IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. 1993/J.320

BETWEEN	**JAMAICA CITIZENS BANK LTD.**	**PLAINTIFF**
AND	**DALTON YAP**	**DEFENDANT**

Michael Hylton, Q.C., Miss Nicole Lambert and Patrick McDonald, instructed by Myers, Fletcher and Gordon for the plaintiff.

Dennis Morrison, Q.C., Norman Wright and Christopher Dunkley, instructed by Wright, Dunkley and Co. for the defendant.

Heard: September 17,18,19,23,24,25 and 26; October 16,17 and 18; November 18, 1996; and September 22, 1997.

PANTON, J.

The plaintiff carries on business as a banker in Jamaica and in Miami, Florida, U.S.A.

The defendant was employed to the plaintiff, first as Assistant General Manager, Technology (Sept. 12, 1988), and then as General Manager, Technology and Operations, from January 1, 1993 until his dismissal on October 1, 1993.

The plaintiff offered credit card facilities to the public. These services were limited to Jamaica, and were under licences from Visa International and Master Card International.

The credit card operations were divided into two divisions: the Retail Division, and the Technology and Operations Division. The former division had the responsibility for initiating arrangements with merchants and card holders, establishing merchant accounts, marketing the facilities, sending out statements and generally dealing with cardholder customers. The latter division had the responsibility for processing merchant and card holder transactions, for authorisation, and for customer queries.

It would not be inaccurate to say that the retail division dealt with the business side of matters whereas the other division dealt with the technical aspects.

The plaintiff, in order to get assistance in offering international credit card services, entered into a contract with FTA Card Services, Inc.(referred to hereinafter as 'FTA'), which is based in Chicago, U.S.A. Under the terms of the agreement, FTA provided various services in the USA including processing the plaintiff's internal Master Card transactions in the USA and preparing statements.

Under the terms of the agreement with FTA, the plaintiff was required to open a bank account in the USA. That account was to be known as the "daily settlement account" and FTA was permitted to withdraw funds therefrom for specific limited purposes.

THE PLAINTIFF'S CLAIM

It is the plaintiff's claim that at all material times, it was its policy to require two signatures for withdrawals over an approved limit from its accounts. All bank statements in respect of its

accounts would also be sent to the plaintiff's accounting department.

The plaintiff alleges that the defendant, acting pursuant to the agreement between the plaintiff and FTA, in or about August, 1991, caused the opening of an account at Southwest Suburban Bank, Bolingbrook, Illinois, USA, in the plaintiff's name.

The plaintiff alleges that beginning in or about January, 1993, and continuing until about November, 1993, Ken Palmer, a director of FTA fraudulently withdrew US$1,315,000.00 from the said account. It is further alleged by the plaintiff that the defendant knew of the fraudulent conduct of Ken Palmer, yet he failed to advise the plaintiff's executive management, its attorneys-at-law, or anyone of the fraud; nor did he take any steps to prevent this activity on the part of Ken Palmer.

The plaintiff has recovered US$337,000.00 from Mr. Palmer and FTA pursuant to a settlement agreement.

Both the plaintiff and the defendant are agreed that there was an implied term in the defendant's contract of employment that he would comply with the rules and guidelines established by the plaintiff from time to time, and that at all times, he would act in the best interests of the plaintiff.

It is the plaintiff's claim that the defendant breached his contract of employment between 1991 and 1993.

The amended statement of claim particularised nine sets of activity on the part of the defendant as being in breach of the contract of employment. At the hearing, three of those were abandoned. The remaining six are as follows:

1. establishing credit card relationships with certain telemarketers in the USA and Antigua without the authority or knowledge of the plaintiff, without carrying out the appropriate credit checks and procedures and in contravention of the conditions of the Visa International licence;

2. delaying compliance with instructions from Visa International and Master Card International for dealing with the telemarketing relationships;

3. delaying communication to the executive management of the plaintiff the problems arising from the relationships;

4. failing and or refusing to terminate the arrangements, having been instructed so to do, and facilitating the establishment of an office in Kingston to circumvent the regulations;

5. authorising payments to the companies of sums totalling US$827,523.60 without maintaining a reserve; and

6. improperly causing or allowing a portion of the reserves held by the plaintiff to meet potential liability arising from disputed charges to be paid out by the plaintiff.

As an alternative, the plaintiff has claimed that the defendant conspired with various persons, including the principals of the various telemarketing companies to defraud the plaintiff and its cardholder customers.

The conspiracy is particularised thus:

1. causing bills to be rendered to the plaintiff for goods and services purportedly ordered by Master Card and Visa International cardholders over the telephone when such was not the case;

2. causing the plaintiff to pay bills rendered at (1) above;

3. causing such payments to be made without the usual deductions being made or held as reserves against chargebacks;

4. having the relevant cardholders invoiced for the said goods and services; and

5. setting up fictitious offices in Kingston for at least one of the companies to use in circumventing the rule against the plaintiff having credit card relationships with companies carrying on business outside of Jamaica.

The plaintiff's alternatives continue with a claim for deceit.

In this regard, the plaintiff particularises the setting up of the office referred to earlier, the wrongful concealing of communications from Visa International, the issuing of a document

falsely representing that it was a resolution of the plaintiff's Board of Directors for the purpose of the opening of an account, and the permitting of the withdrawal of funds by Ken Palmer from the account.

Finally, in its list of alternatives, the plaintiff claims that the defendant owed it a duty to take care in the carrying out of his duties, but that he did so carelessly and negligently.

The particulars of negligence are a repetition of the particulars given earlier in respect of the other claims.

As a result of the aforesaid breach of contract, conspiracy, deceit, and or negligence, the plaintiff claims that it has suffered loss and damage totalling US$1,182,066.16 as well as damage to its reputation. In addition to the claim for damages, the plaintiff is seeking interest pursuant to the Law Reform (Miscellaneous Provisions) Act.

THE DEFENCE

So far as the plaintiff's credit card operations were concerned, the defence is saying that there were two periods that should be noted; July, 1990 to June 1992 when the Credit Card Department was managed as a single operational and administrative unit headed by one Alarene Wong, and post June 1992 when the department was divided into two (Credit Card Marketing, and Credit Card Operations), both of which reported to the Technology and Operations Division of the plaintiff headed by Mr. Lloyd Wiggan, the then General Manager of Technology and Operation.

The defendant admits, however, that as of June 1992, the Credit Card Operations Department was placed directly under his area of operation as he was then the Assistant General Manager, Technology.

The defence states that the defendant had limited knowledge in relation to the agreement with FTA. As far as he knew, FTA had authority to withdraw funds from the Daily Settlement Account without prior authorisation. Further, FTA submitted monthly statements to the plaintiff. In any event, the defence is saying that responsibility for the accounting department of the plaintiff rested with the Finance Division which was headed by one Mr. Neville Parkinson, General Manager, Finance.

The defence denies responsibility for the opening of the account from which Ken Palmer withdrew funds without authority. According to the defence, the account was opened and caused to be opened by the signatories on the account, Mr. Ewart Scott, Assistant General Manager, Finance, and Mr. Neville Parkinson, General Manager, Finance.

The defence is contending that the settlement agreement entered into between the plaintiff and FTA and Ken Palmer is an acknowledgement by the plaintiff that the liability therefor was that of FTA and Palmer, rather than of the defendant Yap.

The defence further denies the allegations of breach of contract, conspiracy, deceit, and negligence. According to the defence, the defendant's responsibilities were confined to exploring the feasibility of creating the technical infrastructure for the credit card transaction processing programme for the interfacing of the

plaintiff's computer system with that of the overseas data capture company for the said companies.

The defence contends that the plaintiff initiated relationships with the telemarketers in 1991 through its then managing director; this led to the establishment of a credit card relationship with them in 1993 through Ewart Scott, General Manager, Retail Banking.

