone, she requested that Jason Connor send her an email highlighting the transactions on the Account Statement being queried. Jason Connor complied with this request, highlighting that other than service charge and interest, the account was relatively dormant as there had been no other transactions on the account. Jason Connor asked for a trace to be initiated on the transaction and for any information that Caye Bank had on Walter to be shared with him. Jason Connor again contacted Charlene Smith with several questions concerning the unauthorised transaction and Rosemore's account.

26 The matter was then escalated to Dean Roches, a Director of Caye Bank, who informed Jason Connor that having reviewed the transaction, he, Dean Roches, was of the opinion that it had been properly processed. Dean Roches also advised Jason Connor that Caye Bank did not accept responsibility for the transfer. Dean Roches testified to the fact that Caye Bank made several futile attempts to recover the money from Walter's account in Canada.

Judicial History

Rosemore's Claim

27 All efforts by Rosemore to recover the USD175,000.00 from Caye Bank proved futile. On 30 March 2016, Rosemore filed a claim in the Supreme Court against Caye Bank and Walter. Rosemore claimed damages for breach by Caye Bank of the express and implied terms of the Depository Agreement in that Caye Bank wrongfully and unlawfully and without Rosemore's authorisation or consent, deducted the sum of USD175,000.00 from Rosemore's account, and in the alternative, damages for negligence by Caye Bank, its agents and/or servants in wiring Rosemore's funds to Walter. In its claim, Rosemore also sought, as an alternative, an order directing Walter to return the funds on the basis that Walter had been unjustly enriched and had unlawfully converted the sum of USD175,000.00 from Rosemore's account.

28 On 18 May 2016, Caye Bank filed a defence and counterclaim putting Rosemore to proof that the sum of USD175,000.00 from its account was unauthorised and alleging that Caye Bank did not believe that the transaction was unauthorised. Caye Bank also alleged that it had a genuine belief that the transfer was authorised, and denied that Caye Bank was grossly negligent, or that its actions amounted to wilful misconduct. Caye Bank alleged that, on the contrary, it acted in compliance with the Depository Agreement and was therefore not liable to Rosemore for breach of that agreement.

29 It may be noted, parenthetically, that Walter, a Canadian resident, took no part in the proceedings and a default judgment was entered against him. The judgment against Walter was not satisfied and the claim was continued against Caye Bank.

Supreme Court's Findings and Decision

30 The case was heard by Abel J sitting in the Supreme Court. He reviewed: (i) clause 2 of the Depository Agreement which stated that the Bank may rely upon any signature on the signature card in the payment of funds; (ii) clause 14 of the Depository Agreement which provided that the Account Holder may upon verification of signature or upon identification satisfactory to the bank, authorise wire transfers to and from the account; and (3) the evidence on the procedure for the wire transfer.

31 Based on that review, Abel J rejected Caye Bank's defence on the basis that there was no evidence that Rosemore had authorised the transfer. In fact, according to him, the uncontroverted evidence was that Jason Connor did not sign the transfer form, and therefore, that Rosemore could not be held to have authorised the transfer. That being so, the transfer request was to be categorised as a request by a third-party, and Caye Bank acting on it was in breach of clause 14 of the Depository Agreement. At [184] of his judgment, Abel J concluded:

On the evidence before this court, someone other than Rosemore, likely the 2nd Defendant, as a third party to the contractual arrangement between Rosemore and Caye Bank, had its/his request processed in the transfer of US\$175,000.00, from the account of Rosemore. This is clearly in breach of the Depository Agreement between the parties.

According to Abel J, Caye Bank's honest belief that the transaction was done at the instructions of Rosemore was irrelevant to the interpretation of the Depository Agreement.

32 The judge held further that, in acting on the wire transfer request, Caye Bank had failed to comply with reasonable and mutually accepted banking standards. In this regard, he noted in particular that (i) in the past there had been only a limited number of transfers, and none as substantial as USD175,000.00; (ii) in order to confirm the instruction, Caye Bank had sent an email to jason1rosemore@gmail.com, which was not the email address it had on record for Rosemore; (iii) Caye Bank failed to observe visible inconsistencies in the signature; (iv) Caye Bank had failed to ensure anti-fraud controls were in place, and the password 'EARWIG' was no secret to Caye Bank's employees as the password had been used by Rosemore for four years and was openly recorded on several easily accessible documents in Caye Bank; and (v) Caye Bank ought to have called Jason Connor to verify the transaction.

33 In the circumstances, the judge held that Caye Bank breached its implied duties to Rosemore to exercise reasonable skill and care and that Caye Bank was not entitled to rely on clause 51 as (i) the transfer was executed without Rosemore's authorisation, and (ii) it did not protect Caye Bank 'from liability in negligence'. He therefore ordered that Caye Bank pay damages for breach of the express and implied terms of the Depository Agreement. In the alternative, he ordered damages in the sum of USD175,000.00 for negligence caused by Caye Bank, its agents and/or servants in wiring Rosemore's funds in this amount to Walter.

34 Being dissatisfied with the judgment of Abel J, Caye Bank appealed to the Court of Appeal

Appeal to the Court of Appeal

35 Caye Bank appealed to the Court of Appeal against the whole of Abel J's judgment. In summary, the grounds of appeal were that (i) the trial judge erred in finding that there was no evidence that Rosemore did authorise the transfer; (ii) the trial judge erred in finding that Caye Bank breached its contractual obligations to Rosemore; (iii) the trial judge erred in finding that Caye Bank did not plead that the breach of confidential information was on Rosemore's side; (iv) the trial judge erred in finding that the request to transfer the money was a third-party request; (v) the trial judge failed to consider the evidence of the standards of accepting and carrying out electronic wire transfers in Belize; (vi) the trial judge considered inadmissible hearsay evidence that instructions were received via the email jason1rosemore@gmail.com; and (vii) that the ruling was against the weight of the evidence.

36 Hafiz-Bertram JA, delivering the judgment of the Court of Appeal upheld the trial judge's decision and dismissed the Appeal. Three main reasons were given by her for the Court's decision.

37 The first was that, as held by Abel J, Caye Bank was in breach of clause 14 of the Depository Agreement as Caye Bank's method of verifying the signature was 'unreasonable'. At [38] of her judgment she reasoned:

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 transactions in connection with the Account. The signature on the wire transfer was not the signature of Connor...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 card and the signature on the wire transfer. No other identification was required by the Bank...

38 At [40] of her judgment, Hafiz-Bertram JA concluded:

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.

