[2026] JMCC COMM. 05

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2023CD00228

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**CLAIMANT**
AND	**JANENE LAING**	**DEFENDANT**

Sandra Minott-Phillips KC and Mr. Jamaiq Charles instructed by Myers, Fletcher & Gordon, Attorneys-at-law for the Claimant

Caroline P. Hay KC and Mr. Zurie O. Johnson instructed by HayMcDowell, Attorneys-at-law for the Defendant

Civil procedure – Breach of Contract- The Banking Services Act, The Consumer Protection Act- Whether the conduct and representations of the Claimant amount to negligence, negligent misstatement and/or breach of the implied duty of care and skill- Failure to exercise due diligence- Indemnity clauses- Implied terms in a contract- Unjust enrichment- Whether the Claimant is estopped from recovering the sums lost-

IN OPEN COURT

Heard on 9th, 10th, 11th, December, 2025, 30th January and 25th March 2026

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

[1] The business of banking is an essential feature of modern-day life. This feature is even more essential for professionals serving the public. When that professional

is an Attorney-at-law, it is inevitable that that professional will utilize the services of a bank to conduct money transactions. That relationship usually commences with a contract being executed by the parties, which customers of a bank are required to sign.

[2] The Defendant, Janene Laing, is an Attorney-at-law who was at all material times a customer of the Claimant the National Commercial Bank Jamaica Limited (hereafter NCB). Her banking relationship with NCB commenced on June 21, 2017. In furtherance of this relationship, she was required by NCB to sign a Personal/Single Relationship Form which sets out the Terms and Conditions of the Banking Relationship (The Terms). The form was also signed by a bank official and a customer service supervisor. Ms. Laing signed the Form and therein commenced her banking relationship with NCB.

[3] The case concerns the interpretation of the Terms agreed by the parties and questions whether either party breached any of these Terms and considers the consequences, if any, that flow from the breach. It touches on the duty of care embedded within the confines of the Terms and questions whether they can be expanded to include other terms which, though not expressed, can be inferred from the fact of the relationship.

[4] The issue has also been raised as to whether these Terms are consistent with the requirements of Part IV of the Consumer Protection Act (CPA) and whether they are unfair and unreasonable. It is important to state at the outset that the notion of fairness that is applied in daily interactions or that society had determined by applying principles of equality and equity, is oftentimes not aligned with what the law determines fairness to be, but fairness has to be judged based on what the law dictates. This case has to be determined based on what is fair and reasonable according to the law, in particular what is fair and reasonable according to the provisions of the CPA.

THE CLAIMANT'S CASE

[5] The Claimant's case is contained in the Claim Form (the Fixed Date Claim Form filed on May 8, 2023, by order of the Court proceeded as if commenced by Claim Form), the Particulars of Claim filed July 24, 2023 and the Amended Reply and Amended Defence to Amended Counterclaim filed April 11, 2025. The Claimant seeks Damages against the Defendant in the sum of United States Two Hundred and Eighty-Six Thousand, Four Hundred Dollars (US$286,400.00) and Interest on such damages pursuant to the Law Reform (Miscellaneous Provisions) Act from the date of default to the date of payment plus costs. The Claimant relied on the 'Terms and Conditions for Banking Relationship with National Commercial Bank Jamaica Limited' for their full meaning and effect and asserted that pursuant to them, the Defendant agreed, among other things, to the following:

i. *At all times, in respect of her accounts and dealings with NCB, to act in good faith and with due diligence and to take all necessary precautions in all acts and matters relating to the operation and maintenance of her accounts with NCB (clause 1.11);*
ii. *To bear alone all consequences of her negligence in relation to her accounts and hold NCB harmless in respect of any and all losses arising due to her fault or negligence (clause 1.11);*
iii. *Any credit entry made in any of her accounts in respect of cheques received does not make the funds so credited available for withdrawal until the proceeds of the cheque have actually cleared and been realised by NCB (clause 3.1);*
iv. *NCB reserved the right to debit the account in reversal of the relevant credit entries if such cheques are returned unpaid, and to charge a fee for the reversal of the entry (clause 3.1);*
v. *Take such steps as are reasonable to avoid fraud, forgery and other illegal activities from taking place in respect of her account, including issuing and negotiating cheques and other bills of exchange (clause 5.2);*

vi. *Take the full risk associated with any fraud, forgery, and other illegal activity in respect of her account, and to release, indemnify and hold NCB harmless in respect of any damages or losses arising therefrom (5.2).*

vii. *In the event of any error made by NCB in recording any entry in or to Ms Laing's account, NCB shall have the right to make the necessary correction and may accordingly reverse or adjust the entry without notice to Ms Laing and recover the amount (if any) due from her. NCB shall not be liable for any damage or loss arising as a result of any such error (clause 1.12);*

viii. *To indemnify NCB against any loss, charge or expense which NCB may suffer or sustain by NCB complying with the Terms and Conditions and to absolve and hold NCB harmless from all liability for loss or damage which the customer may sustain howsoever caused, provided NCB has not acted contrary to the Terms and Conditions (clause 1.26);*

ix. *In addition to any powers of combining or consolidating the accounts and liabilities of Ms Laing, or of set-off conferred on NCB by law, Ms Laing agreed that NCB may at any time without prior notice to her set-off, combine, or consolidate any or all such sums of money or part or parts thereof as may now stand or hereafter may from time to time be standing to her credit upon any account with any or all such sums of money or part or parts thereof as may now be or hereafter may from time to time become due or owing to NCB by Ms Laing, either as principal or surety, and either solely or jointly with any other person upon current account, bills of exchange or promissory notes or upon loan or upon any other account whatsoever…(clause 1.13);*

x. *NCB is authorized to debit any of her accounts with any cheques, bills of exchange or other instruments which were previously credited to her account which were either not paid when presented by NCB or if paid NCB may be required to refund or which may be*

dishonoured for any reason whatsoever; and authorize NCB to also debit her account with all NCB's costs, charges and expenses incurred in connection therewith (clause 1.16).