There was no responsibility on the part of the defendant to conduct credit checks and procedures with respect to merchants. Such responsibility, says the defence, laid with Mr. Scott.

According to the defence, the defendant "actioned" "in a timely manner" every request by Visa International and Master Card International. Further, there was no lapse in communication between the defendant and the executive management of the plaintiff; nor did the defendant participate in the setting up of a fictitious office in respect of any of the companies.

THE OPENING OF THE PLAINTIFF'S CASE

In opening the plaintiff's case, learned Queen's Counsel, Mr. Hylton, said that the claims related to two separate issues: FTA Card services and the telemarketers. **The plaintiff saw the FTA Card Services issue in this way.** By 1991, the plaintiff having begun to issue credit cards under licence from Mastercard International had encountered some technical difficulties in the processing of the transactions. The defendant was assigned the task of locating someone who could provide processing services for the plaintiff.

The defendant made contact with Ken Palmer of FTA and a contract was concluded between the plaintiff and FTA on July 18, 1991.

The contract required the plaintiff to establish a bank account in Chicago for the purpose of depositing the proceeds of transactions processed by FTA. The defendant saw to the opening of this account. He obtained the signatures of senior managers of the plaintiff on a signature card and a blank form of resolution, completed them in such a way that FTA's officers could withdraw the funds in the account without requiring a signature by any officer of the plaintiff, and signed the resolution certifying that the plaintiff's board of directors had in fact passed such a resolution, when it had not.

The account, having been opened, several large withdrawals were made by Ken Palmer. The defendant, according to the plaintiff, is liable for these withdrawals as he facilitated them and took no steps to prevent them although he knew that they were not authorised.

In relation to telemarketing, the plaintiff explained its case in the following manner. Telemarketing involves the sale of goods and services to persons over the telephone. Payment is effected by the purchaser giving the merchant his credit card number; the merchant transmits the information about the cardholder's number and the value of the transaction to the acquiring bank, which processes the transaction and pays the merchant. The bank then recovers payment from the cardholder or issuing bank as the case may be.

In 1993, the defendant caused the plaintiff to enter into arrangements with various overseas based telemarketing merchants to process transactions on their behalf. This was contrary to the regulations issued by Visa International. The defendant, though warned about the risks, ignored the warning. He also ignored the fact that the Marketing Division which had responsibility for certifying the merchants had not given the go-ahead in respect of these merchants.

An acquiring bank, such as the plaintiff, has to be particularly careful in relation to chargebacks. These are reversals of charges to cardholders' accounts where, for example, the goods or services purchased were not satisfactory or had not been received. In such a situation, the cardholder is not required to pay the cost of the disputed transaction and the bank would then be faced with the likelihood of absorbing the cost involved.

The plaintiff alleges that no merchant agreements were prepared for these merchants, as no checks had been conducted, and that the defendant concealed the opening of the accounts from the Marketing Department by not including the relevant information in the monthly reports issued by his department.

When the accounts were discovered, instructions were given repeatedly to the defendant to close them. He did not, although he said they had been closed. Eventually, the accounts were closed when other members of the plaintiff's management team intervened. As a result of the unauthorised telemarketing activities, the plaintiff alleges that it suffered a loss of US$204,066.16.

THE EVIDENCE

This case requires, in my view, a detailed look at the evidence of each witness and his or her response to the various situations that presented themselves during the period under consideration. Each witness, like the defendant, was in a special relationship with the plaintiff. It is through these persons, with the assistance of documents, that the plaintiff hopes to prove its case. In many instances, it is the word of the plaintiff's witness against that of his or her former colleague, the defendant. The Court has to be particularly careful, it would seem, in assessing the evidence of each witness, bearing in mind the instinct for self-preservation.

Mr. Lloyd Wiggan, a banker with over thirty years experience, was the first witness called on behalf of the plaintiff. He had been the plaintiff's managing director since November, 1992. Prior to that time, he had held the position of General Manager for Technology and Operations. It was he who recruited the defendant as Assistant General Manager for Technology and Operations.

According to Mr. Wiggan, the plaintiff had become a principal member of Master Card and needed a contractor to do processing on its behalf. At that time, the technology available to the plaintiff was inadequate. Mr. Wiggan was then the General Manager of Technology and Operations while the defendant was his assistant. The defendant was the key person, according to Mr. Wiggan, involved in the process of locating the appropriate contractor. As a result, the defendant handled the negotiations with FTA on the plaintiff's behalf.

Mr. Wiggan testified further that a Board resolution was required for the opening of an account by the plaintiff at another bank, and the defendant had no authority to sign Board resolutions.
The signing of cheques for withdrawals above a certain limit from the account would require two signatures. Withdrawal of under US$5,000.00 would require one signature. Above that amount up to US$15,000.00 would require two signatories at the supervisory level. For amounts of US$15,001.00 and above, there would be a requirement for two signatories but one of these would have to be at the management level. An assistant manager is regarded as being at the management level.

An account was opened by the plaintiff, but Mr. Wiggan said that he was unaware until December, 1993, that the account had been opened in a way to allow FTA to draw on it. However, Mr. Wiggan, when shown paragraph 8d of the agreement with FTA, agreed that it contemplated the empowering of FTA to debit the account for purposes stated in the paragraph without first having to make a reference to the plaintiff; that is, for the purpose of the management of the settlement account. He also conceded that the wording of the paragraph did confer some extra authority on FTA beyond the daily settlement.

Mr. Wiggan confirmed that the agreement between the plaintiff and FTA had been reviewed by the plaintiff's legal department, and had been approved in the final form in which he, Mr. Wiggan, had signed it.

The plaintiff and FTA, Mr. Wiggan said, had signed a settlement agreement arising from the suit filed by the plaintiff in the

United States of America. FTA and Ken Palmer (referred to earlier) had admittedly converted the plaintiff's money by false pretences, and the plaintiff had, since the settlement agreement, recovered some of that money.

Mr. Wiggan confirmed that in 1993 the plaintiff had been offering credit card services including the processing of transactions for merchants. At the beginning of that year, the plaintiff had a system by which merchants would be identified, approved and contracted. **The Marketing** section of the Credit Card Operations was responsible for acquiring merchants. Specific assignments would be made to individuals in the plaintiff bank to solicit new merchants. After using "due diligence" and seeing that the requirements of the principals had been met, the Marketing section would enter into contract with the new merchants.
So far as processing the transactions was concerned, the **Operations** section of the credit card business would have a role.

The Marketing section had as its senior personnel Mr. Scott, Mrs. Alarene Knight and Mr. George Lumsden whereas the **Operations** section had the defendant, Mr. George Beckford, Mrs. Leslie Hew and Miss Maria Green.

According to Mr. Wiggan, during the first quarter of 1993, at an executive meeting, the defendant raised the issue of telemarketing. Executive meetings are attended by general managers and the managing director. At this particular meeting, it was decided that telemarketing was too risky and so the plaintiff should not get involved with it.

Notwithstanding this decision, Mr. Wiggan said that he learnt on his return from vacation in July, 1993, that the plaintiff was involved with telemarketing. Mrs. Alarene Knight had shown him a letter dated 6th July, 1993, from VISA International. This letter, [which is at page 269 of Vol 1B] was addressed to Mrs. Knight (who was then Alarene Wong). It reads thus:

"Dear Miss Wong:

Enclosed are two more reports on LMP Marketing reflecting deposits of 101 transactions totaling US$4,267 on 4 July 1993 and 53 transactions totaling US$2,280 on 5 July 1993.

Apparently your centre is not complying with instructions regarding this merchant as furnished by this office in various written and telephone communications.

Again, this merchant must be terminated!

I will be writing shortly regarding steps Visa International plans to take should this merchant, along with the other merchants you have been instructed to cancel, are not immediately terminated.