39 The second reason was that Caye Bank was in breach of its *Quincecare* duty. Based on the expert evidence of Mr Iles, Hafiz-Bertram JA determined that Caye Bank did not act reasonably in verifying the signature, and that there were red flags that the request for the wire transfer might have been fraudulent. She held that Abel J was

therefore right to uphold the claim in negligence as Caye Bank was put on inquiry by those red flags. Consequently, by virtue of the *Quincecare* implied term of the Depository Agreement to act with reasonable skill and care, Caye Bank was obliged to make reasonable inquiries before making the payment to Walter.

40 Hafiz-Bertram JA also held that Caye Bank was not protected by the Indemnity Clause in the Indemnity Agreement. However, she did not make any express ruling on clause 51 as it appears that Caye Bank had abandoned that ground before the Court of Appeal.

Appeal Before this Court

Grounds of Appeal

41 Caye Bank filed a notice of appeal with this Court on 15 February 2022. Grounds 1, 2 and 3 merely recited what the Court of Appeal correctly upheld and were not strictly speaking grounds of appeal. The grounds of appeal which were raised and argued before this Court are as follows:

4. The Court of Appeal misconstrued clause 14 of the Depository Agreement, as it appeared to impose the same obligations on Caye Bank as if it was dealing with non-wire transfers, even though the risks inherent for a bank in dealing with both are different.
5. The Court of Appeal should have held that on a proper construction of clause 14 if Caye Bank received a wire transfer it was entitled to either: (a) identify the signature on the wire transfer; or (b) identify the sender of the wire transfer to its own satisfaction. If Caye Bank chose the first option of verifying the signature, it was not obliged to do anything more than check it with reasonable care against the signature on the signature card. If Caye Bank chose the second option of identifying the sender, it was not obliged to do anything more than satisfy itself with reasonable care that the secret identification details contained in the request matched those of Rosemore.
6. The last sentence of clause 14 'No third-party requests will be processed' was a limitation for Caye Bank's benefit. It was not a promise that if by mistake it did act upon a third-party request, it would be liable for same.
7. The Court of Appeal erred in law because it held that Caye Bank was obliged to carry out further tests such as telephoning Mr Connor. The Court of Appeal should have upheld Caye Bank's appeal as:
 - i. Caye Bank checked and verified the signature.
 - ii. Caye Bank checked the secret identification details on the wire transfer to ensure it matched Rosemore's details and checked the NetTeller ID, Cash Management ID and ensured that the reference email for the message was admin@rosemore.com.
 - iii. There was no evidence or allegation that Caye Bank carried out these exercises carelessly.
8. The Court of Appeal erred in finding that there were visible differences observable with the naked eye between the signature on the transfer and Jason Connor's signature as recorded on the signature card.
9. The Court of Appeal should have considered ground 9 (which Caye Bank abandoned at the Court of Appeal) that clause 51 of the Depository Agreement excluded Caye Bank's liability save in the event of gross negligence or wilful misconduct.
10. The Court of Appeal erred in finding that the Indemnity granted by Rosemore was limited to cases where Rosemore authorised the transfer.
11. The Court of Appeal erred in law by finding that Caye Bank was separately liable in negligence and contract.
12. The Court of Appeal erred in holding that the burden was on Caye Bank to show that it has a defence once Rosemore had not authorised the transfer. Rosemore still had the duty to prove that Caye Bank breached its contractual obligations.

Caye Bank's Submissions

42 Caye Bank submitted that it did not breach clause 14 of the Depository Agreement, (grounds 4 to 7 of the notice of appeal). According to Caye Bank, clause 14 provides an alternative means for customers to give instructions to the Bank in respect of wire transfers and then gives the Bank an option as to how to act on the transfer. The Bank may either (a) verify the signature on the wire transfer form, or (b) it may identify the sender of the wire transfer request to its satisfaction. By providing this option, Caye Bank averred, the scope of the tasks which the Bank must undertake on receipt of a wire transfer request is limited. Caye Bank maintained that it carried out both tasks with reasonable care and that, consequently, it was not in breach of its obligations under clause 14. Caye Bank emphasised that there was no obligation on it under clause 14 to call Jason Connor.

43 In arguing in effect grounds 8,10, and 11 of the notice of appeal, Caye Bank agreed that, as a general principle, the Bank had a *Quincecare* duty to conduct inquiries where it was put on inquiry that its customer, Rosemore, was subject to a fraud. However, Caye Bank disagreed that the duty arose in the instant case as there was nothing to

put it on inquiry. The Bank argued that the discrepancies regarding the signature was not obvious to the naked eye as the expert, Ms Marin alleged. Caye Bank honestly believed that the signature on the transfer request was Jason Connor's signature. There was nothing visible to the naked eye to create suspicion in Caye Bank's employees in relation to the signature.

44 Similarly, Caye Bank stressed that it was reasonable for Caye Bank to send confirmation of the wire transfer to the Gmail address, as this is what it was asked to do by the admin@rosemore.com email address. It was further submitted that it was reasonable to comply with this request as the admin@rosemore.com account was the email address provided by Jason Connor to Caye Bank and was a secure account which only Jason Connor could use. Secondly, the request came through the Bank's online portal, not just by email.

45 Caye Bank further contended that clause 14 delimits the metes and bounds of its authentication obligations. For this reason, the Bank maintained that that clause excludes 'the more onerous *Quincecare* obligation that the Bank might otherwise be under'.

46 Another submission by Caye Bank was that clause 51 of the Depository Agreement excludes Caye Bank's liability except for its gross negligence or wilful misconduct. According to Caye Bank, Rosemore did not prove that it was either grossly negligent or guilty of wilful misconduct and so the courts below erred in finding Caye Bank liable for the transfer.

47 Caye Bank's final submission was that it was covered by the Indemnity Clause in the Indemnity Agreement against any liability incurred by it to Rosemore as the request to transfer the funds contained the password 'EARWIG'.

Rosemore's Submissions

48 Rosemore relied on the case of *Barclays Bank plc v Quincecare Ltd*² in which Steyn J laid it down that a bank has a duty not to honour the banking mandate to follow a payment instruction where it was 'put on inquiry' that the payment may in fact facilitate a fraud on the customer ('the Quincecare duty'). Rosemore submitted that Caye Bank breached that implied duty of their contract and was negligent as it executed an order to transfer a large sum of money from Rosemore's account when Caye Bank had reasonable grounds (although not necessarily proof) for believing that the order was an attempt to misappropriate the funds of Rosemore. Caye Bank therefore ought to have contacted Jason Connor to conduct an enquiry.

49 Rosemore relied on the findings of the trial Court that Caye Bank did not receive authorisation from Rosemore with respect to the wire transfer in issue to argue that Caye Bank processed the transfer at the behest of a third-party and therefore breached the

Depository Agreement. Rosemore maintained that clause 14 of the Depository Agreement makes plain that it is the Account Holder who may authorise wire transfers to and from the Account and that it is therefore a condition precedent of any wire transfer that Caye Bank ensure that this authorisation has been properly received from the

Account Holder and not from a third-party. Therefore, Rosemore argued, the *Quincecare* duty was not excluded by clause 14 of the Depository Agreement.