xi. *NCB shall not be bound by any information provided by NCB to Ms Laing that is not provided in writing (which shall include information provided on NCB's website or by e-mail) or through NCB's interactive voice recognition system. NCB shall not be liable to Ms Laing in respect of any information alleged to have been provided orally by NCB or its employees to her or by her to NCB, unless such information is confirmed or recorded in a written or other permanent form (clause 1.23).*

[6] The Particulars of the Breach of Contract and or Unjust Enrichment is set out as follows:

i. *Failing to take reasonable precautions regarding parties and legitimacy of the transaction, including conducting sufficient due diligence;*
ii. *Wilfully or negligently allowing her account with the Claimant to be used to facilitate a fraudulent transaction;*
iii. *Failing to exercise due diligence and take all reasonable precautions regarding her account;*
iv. *Failing to take reasonable steps to avoid fraud, forgery and other illegal activities from taking place in respect of her account with the Claimant; and*
v. *Parting with part proceeds of the cheque to an unknown third-party.*

[7] As a consequence, NCB pleaded that it has suffered loss and damage because of the fraudulent cheque which was presented by Ms. Laing. Her actions constitute a breach of the Term to act with due diligence, and to take reasonable steps to avoid fraud, forgery and other illegal activities in relation to her account.

[8] In the alternative, NCB pleaded that the Defendant was unjustly enriched upon the credit entry being made to her account in respect of the cheque in the sum of United States Two Hundred and Eighty-Six Thousand, Four Hundred Dollars (US$286,400.00).

[9] In the Amended Reply and Amended Defence to Amended Counterclaim, the Claimant further denies any negligence on its part and asserts among other things that the Defendant was negligent; that NCB had a right to debit the Defendant's account in reversal of the credit entry; that the Defendant used her account to commit a fraud; that the contract terms are fair and reasonable and consistent with the Banking Services Act which required the bank to be prudent; that the payment of the sum of United States Two Hundred and Seventy-Four Thousand, Three Hundred and Ninety-Six Dollars (US$274,396.00) on behalf of the Defendant constituted a loan to her; that NCB did not make any negligent misstatement to the Defendant on which she relied; that any written or oral communication with the Defendant in relation to the cheque occurred after she gave instructions for payment of the proceeds; that there was no fixed period for the clearance of a foreign cheque; and that the Defendant did not alter her position to her detriment as a result of any statement made by NCB's servants or agents.

[10] NCB admitted owing Ms. Laing a general implied contractual duty to act with reasonable care and skill and avers that at all times it complied with that duty and did not breach the contract. NCB further averred that Ms. Laing knew and accepted that remittances made through NCB on her instructions are done at her risk and cost and that the statements made to Ms. Laing by NCB reflected the information conveyed to NCB. It pleaded that there is no actionable misrepresentation made by NCB to Ms. Laing.

[11] At trial the sole witness for NCB Ms. Maxine McKenzie gave evidence that as at June 21, 2017, Ms. Laing had five (5) accounts with NCB. They were listed as follows:

a. 3……..6- JMD current account
b. 8……..3- JMD savings bank account
c. 1……..7- JMD loan
d. 3……..7- JMD savings bank account
e. 3……...4- JMD savings bank account

[12] She also had a NCB Midas card. On June 21, 2017 she added a personal United States Dollar account for the express purpose of receipt of funds. She estimated her monthly deposit as United States Five Hundred Dollars (US$500). On that said date she updated certain contracts she had with the bank including her Personal/Single Relationship Form. That contract incorporates by express reference the Terms and Conditions for Banking Relationships with NCB. Ms. McKenzie testified that as Ms. Laing was an Attorney-at-law, NCB understood her to be statutorily obliged to conduct due diligence of her own on her prospective clients before engaging with them.

[13] It is this due diligence that NCB asserts that she failed to conduct when on January 11, 2021, she deposited a Citibank cheque dated 7th January 2021 for lodgement to her account. The cheque was made out to Janene Laing in the sum of United States Two Hundred and Eighty-Six Thousand, Four Hundred and Nine Dollars (US$286,409.00). Endorsed on it was the name of remitter Farrow Brokerage. She further instructed NCB by telegraphic transfer to wire the amount of United States Two Hundred and Seventy-Four Thousand, Four Hundred and Nine Dollars (US$274,409.00) to her client and this was done by NCB on January 13, 2021 from its Constant Spring Branch.

[14] On January 19, 2021 the funds were returned and recredited to Ms. Laing's account with an indication that "a declaration of the sum amount needed". On January 21 2021, Ms. Laing again instructed NCB by telegraphic transfer to resend the money to her client. On January 29, 2021 NCB received information that the cheque was valid and informed Ms. Laing of this. According to NCB, this

information accurately reflected the information NCB had at the time (which was subsequently established to be wrong).