If you have any questions, please contact me."

As a result of this letter, Mr. Wiggan had a discussion with the defendant. He told him of the "widespread concern from VISA and Mrs. Knight about the establishment of telemarketing accounts". The defendant, he said, assured him that all the accounts had been

closed. This assurance is reflected in a note that was written on the letter by the witness who, during cross-examination, said he was satisfied with what the defendant had done, based on the discussions they had had.

On July 21, 1993, Mrs. Knight wrote to Mr. Wiggan advising that there were six telemarketing merchant accounts that were "still opened". In the memorandum, she said that no merchant transactions had been processed through them since July 2, 1993, but they had remained open to facilitate credit transactions. Then, she added; "Visa International requires written confirmation that all accounts are closed in our books." [see page 290 Ex1 B].

Mr. Wiggan added "Worldwide Marketing" in his own handwriting to the list of accounts that had been supplied by Mrs. Knight, and also a note instructing George Lumsden to follow up on the matter. Mr. Lumsden was then acting for Mr. Scott who was on leave.

While being cross-examined by learned Queen's Counsel, Mr. Morrison, the witness said that telemarketing fell under the jurisdiction of those under Mr. Scott. He also said that he was not aware that in March, 1993, Mr. Scott was engaged in discussions as regards the plaintiff's entry into telemarketing arrangements.

There are two documents which, in summarizing Mr.Wiggan's evidence, ought to be mentioned. The first is at page 119 of Vol.1 A and the second begins at page 123 and appears to be endless as it meanders to page 146. The latter document is headed "Market and service agreement" and appears to be a draft contract between the plaintiff

and World Transaction Services of San Diego California (referred to as WTS) and South East Caribbean Trading Co. of 1 Ardenne Rd. Kingston (referred to as SECT). The address of this latter entity had first been typed in as 4 King St., which happens to be the plaintiff's address but it was crossed out by the defendant who wrote the Ardenne Rd. address. The defendant also penned a note to his secretary on the face of this document instructing her to copy it to Ewart Scott. This was a proposed telemarketing agreement. Mr. Wiggan said he knew nothing of it until a week or so before he gave evidence.

The former document at page 119 bears a heading "Universal Bancard Systems Inc.". It is dated March 17, 1993. There is a subject title. It is "TRADE SECRET INFORMATION". The rest of the document reads thus: "It is understood that in connection with discussions between Universal Bancard, Ceridian, World Transaction Services and Jamaica Citizens Bank, Ltd., all information and materials exchanged will not be disclosed or disseminated in anyway to anyone who is not an officer or official of these organizations except when required by legally authorized parties." This document is signed by one Richard Rothberg, President of Universal Bancard Systems, Inc., Charles Sapp, on behalf of Ceridian and Ewart Scott in his capacity as General Manager Retail Banking, for the plaintiff. Mr. Wiggan said that he did not know of the existence of this document; and that if Scott was involved in telemarketing in 1993, it was without his knowledge.

Mr. Wiggan recalls receiving a copy of a letter dated July 9, 1993, from VISA International"s Vice-President to the defendant as to

problems with certain merchants who were apparently breaking the rules and regulations. (see page 275).He also received a copy of a memorandum dated July 29, 1993, from George Lumsden to George Beckford instructing that certain named telemarketing merchant accounts were to be **suspended without delay.**(see page 293)

Eventually, on September 2, 1993, a VISA vice-President wrote directly to Mr. Wiggan in connection with the plaintiff's telemarketing activities. The unfavourable exposure to VISA was highlighted and the plaintiff's security bond was substantially increased.(see page 387). Four days later, Mr. Wiggan responds to VISA, advising among other things that he had called in the plaintiff's group chief internal auditor to conduct a full investigation.(see page 391).

The second witness called was Mr. Ewart Scott. At the time of giving evidence, he was President of the Horizon Merchant Bank and President of the Horizon Group. He had been employed at the Jamaica Citizens Bank from 1986 to 1994. In January, 1993, he assumed the role of General Manager, Retail Banking and Marketing. It was to him that the Credit Card Department's marketing division reported to. The manager of that department was, in 1993, Mrs. Alarene Knight. That department was responsible for vetting and approving merchants prior to the establishment of accounts. This area will be looked at further while considering the telemarketers. On October 1, 1993, while acting as Managing Director, Mr. Scott penned the letter that dismissed the defendant.

At the time of the signing of the agreement with FTA in 1991, Mr. Scott was the Assistant General Manager , Finance. He reported to Mr. Neville Parkinson, General Manager, Finance.

Mr. Scott was one of the plaintiff's officers who signed the card to open the account at Southwest Suburban Bank, Bolingbrook, Illinois. According to Mr. Scott, the defendant came to him explaining the need to open the account and asked him to sign the card in blank. He obliged. He also obligingly signed the document that indicated that there had been a Board resolution sanctioning the opening of the account. He said also that the various sections of this latter document had not been completed when he signed it.

Having signed the forms, he returned them to the defendant. The next time that he saw them was in Chicago in December, 1993. At that stage, they had been completed.

To complete this area of Mr. Scott's evidence, some quotations will now be included. While being examined in chief by learned Queen's Counsel, Mr. Hylton, the following was recorded:

"Q. There is a statement in Mr. Yap's Defence and I am now reading, Mi Lord, from paragraph 9 of the Defence which is at page 17. It says in effect that this account was opened or caused to be opened by you and Mr. Parkinson. Did you play any role in the opening of the account other than what you have told us?

A. No.

Q. Why did you sign these forms in blank?

A. At the time the process to open a foreign account - the bank had various foreign accounts in various banks. The process to open a foreign account was one wherein the sponsor of the transaction, the person who had direct responsibility for the transaction who needed the account to be opened, would seek the appropriate signatures, get them signed, send it to the Board who would then do the usual Board resolutions. It would then be returned through the Secretary of the Board to the appropriate officer who would then send it to the bank in question. At the time it reaches the Board, the process of documentation would have been filled up, when the Board then ratifies whatever is necessary. In effect, what usually occurred is, each General Manager would make a report to the Board via the Managing Director, which would be put in that form.

Q. Anything else?

A. Yes.

Q. When you signed these forms and gave them to Mr. Yap, what did you assume?

A. First, as a member of the Senior Management team, I expected that he would do what is expected in getting the accounts opened.

Q. When you say what is expected, are you referring to the processing?

A. Yes.

Q. You had identified Mr. Yap's signature on page 38. You are aware that the document at pages 37 and 38 purports to be a resolution of the bank?

A. Yes.

Q. Do you know whether Mr. Yap had authority to sign resolutions on behalf of the bank?

A. No."

It was in early 1993 that Mr. Scott first met "the telemarketers or whatever you call it" (his words). At that meeting, he said, the defendant, Mrs. Knight and "two of the opposing parties" were present. At first, he did not recall their names; but, he did so as he continued his evidence.

The telemarketing issue, he said, was raised by the defendant at an executive meeting that he believed took place in February, 1993. A decision was taken that telemarketing was too risky, and the risk was not worth the effort. He said that Messrs Wiggan, Parkinson, Mrs. Facey, the defendant and himself were present. The persons present were at the level of general manager.

Later, Mrs. Knight sent him (Scott) a memorandum dated May 3, 1993, which made him aware that the plaintiff had entered into an

arrangement with telemarketers.(see page 161 Ex. 1A). On that memorandum, he wrote requesting the defendant to note urgently and take appropriate action. This was not the only handwritten note that he penned to the defendant urging prompt and urgent action. There is another on page 261 Ex. 1B. This was in July, 1993. This latter document was a letter from the Vice President of VISA International to Mrs. Knight (addressed as Alarene Wong).
Earlier, that is, on June 28, 1993, Mrs. Knight had sent Mr. Scott another memorandum on the subject.(see page 232 Ex1A).