50 In relation to clause 51 of the Depository Agreement, Rosemore argued that this ground was abandoned at the Court of Appeal. Furthermore, Rosemore submitted that the Depository Agreement did not apply as Caye Bank was not taking any action permitted by the Depository Agreement. In order to exclude the *Quincecare* duty, clear terms are required. Clause 51 did not expressly exclude the *Quincecare* duty and so Caye Bank was still bound by the *Quincecare* duty.

51 In relation to the Indemnity Agreement, Rosemore submitted that Caye Bank is not absolved from liability as it had a duty to avoid the processing of third-party requests.

Analysis And Conclusions

Issues in this Appeal

52 In our judgment, the pleadings, as well as the oral and written submissions of counsel on both sides raise five main issues. These are: (i) Whether Caye Bank breached clause 14 of the Depository Agreement. (ii) Whether Caye Bank was in breach of its *Quincecare* duty. (iii) Whether clause 14 excluded Caye Bank's liability for breach of its *Quincecare* duty. (iv) Whether clause 51 excluded Caye Bank's liability for breach of its *Quincecare* duty. and (v) Whether the Indemnity Clause indemnified Caye Bank against liability for breach of its *Quincecare* duty.

53 Accordingly, we address these five issues seriatim hereafter.

Whether Caye Bank Breached Clause 14 of the Depository Agreement

54 Caye Bank has argued before us that its liability for executing the wire transfer request may only be determined by considering Clause 14 of their Depository Agreement which contained their mutually accepted standards of verification and identification. It will be remembered that that clause provides as follows:

Account Holder may, upon verification of signature or upon identification satisfactory to 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.

55 We agree with Caye Bank that clause 14 is an express term on the standards of verification and identification mutually accepted by Caye Bank and Rosemore. It is axiomatic, then, that the metes and bounds of Caye Bank's verification and identification obligations under this clause can only be determined on a proper interpretation of that clause.

In *Blairmont Rice Investments Inc v Kayman Sankar Co Ltd*³ at [71]–[72] this Court adopted the modern objective and contextual approach to contractual interpretation and settled the principles which will guide it as follows:

[71] In our judgment, the principles which should guide our courts, based as they are on the common law system, in the interpretation of a commercial contract, are those enunciated in *Wood*⁴. Our courts must always have in mind that their function in interpreting a contractual term is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. Such ascertainment is achieved “by depersonalising the contracting parties and asking, not what their intentions actually were, but what a reasonable outside observer would have taken them to be”.

[72] The foregoing does not mean that our courts should treat contract interpretation, in the words of Lord Hodge in *Wood*, as a “literalist exercise focused solely on a parsing of the wording of a particular clause”. Rather, it should be viewed as requiring consideration of the contract as a whole and, depending on the nature, formality, and quality of its drafting, more or less weight should be given to elements of the wider context in reaching its view as to that objective meaning. The

interpretation of a contract should be approached as an iterative exercise and, where there are rival meanings, the court should give weight to the implications of rival constructions by reaching a view as to which was more consistent with business common sense.

57 Having regard to *Blairmont*, we agree with counsel for the appellant that clause 14 must be construed in the context of Caye Bank's NetTeller online banking service. So interpreted, that clause means that Caye Bank's obligation, where it received a wire transfer request, was either to (a) verify the signature on the wire transfer, or (b) to identify the sender of the wire transfer to the Bank's own satisfaction. If Caye Bank chose the option of verifying the signature, then by clause 14 read together with clause 2 of the Depository Agreement, Caye Bank was only obliged to check the signature on the wire transfer request with the signature on the signature card. If Caye Bank chose the second option of identifying the sender, then on the express language of clause 14, it was not obliged to do anything more than satisfy itself that the secret identification details contained in the request matched those of Rosemore. We agree further with counsel for Caye Bank that the last sentence of clause 14, namely, ‘No third-party requests will be processed’, means exactly what it says. It means that the Account Holder may not authorise any third-party to make any requests for a wire transfer. The Account Holder was the only person who could make such a request. That sentence is a warning and certainly is not intended to confer any rights on Rosemore in the event that a third-party somehow is able to make a request containing Rosemore's secret online banking identification details.

58 In a word, clause 14 reflects the security processes set up by Caye Bank to reduce the risk of unauthorised online access to Rosemore's funds. That clause obviated the need for Caye Bank to certify that Rosemore gave actual or other authority to a third-party to make a request on Rosemore's behalf. Given that a request was received by Caye Bank in its online portal and contained Rosemore's secret online banking identification details, it was not unreasonable for Caye Bank to assume that the request was that of Rosemore and that Caye Bank was therefore authorised by Rosemore to execute the request. We therefore disagree with the Courts below that the mere fact that there was no evidence that Rosemore actually, or otherwise, authorised the fraudster to make the request meant that Caye Bank was to be considered, without more, to have executed an unauthorised request.

59 The position of the lower Courts on this matter is best captured at [30] of the judgment of the Court of Appeal⁵ where it was said:

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.

60 We agree with counsel for Caye Bank that the Court of Appeal erred in focusing on whether Jason Connor himself actually gave the authorisation. Clause 14 read with clause 2 cannot be interpreted as supporting such a conclusion. Indeed, such an interpretation in the context of online banking wire transfer transactions would impose an impossible duty on Caye Bank in deciding whether to act on a wire transfer request remembering, of course, the fundamental principle of banking law that a bank is under a strict duty to promptly follow the instructions of its customers. Rosemore's account number, indemnity password and Jason Connor's signature on his signature card were unique to Rosemore and were, as it were, Rosemore's online banking persona. They were designed to do away with the need for Caye Bank having to undertake the insuperable task of investigating whether instructions given in Caye Bank's online portal were in fact authorised by Rosemore.

61 Both Courts below accepted the evidence of Ms Tricia Villanueva, the secondary verification officer who reviewed the wire transfer transaction on behalf of Caye Bank. Basically, her evidence was that she followed the Bank's usual verification process. She testified that, before making the transfer, she checked that the account number on the Request was 11341, which was Rosemore's account information. She further checked that the name on the Request was that of Rosemore and that the correct indemnity password, 'EARWIG' was referenced. According to her, she checked the signature on the request, which appeared to be Jason Connor's, and cross-checked that signature with the signature card and passport. Ms. Villanueva also gave evidence that she noted that Florangely Graniel, the primary verification officer, had written on the Request that the client had called on 22 April 2015 to confirm the wire and the Indemnity password.