[15] On February 9, 2021 NCB received a SWIFT notification that the cheque was subsequently returned by the issuing Bank (Citibank) through NCB's correspondent Bank, New York Mellon and that NCB's account was debited in the sum of United States Two Hundred and Eighty-Six Thousand, Four Hundred Dollars (US$286,400.00) with a notation "REFER TO Image" typed in the top right hand corner and to its left side. The bank resubmitted the cheque to the issuing bank for processing. On March 25, 2021 NCB informed Ms. Laing by email that the sum was validated and honoured by the initiating bank (Citibank N.A.) According to NCB this was the information it received at the time (which was also subsequently established to be wrong). On April 8, 2021 Citibank returned to NCB the cheque for United States Two Hundred and Eighty-Six Thousand, Four Hundred Dollars (US$286,400.00) with the confirmation that it was fraudulent.

[16] NCB informed Ms. Laing about this on said date and debited her account for the said sum. NCB wrote to her on April 20, 2021 informing her of the debit and that they were seeking to recover the funds and asked her to make contact with the recipient of the funds and seek its return and to report the matter to the police.

[17] According to NCB the debit is reflected in Ms. Laing's statement of account, and she did not notify NCB in writing within the contractually stipulated fifteen (15) day period that the debit was wrongly made.

[18] The Claimant asserted that the Terms, expressly agreed, authorised the Bank to debit her account with an instrument previously credited to her account and then dishonoured for any reason whatsoever. Ms. Laing has not paid this debt that she owes to NCB and she has refused to hold the bank harmless or to indemnify it from the loss sustained.

[19] The Bank placed a lien on Ms. Laing's account (with number ending 0286) for the sum of United States Eleven Thousand, Eight Hundred and Eighty-Eight Dollars (US$11,888.00) which represents the existing funds in her bank accounts, which are insufficient to settle the amount she owes the Bank.

[20] Ms. McKenzie pointed out that the noting by the Bank of a credit to a customer's account from the proceeds of a cheque lodged does not, without more, mean that the cheque has cleared. Further that NCB made no statement to Ms. Laing upon which she was entitled to rely as a basis for instructing NCB to transfer money from her account to her client. She further advanced that her payment instructions to NCB on January 13 and 21, 2021 both preceded any express statement the Bank made to her that the cheque was valid.

[21] The Claimant avers that it is contractually entitled to a recourse against a customer who has not given value or consideration for a payment made by the Bank on her behalf and calls upon Ms. Laing to make good the proceeds paid out by the bank on her behalf as provided for in the Terms. NCB asserts that since January 21, 2021, Ms. Laing had been indebted to the Bank for that portion of the sum of United States Two Hundred and Eighty-Six Thousand Four Hundred Dollars (US$286,400.00) that she instructed the bank to transmit to her client, being monies had and received by her following a total failure of consideration, together with interest accrued on her debt since that date.

[22] The Claimant claims that she failed in her duty to take reasonable steps to confirm the legitimacy of her client and of the transaction including, failing to conduct the due diligence on her client required of her by law, and as a matter of prudence; that she obtained no incorporation documents for her corporate client, no picture identification for the purported Executive Director Mr. Alessandro Sandor and did not do adequate research on the company or on Mr. Sandor. Further that she failed to do a google search and that that would have shown Mr. Sandor to be associated with bad cheque fraud prior to January 2021. She failed to do sufficient checks on

the purported remitter of the funds Farrow Brokerage. She also failed to request and/or receive a deposit on account of services to be performed. Among the red flags should have been that her engagement letter was purported to be signed by the Mr. Sandor and not the entity. There was also no correlation between her engagement to provide legal services and the entity to which she instructed NCB to transfer the money.

THE DEFENDANT'S CASE

[23] The Defendant's case is set out in the Amended Defence and Counterclaim filed on March 7, 2025 and the evidence given at trial. In the Amended Defence and Counterclaim, the Defendant avers that she does not accept that she is bound by any Terms that are unfair and unreasonable, particularly where the Claimant seeks to restrict or exclude liability for its own negligence. The Defendant relies on Part IV of the Consumer Protection Act particularly sections 36, 38, 39 and 43.

[24] She pleaded that any contractual term which permits the Claimant to debit a customer's account in reversal of a credit entry after clearance and realization of the cheque, where clearance and realization results from either the Claimant's negligence or the negligence of a third party and not from any act of the customer, is unfair and unreasonable and ought not to be relied upon by the Claimant to restrict its own liability for losses flowing therefrom. Further or alternatively, Clause 3.1 "Conduct of Account" must be read alongside Clause 1.11 "Customer's Obligations and Negligence" and when read together, the Defendant says that the Claimant can only rely on Clause 3.1 to recover loss from the Defendant where the losses flow from the negligence of the Defendant. The Defendant says the losses being claimed do not flow from any act or omission by her.

[25] She further pleaded the existence of an implied term obliging the Claimant to exercise due care and skill in its transactions and dealings with her including an obligation to accurately communicate matters affecting her. She also pleaded in

the alternative that a duty of care in tort arose and the Claimant was under a duty, having assumed responsibility, to make no unqualified negligent misstatement to her, and on which she relied to her detriment.