Mr. Scott has steadfastly maintained that he had nothing to do with the opening of the telmarketing accounts. His department which had the responsibility for checking the suitability of merchants was never consulted nor advised, he said ; as a result, they made no credit checks.

On August 9, 1993, George Lumsden signed a memorandum on the witness' behalf instructing Ms. Lesley Hew to close two merchant accounts with immediate effect. Those were Worldwide Marketing and Rick Greenlese. On the following day, a letter is faxed to the witness by VISA's Vice President, Mr. Dawson. Mr. Scott is urged to "insure that Worldwide Marketing is terminated as a Visa merchant". On August 17, Mr. Scott replied to Mr. Dawson advising that the following merchant accounts had been closed in the plaintiff's books: **Travel Connection, Floral Exchange, LMP Marketing, International Concept, S.E.C.T., and Universal Bancard System.** He further advised that Worldwide Marketing had not been closed but no further transactions have been processed on the account.(see page 330 Ex.1B)

So far as the document headed "Marketing and Service Agreement" (referred to while reviewing Mr. Wiggan's evidence) is concerned, Mr. Scott does not recall seeing it. However, he recalls seeing and signing the document that bears the subject title **Trade secret information** (also referred to during Mr. Wiggan's evidence). In relation to the affixing of his signature to the document, Mr. Scott, having said that he did not know the other signatories, was asked:

"When it was signed by you, were there any other signatures affixed?"
He replied:

"No. I think so. I think so. I cannot tell you exactly."
Then, he was asked:
"In what circumstances did you affix your signature to the document?"
He replied:

"Mr. Yap called me into a meeting with Bill Todd where they presented me with the documentation and suggested that the service...

He continued:

".....called me into a meeting into his office. When I went in , Mr. Bill Todd- wherein he provided me with copies of the documentation- Universal Systems documentation which included the Letter of Intent on the next page. After reading it, going through

it, it described features that we were discussing other than telemarketing, called telemoney; it was my understanding that in order for us to do the testing, we needed to sign to allow access to the technology. It is on that basis I signed to allow us to get access to that technology."

Miss Maria Green , who is now the manager of the Credit Card centre, was a supervisor with the Credit Card Operations section in 1993. She reported to George Beckford who, as already stated, reported to the defendant. She supervised the area that carried out the opening of merchant accounts, that is, the telemarketers.

Miss Green testified that the defendant was the person who gave instructions for the opening of the telemarket accounts. This was not challenged.

The instructions to open these accounts usually came in writing from the Marketing department. However, in relation to the telemarketers, no instructions came from that department. Miss Green is of the view that the level of charge backs was a lot higher than usual. It should be noted, however, that so far as charge backs were concerned Miss Green's area of responsibility would only come into play when the plaintiff had to send back a charge back.

The next witness was Mr. George Beckford.
He was at the time of giving evidence Assistant Manager, Credit Card Centre, of another bank. During 1992/1993, he was Assistant

Manager, Operations, at the Credit Card Centre of the plaintiff. He reported to the defendant.

Mr. Beckford first became aware of the relationship between the plaintiff and FTA when he went to the Credit Card Centre in April, 1992. {The notes of evidence as recorded by the Court reporter on page 52 are incomplete in this regard. There is no impediment however as the Court is guided by its own notes}.

He was aware of the withdrawals made by FTA from the plaintiff's account in Chicago. The action taken by him was that of speaking to Ken Palmer, who advised him that they were security deposits which were being retained. According to Mr. Beckford, the defendant also spoke to Palmer.

The withdrawals continued in the months that followed. Mr. Beckford communicated with Ken Palmer again. On September 9, 1993, Mr. Palmer wrote to Mr. Beckford giving him the reasons for the withdrawals. Another letter came from Mr. Palmer to Mr. Beckford on September 22 in relation to the matter. On September 24, Mr. Beckford wrote to Mr. Palmer thanking him for the information that he had supplied, and requesting details of the composition of the US$450,000.00 security deposit held up to June 18, 1993. Then, on November 12, 1993, Mr. Palmer wrote to Mr. Beckford informing him that they (FTA Card Services,Inc.) had increased the security requirement to US$1,300,000.00;and advising of the deduction of an additional US$100,000.00 "as of today". The letter ends with a thank you for doing business with them. Up to that point the security deposit retained by FTA, according to Palmer's letter, was US$1,200,000.00.

Mr. Beckford said that he was aware that there was a real problem when the withdrawals reached US$1,200,000.00.

So far as telemarketing was concerned Mr. Beckford said that in March, 1993, accounts were opened for **Travel Connection, Floral Exchange, LMP Marketing Ltd etc. The instructions to open them were given by the defendant.**

By a memorandum dated May 3, 1993, VISA International advised Mr. Beckford that **Travel Connection** was "possibly....accepting fraudulent transactions". A form was attached to the memorandum, and Mr. Beckford was asked by the writer of the memorandum to investigate the matter and complete the form and return it to VISA.

Mr. Beckford said that he discussed this memorandum with the defendant who called the representatives of the merchants regarding this issue and then he (defendant) called VISA. Whereupon, according to Mr. Beckford, **"we were comfortable that everything was working alright"**. It should be pointed out that this piece of evidence has not been seen in the printed notes of evidence. It should have been recorded as part of the evidence given in the last answer of the witness on page 45 of the recorded notes. The oversight is of little moment, however, as it was recorded in the Court's notes of the evidence. In Mr. Beckford's view, the defendant had taken appropriate action. Incidentally, Mr. Beckford did not say whether he had completed the form and returned it to VISA as requested.

At a meeting attended by the witness, Mrs. Knight, Miss Green and

one George Laing, on July 19, 1993, there was a proposal to open a merchant account in the name **Worldwide Marketing** using a local address. VISA International, he said, had asked them to cease processing transactions that did not originate in the region where the processing was being done. That,he said, was the reason for the local address so that the transactions would originate locally so they would be able to process it. The defendant, he said, was the person who gave the instructions for the account to be opened.

During cross-examination by learned attorney-at-law, Mr. Wright, the witness Beckford said that he was not in a position to say whether the defendant, in giving instructions for the opening of the accounts, had been acting pursuant to instructions from the Marketing section.

The witness produced a chart with a list of the telemarketing chargeback figures as at June 30, 1994. The mere fact that there was a high percentage of charge-backs did not indicate, he said, how many would be settled in favour of the cardholder as valid, or in favour of the issuing bank as not valid.

Mrs. Alarene Knight, formerly Wong, was employed to the plaintiff from 1990 to 1996. Her position between 1990 and 1992 was Credit Card Centre Manager. In 1992, her position was changed to Card Centre Manager (Marketing) with the responsibility of opening and managing all the credit cards issued; in other words, selling the bank's services to establishments.

In order to perform this task properly, the merchants had to be

visited before the plaintiff entered into an agreement with them. Instructions would then be given to Credit Card Operations for the account to be opened. When all the opening processes had been completed, "and the merchant is fully on board", a monthly transaction report is sent by Credit Card Operations to Marketing.

The offending telemarketers did not appear on the monthly transaction report. Nor had they gone through the regular processes prior to opening. They had not been checked nor approved by the Marketing section. **These telemarketers were Travel Connection, Floral Exchange, LMP Marketing, Worldwide Marketing, and International Concepts.**

Mrs. Knight received on May 3, 1993,information from VISA International that Travel Connection may have been accepting fraudulent transactions. She immediately reported the matter to Mr. Scott who requested the defendant to deal with it urgently.

On July 2, 1993, VISA International sent Mrs. Knight a letter which reads thus:

"Enclosed are "Fraud Transaction Screening Program" reports regarding the following merchants affiliated with your bank:

LMP Marketing Limited

International Concepts

Please note the report on LMP Marketing reveals that on 2 July 1993, that merchant deposited 238 transactions totalling US$10,261.00, this in spite of communications from this office regarding the fact that LMP Marketing is depositing fraudulent

sales drafts. This merchant is listed as a hotel and it seems highly unlikely that 238 deposits would be made of even amounts from US$27.00 to US$93.00.