62 The Courts below also accepted the evidence of Mr Dean Roches, the Executive Vice President of Caye Bank. He gave evidence that, after the fraudulent transaction was brought to his attention, he reviewed the verification process followed by bank staff in executing the request. According to him, he cross-referenced all the relevant documents directly related to the transaction, including the emails or messages requesting the wire transfer of funds and Connor's verification of signature documents. His conclusion was that the request was processed in accordance with Caye Bank's verification and identification processes contemplated by clause 14.

63 There was no evidence before the Courts that Caye Bank did not properly follow the verification and identification processes contemplated by clause 14. In those premises, we disagree with the Courts below that Caye Bank was in breach of the mutually accepted procedure expressly set out in clause 14 of the Depository Agreement.

All that said, we hasten to add that the express provision in clause 14 was not the only contractual term governing the verification and identification obligation under the Depository Agreement on Caye Bank. As the flood of cases cited below have held, that Agreement is subject to an implied contractual term (and a coextensive duty in tort) that the Bank will observe reasonable skill and care in acting on online wire transfer requests if the Bank is put on inquiry, or in other words, subject to a *Quincecare* duty. Put simply, in addition to the express mutually agreed standards of verification and identification expressly provided for in clause 14, once it was put on inquiry, Caye Bank was subject to an implied contractual term that it would observe reasonable skill and care in and about executing the instructions given in the online portal. If Caye Bank breached this implied term, Caye Bank would be equally liable for breach of contract. And so, we turn to that issue.

Whether Caye Bank Breached its Quincecare Duty of Care

65 In approaching this issue, we consider it advantageous to begin by examining the nature and scope of the *Quincecare* duty. This will enable us to decide whether, on the facts of this case, Caye Bank breached its *Quincecare* obligations.

(1) The Nature and Scope of the Quincecare Duty of Care

66 As already noted, the *Quincecare* duty was first formulated by Steyn J in *Barclays Bank v Quincecare*⁶. The facts of that case were that Barclays Bank agreed to loan £400,000 to Quincecare, a company formed to purchase four chemist shops. Under the loan facility, the chairman of the company defrauded the company by causing Barclays to transfer some £340,000 to a firm of solicitors who, under prior arrangements with the chairman, then transferred that sum into his account in the USA. Barclays brought an action against Quincecare for repayment of the loan and Quincecare counterclaimed for loss caused by Barclays' breach of duty of care owed to the company. Steyn J's explication of the bank's duty of care in this case is what is commonly referred to as the *Quincecare* duty of care.

67 As adumbrated by Steyn J, the *Quincecare* duty may be summarised as a duty on a bank to refrain from executing a customer's order if, and for so long as, the bank is 'put on inquiry' in the sense that the bank has reasonable grounds for believing — assessed according to the standards of an ordinary prudent banker — that the order is an attempt to

defraud the customer. It arises by reason of 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.

68 As this is the first case in which the *Quincecare* duty of care has engaged the attention of this Court, we consider it profitable to set out at length the passages from Steyn J's judgment in which he carefully explained the nature of this duty of care as follows:

... In my judgment 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; [1979] Ch 384. 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.

Given that the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to transfer money, it is nevertheless a duty which must generally speaking be subordinate to the bank's other conflicting contractual duties. Ex hypothesi one is considering a case where the bank received a valid and proper order which it is prima facie bound to execute promptly on pain of incurring liability for consequential loss to the customer. How are these conflicting duties to be reconciled in a case where the customer suffers loss because it is subsequently established that the order to transfer money was an act of misappropriation of money by the director or officer? If the bank executes the order knowing it to be dishonestly given, shutting its eyes to the obvious fact of the dishonesty, or acting recklessly in failing to make such inquiries as an honest and reasonable man would make, no problem arises: the bank will plainly be liable. But in real life such a stark situation seldom arises. The critical question is: what lesser state of knowledge on the part of the bank will oblige the bank to make inquiries as to the legitimacy of the order? In judging where the line is to be drawn there are countervailing policy considerations. The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers. In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company ... 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...⁷

69 What emerges from this statement is that there are three main focal points in the *Quincecare* duty of skill and care which are to be underlined. The first is that the *Quincecare* duty of care is an aspect of the bank's duty of reasonable skill and care in and about executing the customer's orders and arises by reason of an implied term of the contract and under a co-extensive duty of care in the tort of negligence. The second is that the *Quincecare* duty of care runs counter to the bank's ordinary contractual duty to comply with a valid order of the customer and, in line with this, the standard of care imposed should not place too onerous a burden on banks. The third is that '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...'. This standard is best expressed in the principle 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 customer. Those are the fundamentals of the traditional scope of the *Quincecare* duty.

70 In our view, the traditional scope has been expanded in the English Court of Appeal decision in *JP Morgan Chase Bank NA v Federal Republic of Nigeria* ⁸. In that case, the Federal Republic of Nigeria ('FRN') brought a claim against JP Morgan Chase Bank ('JPMCB') to recover funds in its depository account with JPMCB which JPMCB had paid out in accordance with instructions given by agents of FRN who were authorised to give

those instructions under the terms governing the account. FRN claimed that JPMCB had made the payments in breach of the *Quincecare* duty of care. JPMCB applied for summary judgment/strikeout on the ground, inter alia, that the *Quincecare* duty of care was not applicable as such a duty was inconsistent with the express terms of the

depository agreement. The High Court dismissed JPMCB's application and JPMCB appealed. The Court of Appeal upheld the High Court's decision.

71 Rose LJ, as she then was, delivering the judgment of the Court of Appeal, expressed the view that the *Quincecare* duty comprised both (i) a negative duty to refrain from executing an order if and for as long as the banker is 'put on inquiry'; and (ii) a positive duty on the bank to do 'something more... than simply deciding not to comply with a payment instruction' when put on inquiry. According to Rose LJ, these negative and positive duties carry equal weight, and neither is separate nor subsidiary nor additional to the other. Rose LJ's formulation of the duty to do 'something more' is not limited to one of inquiry or investigation and thus expands the scope of the traditional *Quincecare* duty.

72 We agree with Rose LJ's expansion of the scope of the traditional *Quincecare* duty and would note here that there is some support in dicta in the case law for the additional duty of inquiry stated by Rose LJ. One such example is by Steyn J in the *Quincecare* case where he made the following statements, at 376:

If the bank executes the order knowing it to be dishonestly given, shutting its eyes to the obvious fact of the dishonesty, or acting recklessly in *failing to make such inquiries as an honest and reasonable man would make*, no problem arises: the bank will plainly be liable. But in real life such a stark situation seldom arises. The critical question is: what lesser state of knowledge on the part of the bank will *oblige the bank to make inquiries* as to the legitimacy of the order? ⁹ (emphasis added).