[26] She admitted having agreed to clauses 1 to 5 of the Terms but countered that the Terms also bind the Claimant in every respect and same degree. With respect to Clause 3.1, she asserts that it does not treat with the circumstance where the Claimant bank received the funds and cleared and validated the cheque and that it had no right to debit the customer's account but that its recourse is against its own banker or the issuing bank and not against the Defendant.

[27] She pointed out that the Claimant has not accurately set out Clause 5.2 and she relied on the accurate terms of Term 5.2 for its full meaning and effect and said that she took all reasonable steps to avoid any fraud, unlawful or illegal activity perpetuated against her account. She relied exclusively on the Claimant's guidance and unqualified statements to her that the cheque had eventually cleared. Further, that Term 4(vii) is also not accurately pleaded and that she relied on the Terms as stated for its full meaning and effect and said that the Claimant failed to comply by failing to act with due care and skill. Therefore, any loss caused to the Claimant arises from its own breach of the contractual terms or in tort and not by her act or omission.

[28] With respect to clause 4(viii), the Defendant said that the Claimant was not entitled to debit the Defendant's account when it did because the cheque was paid when presented. At all material times, the clearance period of the Claimant for foreign cheques was ten (10) days, during which period the Claimant ought to have maintained a hold on the cheque until it was cleared. It would be unreasonable to debit the account four (4) months after the expressed clearance period had expired, particularly since the Defendant was not a knowing party to the fraud.

[29] The Defendant alternatively pleads a duty of care in tort and says that the Claimant's conduct breached the duty of care and by way of detrimental reliance on negligent misstatements made by servants or agents of the Claimant, the Defendant suffered loss and damage and incurred cost. As the Claimant's conduct caused detrimental reliance it would be inequitable to require the Defendant to repay the sum.

[30] The Particulars of the Claimant's conduct inducing detrimental reliance included that the Claimant caused or permitted the proceeds to appear as cleared, that the bank performed or facilitated the wire transfer, confirmed the return to the Defendant's account of funds and again performed or facilitated the wire transfer of funds following which they twice confirmed the clearance of the cheque. By this conduct the Claimant consistently represented to the Defendant that the payments were made from an honoured cheque.

[31] As a consequence, the Defendant altered her position from January 13, 2021 by initiating the wire transfer of United States Two Hundred and Seventy-Four Thousand, Three Hundred and Ninety-Six Dollars (US$274,396.00) on the basis that the bank indicated cleared funds. The Claimant made repeated representations to the Defendant on which she relied, especially as she has no ability to do otherwise. Further or alternatively the Claimant is estopped from reclaiming the payment from the proceeds of the cheque.

[32] She further pleaded that the function of cheque clearance has nothing to do with her and the corresponding banking relationship between the Claimant and Citibank NA excludes her. She asserted that had the Claimant exercised due care and skill with respect to the handling of the cheque, or alternatively, correctly stated the position to the Defendant with respect to the cheque where it clearly had a duty so to do, the effects of the transaction would not have caused it loss or damages and any loss or damage is not attributable to the Defendant.

[33] The Defendant also set out the Particulars of Failure to exercise due care and skill which included some of the Particulars set out under Claimant's conduct inducing detrimental reliance. This included that the Claimant failed to impose or sustain a hold on the cheque, and confirming the clearance of the cheque on January 29, 2021 and on March 25, 2021 without making or confirming correspondent banker checks as to the validity of the instrument as well as failing or refusing to clarify correspondent banker notations with respect to the cheque as to the meaning of the phrase "refer to image".

[34] The Defendant pleaded that the Claimant is in breach of the contract and its implied duty of care in tort by applying a lien to the client trust account while knowing that the account was held in a different capacity as a trust account. The Claimant was therefore precluded from using that account for its own benefit.

[35] With respect to the Claimant's alternative claim for unjust enrichment, the Defendant denied any unjust enrichment because she realised no benefit from the cheque but incurred significant loss.

[36] She also claimed that she relied on several representations of fact concerning the clearing of the cheque and so it is wholly inequitable and unconscionable for the Claimant to go back on its position. Further, that the Claimant is not entitled to the reliefs claimed as the Claimant is estopped based on its representations of fact or negligence on which she relied to her detriment. Further, the Defendant did not fail to take reasonable precautions regarding the parties and legitimacy of the transaction including conducting sufficient due diligence. Further that she did not wilfully and negligently allow her account to be used to facilitate a fraudulent transaction. She did not fail to take reasonable steps to avoid fraud, forgery and other illegal activities from taking place in respect of her account. She could not have informed the Claimant of a fraud when the Claimant repeatedly led the Defendant to believe that the cheque was valid up until April 8, 2021.

[37] In her Counterclaim Ms. Laing claims the following:

i. *Damages*
ii. *Damages for breach of contract and/or in negligence;*
iii. *Damages for negligent misstatement or misrepresentation;*
iv. *Interest;*
v. *Costs;*
vi. *Such further and or other relief as this Honourable Court deems just.*

[38] Under Particulars of Breach of Contract, she pleaded the following:

(a) For the reasons enumerated in paragraph 40 (a) to (h) herein:
(b) Failing to comply with clause 1.7 of the Terms and Conditions by acting without authority or instructions against the Defendant's accounts ending ….2000 and …286:
(c) Failing to exercise good faith in the clearance of the cheque and in its representations to the Defendant:
(d) Failing to exercise reasonable care and skill as is to be expected in the ordinary course of baking business;
(e) Imposing a lien on Defendant's client trust account ending…2000 while knowing the fiduciary nature of the account;
(f) Imposing a lien on the Defendant's account ending …286 in bad faith;
(g) Failing to seek recourse as against its Intermediary Bank of New York Mellon and Citibank NA and seeking to unjustly pass on the liability to the Defendant:
(h) Failing to install and maintain a reasonably efficient security system and to ensure it was properly working at all material times; and

(i) Debiting the account of the Defendant after the recourse period had expired, with the Defendant not being a knowing party to a fraud.