LMP Marketing is depositing fraudulent charges, violating the Visa Local Paper rule, and is laundering sales drafts.

By fax to Mr. Dalton Yap dated 29 June 1993 your centre was notified that LMP Marketing was depositing fraudulent sales drafts with your institution, and various questions were asked in order to determine the exact nature of the business, where Visa account numbers are being obtained, and so forth. To date a reply has not been received.

The enclosed report on International Concepts reveals 16 transactions were deposited for a total of US$9,583.00. All were for US$598.95 each. This is the exact amount per transaction deposited by two other merchants of your centre, Travel Connection and Floral Exchange, which are also listed as hotels. These merchants have been laundering drafts from the same telemarketers in the United States. Therefore, it is highly likely that International Concepts is involved in the same laundering scheme.

Because of the reasons stated above and the reasons stated in the numerous communications and phone calls to your centre, it certainly appears that your bank is becoming a haven for telemarketing laundering operations by fraudulent telemarketers based in the United States.

In view of the above, LMP Marketing, Floral Exchange and Travel

Connection should be terminated, and no further deposits of Visa transactions should be made. Also an immediate investigation should be made of International Concepts and if irregularities are noted, that merchant should also be terminated. It should be noted that US$598.95 seems like a high price to pay for a hotel room.

In order to protect your centre from future chargebacks, it is strongly recommended that deposits by these merchants be frozen if applicable laws and regulations do not preclude such action.

By Tuesday, July 6, 1993, please advise this office of the action taken regarding the above-mentioned merchants.

Regards, Joseph Dawson
Vice-President" (See pages 252 and 253 Ex. 1B)

Mrs. Knight took this letter to Mr. Scott and, in dramatic manner, she described how she stormed a meeting that Mr. Scott was in so as to demand his attention.

On July 6, 1993, Mr. Dawson again wrote to Mrs. Knight enclosing "two more reports on LMP Marketing" and instructing that this merchant must be terminated. This letter and others were copied by Mrs. Knight to Mr. Wiggan who was then out of office but who returned on July 14. On his return, he sent a note to Mrs. Knight indicating that the defendant had informed him that all six accounts had been closed. This letter has already been referred to during the summary of Mr. Wiggan's evidence.

Mrs. Knight confirmed the holding of a meeting on July 19 called by

the defendant. There, a proposal was made in respect of Worldwide Marketing and the provision of a local address. This amazed Mrs. Knight as she felt that the plaintiff was on the verge of losing its licence with VISA, yet discussions were taking place on how to circumvent VISA's regulations. No decision was reached at this meeting.

Closing an account, according to Mrs. Knight, requires the sending of a memorandum from the Marketing section to the Operations section. There was such a memorandum from George Lumsden and Mrs. Knight to Lesley Hew.(see page 270 Ex.1 B) After the closure of an account, a bank would then deal with the merchant on the basis of the provisions of the merchant agreement. If a merchant account was closed and a credit came in the bank would still process it.

The final witness called by the plaintiff was Mrs. Camille Facey.

She is an attorney-at-law who is the plaintiff's corporate secretary. She is the General Manager in charge of the Legal and Loan Restructuring Division of the plaintiff. Mrs. Facey testified that the resolution stated as having been passed by the Board on July 17, 1991, had not been passed. She described it as bogus.

The defendant, said Mrs. Facey, was not authorised to sign resolutions on behalf of the Board. Mr. Neville Parkinson, one of the signatories to the resolution, was not, she said, a Board member, but he attended Board meetings "in his capacity as Financial Controller, General Manager in charge of Finance".

So far as the agreement between the plaintiff and FTA is concerned, Mrs. Facey said that it was very likely that it had been approved by the Legal Department. She did not recall personally vetting the agreement.

In explaining the regular procedure for securing the passage of a resolution of this nature, Mrs Facey said in answer to learned Queen's Counsel, Mr. Morrison :

"So, whoever it was who needed this resolution to be passed for the purpose of doing the bank's business, would take this resolution, decide who the signatories were to be and they would send a note in to me as Secretary, saying this resolution needs to go to the Board, these persons are the authorized signatories. I sometimes demand the authorized signatories to sign before it is brought to me. I am certifying their signatures and I do not certify things in blank but at some point, these signatures would have been affixed prior to my signing it."

Mrs. Facey said that the signatures could have been obtained before or after the Board resolution, but in any event, she would not sign until after the signatures had been affixed.

Incidentally, the plaintiff regularized the account in March, 1994, by passing a resolution.

Arising from the settlement agreement between the plaintiff and FTA, Mrs. Facey said that approximately US$322,000.00 had been recovered by the plaintiff up to the time of trial.

THE EVIDENCE OF THE DEFENDANT

The defendant entered the plaintiff's employment on September 12, 1988. He shone, if one accepts the various evaluations that were done of him by the managing directors and the Board ; and, there is no reason not to accept them. He went on various courses as his experience broadened. Technology is his forte. He has a diploma in electronic engineering from the Radio College, Canada. When he entered banking in 1982 he did so as an executive trainee in the computers department as a member of a task force to implement a computerised banking system at Citibank.

On February 26, 1993, the managing director wrote thus in reference to the defendant:

"Throughout his JCB career, Dalton has been an outstanding member of the Senior Management Team and will be challenged to lift his level of contribution to match his new responsibility as a Division Executive. There is an immediate need for significant and measurable improvements in JCB's Operations and the spotlight will be on Dalton and his team to see how well those expectations are met. Dalton has a real opportunity to make an indelible mark on JCB's Total Quality."

On April 1, 1993, the managing director sent the defendant a letter which had this as its closing paragraph:

"The Board of Directors joins me in expressing sincere appreciation

for your valued contribution to the continuing success of the organization and counts on you to play your part in ensuring excellent results in 1993".(see page 63 Ex. 4)

RE: FTA

According to the defendant, the plaintiff did not have the facility to process Mastercard transactions that had been accumulating, and had reached the grand total of US$140,000.00. He was instructed by Mr. Wiggan to find a processor. This he did when he found FTA. He said further that a draft agreement was received from Ken Palmer, and he passed it to Mr. Wiggan who sent it to the legal department for vetting. The legal department discussed the agreement with the defendant who had, at some point, met with Palmer in Mr. Wiggan's presence.

The defendant said it was Mr. Wiggan who had directed him to go to the Finance Department with the signature card in respect of the opening of the account. There, he asked Mr. Parkinson about the procedure. Mr. Parkinson signed the card and sent him to Mr. Scott who also signed. The card and the "resolution" were signed by both Messrs Parkinson and Scott.

The defendant told the Court that Mr. Parkinson, who was the plaintiff's most senior general manager, had told him that it was not every time that the bank was to open an account that they had to go to the Board; otherwise, they would not be able to run the bank. He was advised by Mr. Parkinson to witness the signatures and

send up the documents to FTA. This, he did.

Having set up the account, the whole process was passed over to Mrs. Alarene Knight, he said. The operations required processing so as to be able to debit and credit as the occasion arose.

The defendant said that he never saw the letters of September 9 and 22, 1993, from Ken Palmer to Beckford, nor that of September 24, 1993, from Beckford to Palmer (referred to earlier).

It may be useful to quote a portion of the evidence given by the defendant while he was being examined in chief by learned attorney-at-law Mr. Norman Wright. It went thus:

"Q. You are saying the bank did not have the facility but it accumulated master card slips to the tune of US$140,000.00 ?