As well at 377:

[One of the factors to be considered is] the scope and means for making reasonable inquiries... ¹⁰

And further at 380:

... I propose to examine only those matters which could arguably be said to be known to the Hull branch, or which *they should, on the basis of what was known, have inquired about*. ¹¹ (emphasis added).

73 Another is by May LJ in *Lipkin Gorman v Karpnale Ltd* ¹² where he stated at 421:

... it is in my opinion only when the circumstances are such that any reasonable cashier would hesitate to pay a cheque at once and refer it to his or her superior, and when any reasonable superior would hesitate to authorise payment *without inquiry*, that a cheque should not be paid immediately upon presentation *and such inquiry made* (emphasis added).

May LJ continued at 422:

... A single telephone call to Mr Gorman, one of the partners in the plaintiff firm, would have brought the whole enterprise to a close. Was there any *duty on the bank to make such a call*? Rather more searching inquiry by the bank of Cass about where he was obtaining his funds with which to gamble, even to the extent of which they were aware, might well also have had the same effect. Was there any *duty on the bank to make that inquiry* until the truth was out? (emphasis added).

And further at 423:

I think that if Fox [the bank manager] had or ought to have learnt of the frequent and substantial withdrawals by Cass in cash from the clients' account even the limited duty of care to which he was subject would have *required him to tell Mr Gorman* (emphasis added).

And at 441:

The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility albeit not amounting to a probability that its customer might be being defrauded, or, in this case, that there was a serious or real possibility that Cass was drawing on the client account and using the funds so obtained for his own and not the solicitors or beneficiaries' purposes. That, at least, the customer must establish. If it is

established, then in my view a reasonable banker would be in breach of duty if he continued to pay cheques *without inquiry* (Parker LJ) (emphasis added).

74 And finally, Sir Geoffrey Vos C in the Court of Appeal in *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd*¹³ said at [5]:

The judge held that Daiwa had breached its duty of care to Singularis in making the payments *without any proper inquiry*. (Citing Rose LJ at first instance [2017] EWHC 257 at [164].) (emphasis added).

And further at [87]:

[The duty is] a duty not to pay away money in a customer's *account without proper inquiry* (emphasis added).

75 The *Quincecare* principle, traditional and modern, has been enunciated in cases involving a fraudulent agent acting for the bank's customer. It is therefore clear that the principle applies in such a context. What is not clear, however, is whether the *Quincecare* duty arises in a wider context than fraudulent agents acting for the bank's customers? More particularly, it is even more unclear whether the *Quincecare* duty applies, as in the case before us, where the fraudster, without the customer's authority, sends an email message with an attached wire transfer request to the bank that appears to come from the bank's customer and to make a legitimate request, or in other words, where the customer is being defrauded as a result of a mistaken authorisation.

76 True, neither counsel for Caye Bank nor counsel for Rosemore raised this question as an issue. They both proceeded on the assumption that *Quincecare* applied in online banking transactions. Despite counsel's reticence, it appears to us that in the present state of the authorities it is incumbent on us to express our opinion on the applicability of *Quincecare* in such transactions.

77 Perhaps, the starting point in approaching this issue is the judgment of Lady Hale in *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd*¹⁴. The facts of that case were that Singularis was wholly owned by Mr Al Sanea within a group of companies. A large sum of money was held for Singularis in a client account by the defendant bank, Daiwa. Al Sanea defrauded Singularis by instructing Daiwa to pay out that money to bank accounts in the names of three other companies within the group of companies. The liquidators of Singularis successfully argued before Rose J, whose decision was upheld by the Court of Appeal, that the defendant had been in breach of its *Quincecare* duty of care owed to the claimant. On appeal to the Supreme Court, the central question was whether Al Sanea's illegal conduct should be attributed to the claimant so that illegality should be a defence to the claim. It was held that the illegal conduct of Al Sanea was not to be attributed to Singularis and illegality was not a defence to the claim and so the appeal was dismissed.

78 The discussion of the *Quincecare* duty of care in the Supreme Court was relatively limited and essentially formed the background to the examination of attribution and illegality which were by that stage the central issues in the case. It is particularly noteworthy that *Singularis* was a case of a fraudulent agent acting for the customer

and that no question was raised as to whether the *Quincecare* duty of care might arise in a wider context than fraudulent agents acting for the bank's customers. Notwithstanding, there are two statements by Lady Hale which have been cited as authority that the *Quincecare* duty of care does not arise outside a fraudulent agent acting for the customer.

79 First, Lady Hale said at [23]:

...the purpose of the *Quincecare* duty is to protect a bank's customers from the harm caused by people for whom the customer is, one way or another, responsible.

80 And second at [35], she stated:

The context of this case is the breach by the company's investment bank and broker of its *Quincecare* duty of care towards the company. The purpose of that duty is to protect the company against just the sort of misappropriation of its funds as took place here. By definition, this is done by a trusted agent of the company who is authorised to withdraw its money from the account.

81 In our judgment, there is a good reason why Lady Hale's statements cannot be taken as supporting a theory that the *Quincecare* duty is restricted to cases which involve a fraudulent agent acting for the customer. There can be little doubt that starting with *Lipkin Gorman v Karpnale Ltd*¹⁵, which involved a solicitor defrauding a bank's customer, the factual context of all major cases in which the *Quincecare* duty of care has been acknowledged are cases of a fraudulent agent acting for the customer: see eg, *JP Morgan Chase Bank NA v Federal Republic of Nigeria* discussed in this judgment at [70]–[72]¹⁶. Indeed, *Quincecare* itself was a case of a fraudulent agent acting for the customer. That said, the circumstance of a fraudulent agent acting for the customer was never advanced as the reasoning in those cases and Lady Hale's statements did not purport to be representing this as a governing principle in the application of the *Quincecare* duty of care.

82 All the cases on the *Quincecare* duty of care proceed on the principle that the bank's primary duty is to execute customers' orders promptly and in accordance with the customer's instructions. Nevertheless, the bank has a secondary duty, which operates in conflict with that primary duty, to refrain from executing an order and to do something more if and for so long as the circumstances would put an ordinary prudent banker on inquiry. Very importantly, there is no suggestion in the cases that the *Quincecare* duty depends on the instructions to the bank being given by an agent of the customer of the bank.

83 In *Philipp v Barclays Bank (UK) Plc*¹⁷ Birss LJ, delivering the judgment of the Court of Appeal, expressly addressed the question of whether the *Quincecare* duty of care applied outside the circumstance of a fraudulent agent acting for the customer. Of this, he said at [30]:

It is capable of applying with equal force to a case in which the instruction to the bank is given by a customer themselves who is the unwitting victim of APP fraud

provided the circumstances are such that the bank is on inquiry that executing the order would result in the customer's funds being misappropriated.