[39] Further or alternatively she claimed that the bank was under a duty of care in tort to her in like terms and contractual duties and that in performance of its duties towards her whether in contract or in tort the bank was obliged to communicate in an accurate and not misleading manner and to take reasonable steps to ensure any statement made to the Claimant was accurate, suitable and was not capable of misleading her in the transaction.

[40] The bank breached the terms of the contract when it failed or refused to act with such skill and care to verify the true position with respect to the cheque which led to the cheque being dishonoured causing loss and damage. Had the Defendant not breached its duty of care this would have been averted.

[41] The Particulars of Negligence and/or Negligent Misstatement are similar to what is pleaded in the Defence. In addition, she pleaded that the bank failed to employ proper procedures to protect against fraudulent or otherwise unlawful transactions and that it failed to ensure that its agents and/or servants exercised reasonable care and skill in the clearance of the cheque and failed to take such care as customary among bankers to ensure that a counterfeit cheque is detected and not honoured before presentation. In reliance on the advice given to the Claimant as pleaded in the counterclaim, the Claimant acted to her detriment and was made to suffer loss and damage and incur expense. The bank's advice, statements and conduct were negligent, and the Defendant is in breach of contract and/or duty of care pleaded causing loss, damage and costs. The Particulars of Loss or Damage is set out as:

(a) Causing or permitting a lien on the Claimant's account ending …0286 freezing the sum of USD$11,888.00;

(b) Costs and Attorney's Costs;

(c) Impairment of the business facility of the account(s) at the Defendant's bank.

[42] Much of what she said in her testimony mirrored what she pleaded but she further testified that she has done numerous transactions for corporate and individual clients across varying countries without incident, as such, transactions involving brokers are not unusual to her. She accepted that she provided her information to NCB when opening her accounts and she acknowledged signing the forms agreeing to NCB's terms and conditions. Ms. Laing indicated that upon being notified that the cheque was dishonoured, she made contact with Alessandro Sandor and requested that he urgently return the funds to her account however, those efforts were fruitless as he did not respond to her requests and the funds were not returned to her account.

[43] Ms. Laing further expressed that she had several telephone communications with NCB representatives to arrive at a resolution and received varying information until April 8, 2021 when she was contacted by Mr. Orlando Robinson who categorically informed her that the cheque was dishonoured. Ms. Laing asserted that on April 26, 2021 she reported the matter to the Fraud Squad of the Jamaica Constabulary Force. During cross-examination, she accepted King's Counsel's assertion that the email from Alessandro Sandor was not specifically addressed to her, however, she countered that that is not unusual.

ISSUES

[44] The main issues that need to be resolved are:

i. Whether the Defendant is bound by the contractual Terms as set out in the Bank's Terms and Conditions?

ii. Whether the said Terms and Conditions are unfair and unreasonable?

iii. Whether the Defendant breached the contractual terms by failing to exercise due diligence or by being negligent?

iv. Whether the Defendant breached the contractual terms by failing to take reasonable steps to avoid fraud on her account?

v. Whether the Claimant breached the implied terms of the contract and whether the conduct and representations of the Claimant amounted to negligence, negligent misstatement and/or breach of the implied duty of care and skill?

vi. Whether there was any misrepresentation by the Claimant that caused the Defendant to act to her detriment?

vii. Whether the Claimant is estopped from recovering the sums lost and whether the Defendant is obliged to hold the bank harmless?

viii. Whether the Defendant was unjustly enriched by the transaction?

Whether the Defendant is bound by the contractual Terms as set out in the Bank's Terms and Conditions and whether the said Terms and Conditions are unfair and unreasonable

[45] These issues touch and concern each other and so will be dealt with together. It is the Claimant's case that the Defendant is bound by the Terms that she agreed to when she commenced her banking relationship with NCB. The Defendant's response is that she should not be bound by any Terms that are unfair and unreasonable and that the said Terms are unfair and unreasonable because they seek to restrict or exclude liability for NCB's own negligence or breach of duty of care and skill and that NCB has failed to show in evidence that those Terms are fair and reasonable.

[46] On behalf of NCB, King's Counsel Mrs. Minott-Phillips submitted that the Bank's evidence pointed to the requirement imposed upon it by its regulator (the Governor

of the Bank of Jamaica) to be prudent in the operation of its business and to ensure that it has in place risk management systems and policies that mitigate risks to its soundness and safety including the risk of its services being used to commit or facilitate a financial crime. Further that the extent of that duty is to be appreciated within the context of what constitutes banking business. She advanced that the Bank's contracts with its customers are a big part of its prudential and risk mitigation requirements.

[47] She further expressed that the relationship between a depositor of money with NCB and NCB, is that of lender and borrower, therefore NCB must be prudent when lending that money because when those depositors want their money, NCB is required to honour their withdrawal request. If the bank allows customers who owe money to not repay their debt, its ability to honour withdrawal requests is jeopardized and can lead to failure of the bank, if this happens on a large enough scale.