A. That is correct.

Q. Now when you say that it accumulated, had they paid out this money?

A. Oh yes! The bank paid out those amounts to the merchants who presented those vouchers to the bank.

Q. So the processing now was required for what?

A. The processing was required so that the bank could get back those amounts from the card holders.

Q. The bank was now to be re-imbursed to the tune of the amounts

it had paid out, which is US$140,000.00?

A. Yes." [page 219 of the transcript]

Mr. Wright asked the defendant: "What did you do?" Then followed this answer: "I remember calling the Master Card representative for the bank..... I called the representative for the bank and asked her for help and asked her to give me a list of organizations who could provide the service." This representative was overseas. The question and answer continued:

Q. Did you get help?

A. Yes. I did. They actually gave me a list of six to seven names, organizations, with telephone numbers that I could use to call.

Q. Did you call these organizations?

A. Yes. I did.....

Q. Were you able to identify someone for the job?

A. Yes. I did.

Q. And which organization did you identify?

A. We finally settled with FTA Services.

Q. And who was the chief person behind FTA?

A. Mr. Ken Palmer.

Q. Is there any reason why you chose FTA ? Selected FTA ?

A. FTA was the only company from the list which would handle the kind of volume that JCB was generating at the time.

Q. Up to that point, had you known anything about FTA ?

A. No.

Q. Had you known anything about Ken Palmer ?

A. No.

Q. So Mr. Ken Palmer is not really some long lost friend of yours?

A. Certainly not."

RE: TELEMARKETING

The defendant testified that he became involved with **telemarketing** when Mr. Ewart Scott gave him a letter which is at page 120 of Ex. 1A and said to him : **"Dalton, just run with this agreement or letter and work with Mr. Bill Todd."** He said he understood that to mean that he should **"put them on the line; just hook them up to the system."**His explanation of his understanding continued thus: **"work with Mr. Todd and find out how the whole business could be set up or what is the processing fee, who are the people and that sort of**

stuff."

Bill Todd and one Richard McGranahan became like service providers who produced some merchants such as Travel Connection, Floral Exchange etc.(the offending telemarketers).

The "Market and Service Agreement" referred to earlier was received by the defendant from Richard McGranahan. The defendant copied and sent it to Mr. Scott who made no further contact with the defendant on it. Although there was no further contact, the defendant, acting on the original instructions to "run with it", communicated information to Messrs Sapp and McGranahan for software purposes so as to facilitate the opening of the merchant accounts.

The defendant expected that the Marketing section would have carried out credit checks etc. in relation to the various merchants. He saw no need to have gone back to Scott for further instructions as the agreement that was sent down was pretty clear as to what was to be done. Mr. Scott, according to the defendant, was very much aware of the establishment of the relationships.

According to the defendant, Mr. Scott's evidence has been aimed at shifting blame from himself to the defendant. **"I mean, the man fired me at the end of the day",**he said.

The defendant, on page 278 of the record, at first stated that he did not recall being present at the meeting which Mr. Scott said was held in February, 1993, and at which the decision was taken not to enter into telemarketing arrangements. However, shortly after he

had said that he did not recall, he went on to say that Mr. Scott was present and that "it was an executive meeting between all the executives at the time, which included Mr. Wiggan". On the next page, he said "I dont recall. It could have been but I dont recall that decision was discussed at any executive meeting". All executive meetings, he said, were minuted.

With reference to the various queries that VISA International made in relation to the conduct of certain merchant transactions and the possibility of fraud, the defendant said that he would have "picked up the telephone and called Bill Todd or Richard McGranahan and said 'look, I got another fax from these people. What is going on?' " (page 291 of the record), or he would have gotten the details and forwarded them to Richard McGranahan "for him to look at, to deal with, for his information"(page 292).

In a letter dated June 21, 1993, at page 205, from VISA International directly to the defendant, instructions are given for the termination of the account of Travel Connection. Based on information "obtained from you, and on information developed by VISA in this case, it certainly appears that 'laundering' is occurring in this case", states the letter. When asked what action he took, the defendant stated that he didnt exactly remember save to say that like previous faxes, he forwarded them to McGranahan "to let him know that the VISA folks" were very much concerned about the merchants he had introduced to the bank.(page 298)

The defendant said that he did not know that VISA had powers to cancel a merchant. To him, only the Retail Banking section could have given him instructions to close as it was from them that he

had had the instruction to open. All they had to do, he said, was scribble a note, "Dalton, close this account right away". He does not remember discussing this with anyone.(page 299) In addition, the defendant had fears as to the legal consequences to the plaintiff of closing an account without good reason.

During cross-examination, reference was made to the defendant's letter of July 7, 1993, to VISA, informing that LMP Marketing, Floral Exchange and Travel Connection had been terminated. However, the witness agreed that LMP Marketing had a second account opened on July 8 but he did not personally know the circumstances involved in the opening of the latter account. The defendant also said that Worldwide Marketing was opened after the July 19 meeting; and that there were persons connected with Travel Connection that were linked to Worldwide Marketing. From the figures presented on page 507 of the record, the defendant agrees that Worldwide Marketing contributed most to the loss suffered by the plaintiff as a result of the activities of the various merchants.

THE SUBMISSIONS

RE: FTA

The plaintiff's attorneys-at-law have submitted that the defendant was the only bank officer who negotiated the contract with FTA; that he was the principal contact for FTA, and that he monitored the activity on the account on the bank's behalf. According to them, the defendant caused the account to be opened in a way that was patently negligent. Further, the defendant took no action when he learned of the unauthorised withdrawals. On this basis, it is

contended that the defendant is liable in damages for the loss that the plaintiff has suffered by virtue of the withdrawals, notwithstanding the settlement agreement with FTA and Mr. Ken Palmer.

The defence has sumitted that the plaintiff's contentions have not been made out. The agreement with FTA contemplated the withdrawals, and statements were sent on a monthly basis to the plaintiff's accounting department.

RE:TELEMARKETING

It was submitted on behalf of the plaintiff that the defendant was generally evasive, and that his credibility was almost non-existent. The questions for determination were posed thus for the Court's consideration:

1. Did the defendant cause the telemarketers accounts to be opened
2. Did he try to conceal the fact that they had been opened?
3. Did he act on requests by VISA International and Master Card International in a timely manner?
4. Did he obey instructions to close the accounts?

According to the plaintiff, it was admitted by the defendant that he opened the accounts. However, he claimed, though not in the pleadings, that he was acting on Ewart Scott's instruction to "run with it". The defendant knew the risks of telemarketing, exposed the plaintiff to them, and ignored the applicable rules and

regulations from VISA. Further, according to the plaintiff, the defendant misled the managing director and VISA on the question of the closure of the accounts. Finally, he opened the account in respect of Worldwide Marketing knowing that the principals were connected with some of the accounts that had recently been ordered closed by VISA.

It has been submitted, on the other hand, on behalf of the defendant that he should be believed on all disputed points wherever his version differs from that of Mr. Ewart Scott. This relates to the opening of the accounts. It was also submitted that the defendant responded in a timely and responsible manner to the concerns of VISA.

FINDINGS

These findings have been made after full consideration of the evidence placed before me and the submissions of the attorneys-at-law. I have also considered the demeanour of the witnesses as they gave their evidence. Thought has also been given to the fact that the witnesses had a special relationship with the plaintiff, and they themselves were active players in the operations of the plaintiff. I am of the view that it would have been unwise to ignore this aspect as consideration has to be given to whether the evidence of any of these witnesses is coloured by anything apart from the truth.

RE:FTA

(a) The agreement with FTA and the opening of the account

There is no doubt that the plaintiff was experiencing great difficulty, inconvenience, and, I suspect, embarrassment so far as the processing of Mastercard transactions was concerned. The plaintiff had accumulated "paper" totalling US$140,000.00. There is no clear credible explanation, from the evidence, as to how such a potentially catastrophic situation had been arrived at. There is also no evidence of any responsibility for this feat being laid at the door of any officer of the plaintiff, or indeed, of its Board of Directors. It may be said that this is not the subject of this suit so it should not be allowed to detain us. However, in my view, it provides a clear index as to how the affairs of the plaintiff had been conducted immediately prior to the signing of the agreement with FTA.