84 We are in complete agreement that there is no reason in principle why the *Quincecare* duty should be restricted to cases of a fraudulent agent acting for the bank's customer. As we have already noted, in principle, the *Quincecare* duty is the negative duty on a bank to refrain from making a payment (despite an instruction on behalf of its customer to do so) and a positive duty to do 'something more' where an ordinary prudent banker is put on inquiry. An ordinary prudent banker may be put on inquiry in factual circumstances outside cases of a fraudulent agent acting for the customer. As it appears to us, it would be patently illogical to exclude the *Quincecare* duty of care in such cases.

85 In our judgment, one particular case where the *Quincecare* duty should be held to apply outside cases of a fraudulent agent acting for the customer is where a cyber fraudster, without the customer's authority, sends an email message to the bank that appears to come from the bank's customer and to make what appears to be a legitimate request and where the bank makes a payment as a result of the mistaken authorisation. To recognise a *Quincecare* duty as applicable in such cases would not divert the focus from the essential content of the *Quincecare* duty distilled by Cockerill J in *Federal Republic of Nigeria v JP Morgan Chase Bank NA*¹⁸ at [158]. The duty would still only arise in relation to the payment instruction; there would still be the need for a clear focus on the issue of what it is which the bank in question must be on notice; and the duty would still not arise except where the bank is on notice that the instruction in question may be vitiated by fraud, namely, that the payment instruction is an attempt to misappropriate the customer's funds.

86 We feel bound to observe that there can be no doubt that the *Quincecare* duty of care is to be treated as the prevailing law in Belize. The *Quincecare* principle is an area of common law which has considerable significance in defining the role of banks and other financial institutions in identifying and preventing financial fraud. As such, it is an area that we must with mature judgment fashion to suit the exigencies of our Caribbean societies. Mindful that we should do so in accord with existing fundamental legal principles, we have carefully

examined the English case law on the *Quincecare* duty of care and have concluded that to apply the *Quincecare* duty to online banking would be entirely in line with legal principles and sound policy. In the fight to combat cyber fraud, banks offering online banking services, and which are put on inquiry, should not reasonably expect to sit back and do nothing more than simply deciding not to comply with a payment instruction. They should make such inquiries as an ordinary prudent banker would make. Indeed, many banks and other financial institutions operating in the internet banking environment are already imposing on themselves enhanced security systems and very strict authentication methodologies. So that applying the *Quincecare* duty as explained by us to online banking cannot be regarded as imposing 'unduly onerous' standards on banks.

87 Considering the foregoing, we turn now to the fulcrum of the applicability of the *Quincecare* duty, namely, the question of whether Caye Bank was put on inquiry.

(2) Was Caye Bank put on inquiry?

This is a question of fact. However, in determining whether, on the facts of this case, Caye Bank was put on inquiry, it behoves us to recall the caution of Steyn J in *Quincecare*¹⁹ that should guide our approach. He said there at 377:

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

And at 377e, he stressed:

[I]t is right to say that trust, not distrust, is ... the basis of a bank's dealings with its customers. And full weight must be given to this consideration before one is entitled, in a given case, to conclude that the banker had reasonable grounds for thinking that the order was part of a fraudulent scheme to defraud the company.

89 It is manifest from this statement that, if Caye Bank is to be held to have been put on inquiry, the facts must reveal 'telling indications'. In that regard, we find the evidence of Mr Mervyn Iles, an international banking expert experienced in the field of bank fraud, based on his consideration of the evidence placed before him, very important. Mr Iles opined that there were a number of red flags that would have put an ordinary prudent banker on inquiry as to whether Rosemore was being defrauded. Mr Iles was of the opinion that one such danger signal was the substantial amount requested to be transferred, USD175,000.00. He observed that that was out of character with the Rosemore account history where, since it was opened in 2011, there had been only one insubstantial withdrawal in the amount of USD1,915.76 in 2012 and the fact that the account had been dormant for several years. Additionally, the reason for which the transfer was requested namely, the purchase of a property was not in line with the business conducted by Rosemore nor had Rosemore paid the beneficiary before. Mr Iles also gave evidence that the use of the password 'EARWIG' which was openly recorded on documents and accessible to many employees of Caye Bank was unsecure.

90 Mr Iles also noted that the employee of the bank, Ms Graniel, during the transaction communicated with the person who made the request for the wire transfer at the email address jason1rosemore@gmail.com. This was not the domain address on record for Rosemore, the account holder, and it was the first time since opening the account that the email address jason1rosemore@gmail.com was used. The secure domain address was @rosemore.com and this was not used. The use of an email address for the transaction which was not on record for Rosemore should have put Caye Bank on inquiry. It is to be noted that 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.

91 As found by the Court of Appeal, another warning signal were the 'observable' differences between the signature on the wire transfer request form and the signature as shown on Rosemore's authorisation card. The evidence of Ms Marin, the expert handwriting witness appointed by the Court, was that the signature on the authorisation form for the wire transfer was not Jason Connor's signature. Her opinion evidence 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 on the photographic copy of similar document, outgoing wire transfer request...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 the specimen signature...Line quality appeared to be poor, line endings appeared thickened, width of second portion of signature appeared as shaded, making the signature QD1 appear of different quality formation.

We agree with the Court of Appeal that the signature discrepancies should have also rung an alarm bell for Caye Bank.

92 No doubt, as Caye Bank argues, it would be unreasonable to expect the Bank to have a handwriting expert on stand-by to conduct a signature analysis before processing a wire transfer. On the other hand, it would not be unreasonable to expect that the Bank's employee verifying the signature in an online wire transfer request would be trained to recognise 'observable' differences in the signature on the wire request and the signature on record especially in circumstances where there are other red flags.

93 We agree therefore with the Court of Appeal that there were alarm bells ringing loud and clear which should have put Caye Bank on inquiry. This Court is not oblivious to the fact that the wire request came from Rosemore's online account which had a unique identification feature linked to Rosemore which was compatible with Caye Bank's verification procedures. However, the 'observable' discrepancies between the signature on the outgoing wire transfer and Jason Connor's signature; the email address jason1rosemoremore@gmail.com used for confirmation of the transaction; and the unusual large amount of the sum requested to be transferred given the account history; the fact that Rosemore had not made a transfer to Walter before; and the purpose for the transfer (purchase of property) given the nature of Rosemore's business were telling indications sufficient to put Caye Bank, as an ordinary prudent banker, on inquiry.

(3) Did Caye Bank Exercise the Skill and Care of an Ordinary Prudent Banker?