[48] Reliance was placed on the judgment of Lord Atkin, LJ in **N Joachimson (a firm) v Swiss Bank Corp** [1921] 3 KB 110 at 127 where he said:

> *"I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours…The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery."*

[49] King's Counsel submitted that the Bank was misled into crediting Ms. Laing's account with the proceeds of a counterfeit "official check", thereby using her account to facilitate forgery.

[50] In response to the Defendant's claim that the contract terms were unfair and unreasonable, Mrs. Minott-Phillips submitted that NCB's evidence of fairness and

reasonableness of its contract terms, taken from the evidence of Ms. McKenzie, is unchallenged and that the Court should find that NCB is required by law to operate prudently. Further that its contracts with its customers are one way of ensuring it does so, and they are fair and reasonable.

[51] The Defendant did not rely on any evidence to support her assertion of unfairness and unreasonableness. King's Counsel Mrs. Caroline Hay advanced that they rely exclusively on Part IV of the Consumer Protection Act (CPA) which is entitled "Unfair Contracts". I have set out below the specific sections being relied on:

Section 36 reads:

> *In relation to any breach of duty or obligation, it is immaterial for any purpose of this Part whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously.*

Section 38 reads:

> *No party to a contract shall –*
>
> *(a) when he is in breach of contract, exclude or restrict his liability in respect of the breach; or*
>
> *(b) claim to be entitled to render –*
>
> *i. a contractual performance substantially different from that which was reasonably expected of him;*
> *ii. any performance in respect of the whole or part of his contractual obligation,*
>
> *except in so far as the contract term satisfies the requirement of reasonableness.*

Section 39 reads:

> *A consumer shall not by reference to any term of a contract be made to indemnify another person (whether party to the contract or not) in respect of liability that may be incurred by the other person for negligence or breach of contract, except in so far as the term satisfies the requirement of reasonableness.*

Section 43 reads:

> *(1) For the purposes of this Part and section 46 the requirement of reasonableness in relation to a contract term, is that the term is a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.*
>
> *(2) […]*
>
> *(3) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.*

[52] King's Counsel Mrs. Hay submitted that these provisions obviously apply to commercial contracts. Further, that the CPA exists among other reasons, to protect consumers from unfair contractual terms in commercial contracts for goods or services. Further, that the statutory test is whether the party contending for reliance on the clauses has demonstrated that it is fair and reasonable to include those clauses in the contract and to rely on them against the customer (consumer).

[53] She contended that the Claimant has provided no evidence to show that in pursuance of the prudential standards they mention (such as the avoidance of risk), they took any steps in the present transaction to detect or avoid fraud.

[54] She contended that the Court ought to find that the fact that there was no evidence that the particular term under challenge had been individually negotiated between the parties, is important in determining whether the term is unfair. She relied on **In**

Pannon GSM Zrt v Sustikné Gyo˝rfi (Case C-243/08) [2010] 1 All ER (Comm) 640 for this proposition. The defendant in that case entered into a subscription contract with the claimant company for the provision of mobile telephone services. The contract was concluded on the basis of a form supplied by the claimant that stipulated that, by signing the contract, the defendant acknowledged the applicable terms and conditions, including the general contractual conditions forming an integral part of the contract, and accepted their content. The Court held inter alia, that an unfair contractual term is not binding on a customer and it matters not whether the customer had ever challenged it before.

[55] Mrs. Hay contended that it is for the trial court to determine whether a contractual term satisfied the criteria to be categorised as unfair within the meaning of the statute in Jamaica, meaning unreasonable. Further, that there is no evidence anywhere that at the time the Defendant was invited to sign the contracts, she was offered any opportunity to individually negotiate contractual terms. Further, there is nothing in the contract which either directly says or even suggests that a foreign cheque can repeatedly be honoured and dishonoured by a foreign bank. Although in cross examination Ms. McKenzie admitting to knowing this could happen, there is no way the Defendant would know this as a customer.

[56] She pointed out that the effect of an unfair contract terms is set out in Halsbury's Laws of England Consumer Protection (Volume 21 (2022) Regulation of Business to Consumer Relationships, the essence of which is that an unfair term of a contract between a trader and a consumer (a 'consumer contract') is not binding on the consumer but this does not prevent the consumer from relying on the term if he chooses to do so.

[57] She highlighted Clause 1.16 as authorizing the Claimant, without qualification such as when they negligently release the hold on a customer's account and permit transactions with uncleared effects, to debit the account with instruments previously credited and look to the customer for the costs, fees, charges and

expenses. This, she submitted, is unlike Clause 1.26 which first places on the Claimant the duty to act in accordance with the contract terms before looking to the customer for indemnity, or Clause 1.11 which seeks to hold the customer to account for her negligence.

[58] King's Counsel contended that the only way to satisfy the Court that it is entitled to rely on Clause 1.16 is if there is evidence as to why it is both fair to the Defendant and reasonable in all the circumstances of this case, for it to rely on the clause in this way. To the extent that this contractual clause seeks to insulate the Claimant from losses flowing from its own negligence, it makes the clause unfair and unreasonable. Whereas the contract does suggest that the Claimant can reverse a credit entry (Clause 3.1), it does not say it can do so after it clears and validates the instrument. The result is that the provision is unenforceable as against the Defendant to ground this claim.