There is no doubt that the managing director saddled the defendant with the task of finding a processor. The defendant took a little while to do this, but he succeeded. FTA Card Services Inc. came to the rescue. As it turned out, FTA did not itself provide the processing service; it did so through another entity.

It would have been unthinkable for these services to have been provided without the intervention of a formal contract. FTA's Ken Palmer sent the form contract that they required to be signed. I find that the defendant passed this document to Mr. Wiggan, the managing director, who sent it to the legal department for vetting. Mrs. Facey, the General Manager of the Legal Division, does not remember personally vetting this agreement, but stated that it was quite likely that her department would have vetted it. Now, there is no doubt that Mr. Wiggan signed the agreement. In the circumstances, it is impossible to find any other fact than that

he, having sent the document to the legal department, signed it after it had been vetted and returned to him.

It is unlikely, I think, that the managing director would have signed a document of such importance without having been aware of its full contents and import. This, it should be appreciated, was not a situation in which a customer was receiving a loan and was asked to sign pages of documents written in "fine print". Here was the plaintiff's top officer signing an agreement with a foreign entity for the provision by that entity, for a fee, of services necessary to the administration and processing of Mastercard credit, debit etc..

Clause 8a of the agreement provided for the making by the plaintiff of an initial security deposit with FTA of US$5000.00. This amount was to be utilized and placed in the Master FTA Settlement Account managed by FTA.

Clause 8b made it mandatory for the plaintiff to open and maintain a type of account to be known as the daily settlement account at a place designated by FTA.

Clause 8c provided for at least a weekly accounting of all net daily settlement activity.

By clause 8d, the plaintiff granted to FTA the limited authority to debit or credit the daily settlement account, as appropriate, for or with the net daily settlement transactions or other debits or credits resulting from the operation of the bank's programme.

Looking on the circumstances that gave rise to the need for the services of FTA, and considering the involvement of the legal department and the managing director in the preparation and signing of the agreement, I am at a loss as to how the plaintiff is claiming that the defendant **caused the opening of the account** in the plaintiff's name as a result of the agreement between the plaintiff and FTA. **The clauses referred to above make it quite clear that the account was opened because the agreement required it to be done.** This can hardly be said to have been the wish or design of the defendant. The defendant, in this regard, was merely carrying out the instructions of the plaintiff -his employer- as given by the managing director.

(b) The "resolution"

There is no doubt that the "resolution" which is dated the 29th July, 1991, was not passed by the plaintiff's Board of Directors. The defendant clearly played a significant part in getting it signed, and indeed, in witnessing it and certifying that it had been adopted at a Board meeting on the 17th July, 1991. That was a false certification, and in my view is an indication that the defendant is capable of stating falsehoods and should be put under close evidential scrutiny.

Having said that, one has to look to see the significance, if any, of the resolution itself. The resolution clearly does the following, in my view:

1. designates the Southwestern Suburban bank a depositary for the plaintiff's funds;

2. designates FTA as the United States of America agent for this account along with Messrs. Parkinson and Scott, and the defendant himself;

3. authorises them to sign on the account;

4. authorises the bank to honour all cheques etc including those drawn to individual order of any such officer and/or other person signing the same without further inquiry or regard to the authority of the said officer;

5. authorises Messrs Parkinson and Scott to singly borrow from time to time on behalf of the plaintiff from Suburban such sums of money as may seem advisable to any of them, and to execute notes etc in the name of the plaintiff.

Looking at this "resolution", I can see nothing that is harmful to the interests of the plaintiff. Indeed, it seems that the interests of the plaintiff were well protected. There should be no underestimating of the fact that the "resolution" projected an active role for Mr. Parkinson, the General Manager for Finance, and Mr. Scott who dismissed the defendant. These individuals were in top positions in the plaintiff's organization.

I do not see it likely that an account could have been opened overseas without Mr. Parkinson's concurrence and approval. After all, he was the officer in charge of all the plaintiff's finances. I fully accept the defendant's evidence that he was encouraged by Mr. Parkinson to sidestep the Board so far as the resolution was concerned. The defendant, it seems to me, went along with this

proposal as he saw no harm in it and it appeared that the senior management in the bank had approved.

The overall situation ought not to be forgotten when the defendant's state of mind and actual deeds are considered in this respect. The stakes were high, in that the bank stood a good chance of losing US$140,000.00. The defendant had been projected as the star on the block. The plaintiff gave him a task to perform. He had the ostensible support of Messrs Wiggan, Parkinson and Scott in trying to solve the problem. Surely, in that situation, the formalities of a "proper resolution" would have been the least of the problems.

Mr. Parkinson was a key player in the act. The plaintiff chose not to call him as a witness. I accept the defendant's evidence.

(c) Mr. Palmer, the plaintiff's officers and the account

The defendant, according to the plaintiff, was responsible for permitting Ken Palmer to withdraw funds from the account. The withdrawal was fraudulently done, to the knowledge of the defendant, yet he did nothing to prevent it or to bring it to the attention of the plaintiff.

I find the plaintiff's position in this regard unsustainable. I am not satisfied that the defendant's duty required him to monitor and report on the state of the account. There seems to be some confusion even among the plaintiff's officers as to who had

responsibility for what. This is an undesirable state of affairs. One would have thought that in an institution of this nature there would have been clear job descriptions, and not merely unclear job perceptions. In the absence of a clear job description linking the defendant to responsibility for overseeing the account, I find that the person who ought to be saddled with managerial responsibility therefor can only be the General Manager in charge of finance, that is, Mr. Parkinson. I cannot see any logic in holding otherwise.

The activities of Mr. Ken Palmer have been the subject of a suit in the United States of America. He has admitted fraudulent conduct. There is a settlement agreement. Throughout Mr. Palmer's behaviour, statements in relation to the United States account were sent on a regular basis to the plaintiff. Indeed, they were the subject of correspondence between Mr. Beckford and Mr. Palmer. In all this, the General Manager in charge of finance has had nothing to say. Instead, blame is being laid at the feet of the defendant who had no responsibility for accounts or finance. It seems to me that so far as Mr. Palmer's fraudulent withdrawals were concerned, there were very senior officers of the plaintiff who had apparently fallen asleep on their watch. The defendant was not one of those officers.

I find that in relation to the FTA arrangements the defendant was neither negligent nor in breach of contract. He did not conspire with anyone; nor did he commit the tort of deceit. There is no false statement that was made by him, intending for the plaintiff to act on it, which has resulted in the plaintiff acting thereon and suffering loss. As said earlier, the activities in relation to

the account in Chicago were the result of the contract that the plaintiff knowingly made, under legal advice, with FTA, coupled with the fraudulent behaviour of Mr. Palmer and the laxity of those who were in charge of the plaintiff's finances.

RE: TELEMARKETING

I have noted that Mr. Wiggan, the managing director, and Mr. Scott, the general manager for retail banking, could not agree as to when this important executive meeting (on which the issue of telemarketing hinges) took place. One said it took place in February, the other said March, 1993. It was agreed by the parties that minutes were taken at executive meetings which were in effect meetings of the senior managers. Although minutes were taken, and the Court has been flooded with documents of all kinds, the minutes of this meeting are nowhere to behold. The discrepancy as to the date of the meeting cannot be overlooked as a minor matter because, according to my understanding of the plaintiff's case, a very important decision was taken at this meeting, and it is the breach of that decision that has given rise to the telemarketing issue.