94 Considering the foregoing, the question which we must now confront is whether Caye Bank discharged its *Quincecare* duty of skill and care? Based on the authorities, the answer to this question turns on whether Caye Bank exercised the care of an ordinary prudent banker in the authentication process of identifying whether Connor was the signatory to the wire transfer request. In this regard, Caye Bank presented three witnesses on the verification process followed in identifying whether Connor was the signatory to the wire transfer request.

95 As we have already seen, the first two such witness were Ms Tricia Villanueva, the secondary verification officer who reviewed the wire transfer transaction before the payment was made and Mr Dean Roches, who reviewed the verification process followed by bank staff in executing the request after the fraud was discovered. Their evidence established nothing more than that the Bank followed its usual verification process. Very notably, however, Ms Villanueva testified that she instructed Ms Florangely Graniel, the primary verification officer who reviewed the wire transfer transaction to speak with the client via telephone to confirm the transaction but there is no evidence that Ms Graniel or any other employee of Caye Bank ever did.

96 The third witness who gave evidence on behalf of Caye Bank was Mr Mark Hulse, an accountant familiar with banking in Belize. His evidence was that the process of receiving instructions and processing wire transfers followed by Caye Bank was essentially the same as that followed by other banks in Belize.

97 In sum, the evidence adduced by Caye Bank was to the effect that it followed the authentication methodologies required by clause 14. Caye Bank, however, did not offer any evidence as to the question of what it did, having been put on inquiry as we have concluded above, in discharge of its *Quincecare* duty of care. That, in our view, is the determinative question.

98 In approaching that question, we find the evidence of Mr Mervyn Iles very important. Mr Iles opined that, being put on inquiry, an ordinary prudent banker would have exercised greater care in the verification process in the circumstances of the wire request transaction in this case. He testified as follows:

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.

99 We agree that Caye Bank should have initiated the kind of actions suggested by Mr Iles. As the Court of Appeal noted, if Caye Bank had contacted Mr Connor by telephone, (as instructed by Ms Villanueva, see [18]) the fraudulent transfer may have been averted. In all these circumstances, we agree with the Court of Appeal that Caye Bank was in breach of its *Quincecare* duty of care.

Does Clause 14 exclude Caye Bank's Liability for Breach of its Quincecare duty of care?

100 According to Caye Bank in its written submissions to this Court: ‘... clause 14 excludes the more onerous *Quincecare* obligation that the Bank might otherwise be under...and it limits it to one of verification of signature, or identification of the sender “to its own satisfaction”.’ And that ‘[f]urther...the last sentence of the clause “No third-party requests will be processed” was a limitation, for the Bank’s benefit, on the circumstances in which it was obliged to act upon such requests...’

101 As it appears to us, there is no reason in principle why it is not possible for a bank and its customer to agree to exclude the *Quincecare* duty of care. After all, exclusion clauses have been used, and are still used, by contracting parties to manage their risks for contractual liability. Indeed, this view of the law is supported by the English Court of Appeal decision in *JP Morgan Chase Bank, NA v Federal Republic of Nigeria* ²⁰. The question for us therefore is whether clause 14 can be interpreted as excluding Caye Bank’s *Quincecare* duty of care as Caye Bank argues.

The traditional approach to the interpretation of contractual terms excluding liability for negligence is that such terms should be interpreted as not excluding negligence unless there is explicit reference to negligence in the wording of the term: *Canada Steamship Lines Ltd v The King* ²¹. This approach is said to be a special manifestation of the *contra proferentem* rule which is to the effect that an exemption clause should be construed strictly against the person relying on the exemption clause. On this approach, it is clear that clause 14 must be interpreted as not excluding Caye Bank's *Quincecare* duty of care as that clause does not expressly refer to negligence.

103 Counsel for Caye Bank has argued in effect, however, that the modern objective and contextual approach to the meaning of contractual language, with business common sense also being relevant in some cases, espoused by this Court in *Blairmont* ²², renders it otiose to search for special rules for determining whether clause 14 is operative as an exclusion or exemption clauses. The meaning of that clause, counsel maintains, is embraced in its objective and context, or as revealed by business common sense. Unfortunately, counsel did not fully explore this view of the law. We are prepared to say, however, that assuming counsel's argument is correct, clause 14 could still not be interpreted as excluding Caye Bank's *Quincecare* duty of care.

104 If the *Blairmont* approach were applied, the determinative question would be whether a reasonable outside observer would think that Rosemore was likely to have agreed to giving up its valuable *Quincecare* right except by clear words in clause 14 to that effect. To us, it is manifest that they would not. Rather, they would see that clause as not disturbing the *Quincecare* implied term that, if put on inquiry, the Bank would be under a duty to use reasonable skill and care whether it be in the verification of the signature or in the identification of the sender to the Bank's own satisfaction so as to protect Rosemore from fraud. It would be contrary to business common sense to expect that the parties to the Depository Agreement would purport to exclude Caye Bank's *Quincecare* duty of care in clause 14 without using clear words to that effect in that clause. Indeed, it is difficult to contemplate how, as argued by counsel for Caye Bank, the words '*to its own satisfaction*' could be seen by a reasonable outside observer as absolving the Bank from exercising reasonable care in verifying the signature of the sender or in satisfying itself of the identity of the sender once it was put on inquiry.

105 In sum, whether the traditional approach or the *Blairmont* modern approach is applied to the interpretation of clause 14, that clause cannot be interpreted as excluding Caye Bank's liability for breach of its *Quincecare* duty of care.

Does Clause 51 Exclude Caye Bank's Liability for Breach of its *Quincecare* duty of care?

106 Clause 51 formed part of the grounds of appeal in Caye Bank's notice of appeal in the Court of Appeal. This ground appears to have been abandoned and was not argued before that Court. Caye Bank now seeks permission to resuscitate that ground before this Court. Rosemore seeks to resist this, arguing that the Court of Appeal's decision did not address clause 51 and that a determination of the issue by this Court 'would be highly prejudicial' to Rosemore. It is to be noted that Rosemore did not show in what way it would be prejudiced.

Permission to resuscitate a claim or argument abandoned in the Court of Appeal before this Court is very much a question for this Court's discretion. In this case, the abandoned argument relates simply to the construction of clause 51; it does not require consideration of any facts and it does not require any further evidence. It is not therefore obvious to us how the respondent would be prejudiced by us hearing arguments. In those circumstances, we are of the view that we should allow Caye Bank to present its arguments on clause 51. In our judgment, a ruling on the efficacy of that clause, and similar clauses, in excluding the *Quincecare* duty would no doubt be a valuable guide to banks and their customers.