[59] King's Counsel relied on the Canadian case of **Bank of Montreal v Asia Pacific International Inc. and the T.D. Bank** 2018 ONSC 4215, where an imposter was able to send funds from the bank's customer's account by way of wire transfer overseas to the defendant bank. The Plaintiff bank sought a declaration that the funds were paid under mistake of fact and should be returned to it. The Plaintiff bank also complained that the defendant bank failed to carry through its anti-money laundering steps in that it failed to perform adequate KYC on its customer(s) and had it done so, it could have detected the fraud. The Court refused the relief. The Court held that BMO was in a better position to prevent the imposter fraud. The Court also looked at the BMO's policies on treating with wire transfers and found that the bank failed to comply with its own policies.

[60] Taking into account the reasoning in **BMO**, Mrs. Hay urged the Court to find that it is unfair and unreasonable to require the Defendant to bear the loss from the Claimant's careless mistake when the Claimant is the party with the greater power to prevent the loss.

[61] She also pointed out that at the time of the transaction in 2021 the Proceeds of Crime Act (POCA) regime governing designated non-financial business persons was not under active monitoring by the General Legal Council. Although the amendments to POCA in 2013 included the designation of attorneys performing certain services as part of this regime, there is no evidence that the Defendant's practice is within this framework. Therefore, the only standard to be applied is that which is reasonable to ask of an Attorney-at-law in 2021 conducting a transaction selling equipment.

[62] In concluding, she suggested that the following passage from Paget's Law of Banking (16th ed) paragraph 4.17 might offer some assistance to the Court:

> *The unfairness of a contractual term is to be assessed by taking into account various matters, including the nature of the subject matter of the contract, the surrounding circumstances at the time the contract was made, and all the other terms of the contract or of another contract on which it is dependent. An appreciation of how the term will affect each party when the contract is put into effect will also be part of the exercise.*

DISCUSSION

[63] The preamble to the CPA provides that it is an Act to provide for the promotion and protection of consumer interest in relation to the supply of goods and the provision of services. When applied in the context of the business of banking this would translate to its purpose being to safeguard customers against unfair practices by banks and other financial institutions. Part IV of the Act is titled Unfair Contracts and among its objectives is, in certain instances to exclude or restrict liability by contract or to restrict indemnity by a consumer where contractual terms are unreasonable.

[64] There is therefore merit in the Defendant's argument that the Court must consider whether the Terms are fair and reasonable. If the Terms are found to be unfair and unreasonable, the Claimant may not be able to enforce them.

[65] The obligation of the court to consider this arises even though there is no evidence led by the Defendant about the Terms being unfair and unreasonable. This is because the test of unfairness and unreasonableness is not only a question of fact but is also a question of law. Section 43(3) of the CPA makes it clear that it is for the party claiming that a contractual term satisfies the requirement of reasonableness to show that it does. It is therefore the Claimant that is required to lead evidence of the reasonableness of its Terms.

[66] The Court must examine the Terms to determine whether any of them are unfair and/or unreasonable. The **Pannon** case relied on by the Defendant makes it clear that an unfair contractual term is not binding on the customer and although that case had to do with a national court vis a vis territorial court, the principle appears to be well settled and applicable that:

> "…*the national court is required to examine, of its own motion, the unfairness of a contractual term where it has available to it the legal and factual elements necessary for that task. Where it considers such term to be unfair, it must not apply it, except if the consumer opposed that non-application."*

[67] Emphasis was placed on the individual negotiation of the term in that where there is no evidence that a particular term was individually negotiated and it is unfair and is not binding on the party challenging it. During cross-examination Ms. Laing was shown the documents she used to open her account, and she accepted that she agreed to the Terms. When the clauses were shown to her, she accepted that she read the clauses. However, there is no evidence of any individual clause being brought to her attention.

[68] It seems to me that the fact that any term was not individually negotiated, without more would not render it unfair but rather that it is an additional factor that made it unfair. It may be necessary to individually negotiate terms if they were different from the standard terms incorporated in banking relationships. Based on the evidence led, these Terms did not conflict with Bank of Jamaica requirements and according to Ms. McKenzie, these Terms were reasonable. There is no evidence to contradict this. Therefore, the fact that the Terms were individually negotiated does not, without more, make them unfair.

[69] The Defendant's case is that Ms. Laing should not be bound by any Terms that are unfair and unreasonable. The Defendant asserts that the Terms are generally unfair and unreasonable and that specifically clauses 1.16, 1.26 and 3.1 when read together with 1.11 are unfair and unreasonable.

[70] I find the passage King's Counsel Mrs. Hay supplied from Paget's Law of Banking to be instructive. In considering whether the Terms are or a particular clause is unfair, I must take into account various matters including the nature of the subject matter of the contract and the surrounding circumstances at the time the contract was made and assess how the term will affect each party when put into effect. This passage is consistent with the provisions of section 43 (1) of the CPA which stipulates that "the requirement of reasonableness in relation to a contract term, is that the term is a fair and reasonable one to be included, having regard to the circumstances which were, or ought reasonably to have been known to or in the contemplation of the parties when the contract was made".

[71] I also find merit in the suggestion made by King's Counsel Mrs. Minott-Phillips that the question of fairness and reasonableness of the Terms must be assessed in the context of what constitutes prudent banking business and ordinary prudential standards. It is noteworthy that this is not set by NCB but rather is set out in the Banking Services Act 2014. Section 20 (a) contains the Third Schedule to the Act

which deals with matters the Supervisory Committee shall have regard to in determining whether to grant a licence to operate as a deposit taking institution.