The minutes, surely, would have provided reliable evidence as to not only the date, but as to what was or were discussed, and as to any decision arrived at. There would also have been reliable evidence as to the participants.

Notwithstanding the non-production of the minutes, I find that there was probably a meeting in early 1993. I find further that the

defendant and the other senior managers were present, and that the matter of telemarketing was probably discussed.

I am hesitant to conclude, and indeed feel that I cannot conclude, that a decision was taken not to become involved with telemarketing. Events subsequent to the meeting suggest that even if the matter of telemarketing was discussed, there was some ambivalence on the part of key persons in the plaintiff's establishment. In an atmosphere of ambivalence, it seems unreasonable for me to believe that there was any firm decision to stay clear of telemarketing.

Mr. Scott's signature on page 119 of Ex. 1 is damning, in my view, to the plaintiff's cause. It speaks of non-disclosure and non-dissemination of trade secret information in the future. Signing this document along with Mr. Scott were representatives of three telemarketing companies that were to feature heavily in the activities of the plaintiff over the next few months. This document is dated March 17. One should never forget that the important executive meeting was held, according to Mr. Scott, in February. So, what good reason would Mr. Scott have for signing this document in March? His explanation about the need for 'testing' by the defendant is unacceptable. This explanation is, in my view, a clear attempt to send the Court in the wrong direction. It is a feint. Mr. Scott appears to know much more than he wished to impart.

I find it nothing but remarkable that the managing director said that he did not know of the plaintiff's involvement in telemarketing until July, 1993, when he returned from a two week

vacation. By then the operations had been going on for months. This state of affairs gives the impression that the managing director, though in office, was inattentive to, and unaware of, what was taking place in his institution. It is too remarkable for me to accept.

Mr. Wiggan's reaction to the existence of the telemarketing accounts did not exhibit the surprise, shock or horror one would have expected if there was really a situation that the defendant had flagrantly flouted a decision of the plaintiff in the area of policy. Instead, there was such calmness, such a cool attitude towards the matter that the only inference I find it possible to draw is that he fully well knew what was going on. It seems as if it would have been quite comfortable for the plaintiff if profits were made, but the reverse situation has made it necessary for blame to be ascribed.

I should have thought that an emergency meeting would have been called by Mr. Wiggan of the same group that, supposedly, made the decision in the first place. Nothing of the sort took place. The response by the managing director was to scribble little notes on memoranda sent to him. Such a lukewarm response does not indicate to me that there had been any breach of settled policy up to that point. Mrs. Alarene Knight was the only person who seemed to have been concerned. She, however, was in a minority of one.

Having looked at the attitudes and behaviour of the main players who have testified on behalf of the plaintiff, it is now necessary to turn to the defendant and his behaviour.

The defendant's employment commenced on September 12, 1988, a fateful day for all Jamaicans - the day Hurricane Gilbert struck. In a document headed "Statement of declaration of allegiance and secrecy", page 11 of Ex. 4, the defendant undertook to faithfully perform the duties assigned to him, and to the best of his ability uphold the interest of the plaintiff. This clearly formed part of his contract with the plaintiff. He developed a reputation of being an excellent worker. It is well documented. The plaintiff relied heavily on him, even in areas that were outside his department. He attended several seminars. He was obviously a model employee.

The opening of the accounts

I find that the defendant gave instructions for the opening of the various accounts. This is not in dispute. After all, Miss Green and Mr. Beckford were unchallenged on this aspect of their evidence. I find further that the defendant inherited a situation in which other employees of the plaintiff had made business contact with persons connected with the offending companies. Even if Mr. Scott did not use the words "run with it", he certainly has given me the impression that he was at least supportive of the telemarketing relationships. That is the reason for his signing of the document referred to earlier. It is noted that he went even further and had discussions on telemoney. Of course, characteristically, Mr. Wiggan claimed he knew nothing of that either.

I accept the evidence that the Marketing department was responsible for the investigation of the merchants, and that the said department had to give written instructions to the Operations department, headed by the defendant, for the closure of an account.

Much has been made of the fact that these accounts were opened in respect of merchants that had not been investigated by the Marketing department. Nothing has been said, however, as to the reason for the failure of the Marketing department to investigate the merchants after they became aware of the existence of the accounts-- even if one assumes that there had at first been total ignorance of their existence (an assumption, I stress). Would it not still be their responsibility to do so? I should think so.

The closing of the accounts

Another question arises. Why didn't the Marketing department immediately issue written instructions to close the accounts at the time that Mr. Scott said that he became aware of the telemarketing accounts ? That time, according to him, was about May 3, 1993. The answer clearly is that there was no policy not to have such accounts.

Considering the critical role that the Marketing department was expected to play in relation to investigation and closure, it seems unreasonable for the plaintiff to be attempting to exonerate the persons employed in that department. Although they knew of the situation, it took a letter from VISA International to Mrs. Knight to get some action from that department (see pages 252 and 261 of Ex. 1B). Following that letter, the written instructions finally went from Marketing to Operations on July 6, 1993 (see page 270 Ex.1 B). Thereupon, the accounts were closed.

Complaint has been made in respect of the defendant's response to

the various letters from VISA querying the status of the accounts. The defendant maintained that he brought the queries to the attention of the parties concerned and, for him, that was appropriate action. He is not alone in that view as Mr. Beckford was satisfied with how the defendant handled the complaints. I am prepared to accept Mr. Beckford's judgment in the matter.

The re-opening of LMP Marketing

Based on the evidence given by the defendant on pages 368 to 370 of the record of the notes of evidence, I find that the account for LMP Marketing, though closed on the 6th July, 1993, was re-opened about two days later. The defendant, I find, sought to avoid providing answers in relation to this re-opening while he was being searchingly cross-examined by Mr. Hylton. In my judgment, the defendant was the person who gave the instructions for the re-opening.

There is absolutely no doubt that the defendant was, at the time of the re-opening of this account, fully aware of the implications of this act. He knew of the likelihood of loss to the plaintiff thereby.

The opening of Worldwide Marketing Ltd.

The re-opening of LMP Marketing was not the only activity of the defendant in this regard after the closure of the accounts on the 6th July, 1993. Another significant act was his opening of Worldwide Marketing Ltd. At the stage at which this account was opened, there is no doubt that the defendant knew that such an act

was inimical to the interests of the plaintiff. VISA had given instructions for the closure of all such accounts, pointing to possible fraudulent dealings. Furthermore, the July 6 memorandum from Marketing to Operations was in effect. Most damaging perhaps is the fact that Worldwide Marketing Ltd. involved persons who had been connected with the already closed accounts. The opening of this account clearly violated VISA's regulations as well as the plaintiff's now known policy.

In my judgment, the re-opening of LMP Marketing and the opening of Worldwide Marketing constituted a breach of the defendant's contract of employment with the plaintiff. This was clear defiance of the plaintiff's policy. It follows that the defendant is liable for the losses sustained by the plaintiff from this breach. In the case of Worldwide Marketing Ltd.,he is liable for the loss recorded at page 507 of Ex. 2, that is, US$106,226.04. In respect of LMP Marketing, if I understand the chart at page 507, there does not appear to have been a loss to the plaintiff; in any event, no loss was pleaded.

In the circumstances as I find them, the defendant has also committed the tort of negligence. However, I agree that where there is the protection of a contract, it is impermissible to disregard the contract and allege liability in tort.

SUMMARY OF JUDGMENT

I find that the defendant has incurred no liability so far as the

FTA issue is concerned. He is also not liable in respect of the telemarketing accounts prior to July 6, 1993. However, he committed a breach of his contract of employment in opening the account in the name Worldwide Marketing Ltd., and is liable in respect of the losses arising therefrom. Accordingly, judgment is entered for the plaintiff for US$106,226.04. Interest is awarded at the rate of 12% per annum from June 30, 1994. Costs to the plaintiff are to be agreed or taxed.