108 As has been seen, clause 51 of the Depository Agreement provides as follows:

B. 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 wilful misconduct.

109 Counsel for Caye Bank contends that this clause 'excluded the Bank's liability save in the event of gross negligence or willful misconduct' and that Caye Bank is 'plainly' protected by this clause 'from a tortious claim in negligence at common law'. Counsel's argument continues at [22] of his written submissions:

It is trite that where a banking contract governs the parties' rights and liabilities, there is no room for imposing a duty of care on the Bank which goes further than that which it has undertaken in the contract. See *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank* [1986] AC 80. Therefore, as clause 51 protects the Bank from liability for breaching its contractual duty of care save where there is gross negligence or wilful conduct, it likewise protects it from liability for breaching any concurrent common law duty of care, save where it amounts to gross negligence or wilful (sic) misconduct.

110 We do not accept this submission. As has already been pointed out, there were two terms in the Depository Agreement which governed the bank's obligation to (1) properly follow the verification and identification process, and (2) observe reasonable skill and care in executing the customer's orders. The first is the duty contained in the express term in clause 14 (of course, read in light of clause 2) of the Depository Agreement. The second is the *Quincecare* duty of care which is a term implied into the Depository Agreement 'notwithstanding what was said in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*²³ (Steyn J) in *Quincecare*.

111 Counsel for Caye Bank's entire argument is that the key words of clause 51 are that the Bank is exempted from liability 'for any action taken or not taken by it under the terms of this document', namely, the Depository Agreement. We agree with counsel that these words are of crucial importance in demarcating the operation of clause 51. We also agree that these words make it arguable that clause 51 applied to exclude Caye Bank's liability in respect of 'any action taken or not taken' by Caye Bank under clause 14. This is so because clause 14 is a term in the Depository Agreement which provides for the action to be taken by Caye Bank in the authentication process when Caye Bank is not put on inquiry.

112 As we have held, however, Caye Bank incurred no liability for breach of the express terms of clause 14. Caye Bank's liability is for breach of the *Quincecare* duty of care which, albeit implied, is also a term of the Depository Agreement. Counsel would therefore have to show that clause 51 operates to exclude Caye Bank's (more onerous) liability in respect of the *Quincecare* duty of care as well.

113 To circumnavigate the difficulty with clause 51 as it relates to excluding liability for the *Quincecare* duty of care, Caye Bank submits that ‘whatever the position may be in consumer contracts, it is wrong in principle to adopt a strained approach to exclusion clauses in commercial contracts such as the present between businessmen who are capable of looking after their own interests’. In our judgment, no ‘strained approach’ is necessary to conclude that a broadly worded clause as clause 51 does not exclude the *Quincecare* duty of care. As has already been seen in this judgment, both the traditional approach and the modern contextual *Blairmont* approach to contract interpretation, including in relation to interpretation of commercial contracts, require clear words before a Court will conclude that a contract excludes an implied right, such as the right conferred on the customer by the *Quincecare* duty of care, which only arises if a bank is ‘put on inquiry’ and which is of considerable value to the customer. Caye Bank has not pointed to anything, and we do not

find anything, in the broad language of clause 51 which could be considered as excluding liability for breach of the *Quincecare* implied term.

Does the Indemnity Clause Indemnify Caye Bank's Liability for Breach of its Quincecare duty?

114 Caye Bank points to the fact that the wire transfer request contained the password ‘EARWIG’. This fact, maintains Caye Bank, meant that the bank was covered by the Indemnity Agreement which provides:

In consideration of you [Caye Bank] agreeing to accept telex/fax/e-mail instructions from me/us [Rosemore] 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 such instructions.
- c. On demand to provide funds to meet all payments under such instructions.

115 The Court of Appeal construed this clause as applying only to instructions which actually came from Rosemore. Caye Bank maintains that this construction is wrong and that the Indemnity Clause, properly construed, obligated Rosemore to indemnify Caye Bank, since it had acted on instructions with the identification of EARWIG.

116 The flaw in Caye Bank's argument is the assumption that Caye Bank's liability resulted from it acting on ‘instructions with the identification of EARWIG’. As we have determined, that is not the basis of Caye Bank's liability. Instead, it is that having been put on inquiry, Caye Bank failed to discharge its *Quincecare* duty of care. The question therefore is whether the Indemnity Clause can be construed as indemnifying Caye Bank against losses caused by its breach of its *Quincecare* duty of care.

117 The rules governing the interpretation of an indemnity clause are fundamentally similar to those governing exemption or exclusion clauses: see *Canada Steamship Lines Ltd v The King* ²⁴. Those rules insist that clear words are needed to indemnify losses caused by a party's own breach of its *Quincecare* duty of care. As explained above, the underlying rationale for this rule is that, applying the modern approach of contract interpretation, it is

inherently improbable that a reasonable outside observer would agree to assume responsibility for the consequences of the other's negligence. And, applying the traditional approach, because the Indemnity Clause does not expressly indemnify against liability for breach of the *Quincecare* duty of care, it must be interpreted as not indemnifying against such liability.

Disposal

118 For all the foregoing reasons, this appeal is dismissed; the order of the Court of Appeal dated 26 February 2021 is affirmed; and the appellant shall pay to the respondent the following:

- a. Costs of this appeal agreed in the sum of USD38,331.30 (pursuant to Rule 17.15 Schedule 2 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules, 2021);
- b. Costs in the Court of Appeal to be assessed; and
- c. Costs in the High Court agreed in the sum of USD32,500.00.

/s/ J Wit

The Hon Mr Justice Wit

/s/ W Anderson

The Hon Mr Justice Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice Rajnauth-Lee

/s/ D Barrow

The Hon Mr Justice Barrow

/s/ D Burgess

The Hon Mr Justice Burgess

¹ [1992] 4 All ER 363.

² *Quincecare* (n 1).

³ [2021] CCJ 7 (AJ) GY, [2021] 5 LRC 433.

⁴ *Wood v Per Capita Insurance* [2017] AC 1173.

⁵ *Caye International Bank Ltd v Rosemore International Corp* (Belize CA, 26 February 2021).

⁶ *Quincecare* (n 1).

⁷ *Quincecare* (n 1) at 376.

⁸ [2019] EWCA Civ 1641.

⁹ *Quincecare* (n 1) at 376.

¹⁰ *Quincecare* (n 1) at 377.

¹¹ *ibid* at 380.

¹² [1992] 4 All ER 409.

¹³ [2018] 1 WLR 2777.

¹⁴ [2019] UKSC 50.

¹⁵ *Lipkin Gorman* (n 12).

¹⁶ *JP Morgan* (n 8).

¹⁷ [2022] QB 578.

¹⁸ [2022] EWHC 1447 (Comm).

¹⁹ *Quincecare* (n 1).

²⁰ *JP Morgan* (n 8).

²¹ [1952] AC 192 at 208.

²² *Blairmont* (n 3).

²³ [1986] AC 80.

²⁴ *Canada Steamship* (n 21).