[72] Among the matters the Supervisory Committee shall have regard to is the ability of the bank to carry on its business in a prudent manner. The Claimant has sought to establish reasonableness of its Terms through the evidence of its witness. Ms. McKenzie's evidence that prudential requirements and protection are necessary and therefore make the Terms of the parties' contract reasonable as part of the Claimant's risk management systems and policies has not been challenged. Not only is her evidence unchallenged but when examined, I find it to be reasonable in the context of the business of banking. I therefore agree with the Claimant's submission that NCB is required by law to operate prudently. However, in doing so it must ensure that its contracts with its customers are fair and reasonable.

[73] It is with these considerations in mind that I examine the alleged impugned clauses. Clause 1.11 is titled "Customer's Obligations and Negligence" and provides as follows:

> *"The Customer shall at all times in respect of his/her account and in his dealings with the Bank act in good faith and with due diligence and take all necessary precautions in all acts and matters relating to the operation and maintenance of his/her account with the Bank. The customer **alone** (emphasis mine) will bear all the consequences of his/her negligence and shall indemnify and hold the Bank harmless in respect of any and all losses or damages arising due to the fault or negligence of the Customer".*

[74] No unfairness is being alleged in relation to this clause, however, a comparison is being drawn between this clause and clause 1.16 titled "Bills of Exchange Dishonoured etc" and Clause 1.16 provides as follows:

> *"The Bank is authorised to debit any of the Customer's accounts with any cheques, bills of exchange or other instruments previously credited to an account of the Customer which were either not paid when presented by the Bank or which if paid the Bank may be required to refund or which may be dishonoured for any reason whatsoever, and to debit the Customer's*

account with all the Bank's costs, charges and expenses incurred in connection therewith."

[75] The contention of Mrs. Hay is that clause 1.16 makes no allowance for a circumstance where the bank was itself negligent, as in this case, where the bank negligently released the hold on the customer's account. Further that, it would be unfair for NCB to debit Ms. Laing's account when they were negligent in taking the risk of crediting her account with cleared funds within two (2) days after the cheque was lodged. It is noted that the Bank did not challenge the fact that the account was credited with the proceeds of the cheque within two (2) days but indicated that crediting the account does not mean funds are clear.

[76] In determining whether this clause offends the CPA, the court must first consider whether the CPA contemplates that a party who is in breach could still seek to exclude or restrict liability. I think it does, as the essence of section 38 is that no party who is in breach can exclude or restrict its liability, except where the contract term satisfies the requirement of reasonableness. If the term is reasonable, this provides an exception and the bank can restrict or exclude its liability. The reasonableness of this clause must be considered in the context of its purpose. The title of this clause is "Bills of Exchange Dishonoured etc". It therefore imposes an obligation on a customer who presents a cheque or Bill of Exchange which was not paid. This provision has to be read in tandem with clause 1.1 which imposes obligation on the customer to exercise due diligence in relation to its transactions.

[77] The essence of the **N Joachimson** decision is that a contract involves obligations on both sides. The obligation of the bank to repay on demand is a serious one. If the bank were to stand the loss for every cheque deposited that is unpaid, this would impact the bank's ability to make good on their obligation to pay depositors their money upon demand.

[78] The customer who takes advantage of funds credited to his account does so with some risk involved. This ties in with the customer's obligation to exercise due

diligence in the operation of his/her account and to know the person he/she is dealing with. If the account was previously credited, this would have been done with the money in the hands of the bank, that is depositors' money and then it turns out that it should not have been credited then, if the bank is unable to recover these funds for every dishonoured cheque it may impact its ability to honour the request of other customers when they seek to get their funds back. If the bank could not seek to recover this loss, then it would be true to say that the customer would be unjustly enriched if they are to benefit from an instrument which is bad. Contrary to what Mrs. Hay has suggested, there would be no benefit to the bank in doing so. All the bank is doing in these circumstances is seeking to recover money that they have erroneously credited.

[79] In those circumstances, I see no need to include in clause 1.16 a requirement that this clause applies only where there is no negligence on the part of the bank. This is particularly because section 38 seems to contemplate that even if the bank breaches the contract, it can exclude or restrict its liability if the term is reasonable. Moreover, there is an inherent warning in the clause about the consequence of accessing the funds credited.

[80] Clause 1.26 titled "Indemnity and Release" requires Ms. Laing to be called upon to indemnify the bank. It provides as follows:

> *"In consideration of the Bank complying with these Terms and Conditions, the Customer hereby agrees to indemnify the Bank against any loss, charge or expense which the Bank may suffer or sustain thereby and to absolve and hold the Bank harmless from all liability for loss or damage which the Customer may sustain, howsoever caused, provided the Bank has not acted contrary to these Terms and Conditions."*

[81] There is no contention that this clause is unfair or unreasonable, and I find it to be fair and reasonable as it recognises that the Bank can only claim indemnity where it has complied with its own Terms. The question may be asked whether it is fair and reasonable to limit the bank's compliance to the written Terms. What if the

bank fails to comply with implied terms and conditions? Should it still be allowed to claim an indemnity? The Defendant placed reliance on the **BMO** case where the bank failed to comply with its own policies and ignored obvious red flags and the Court found the Bank liable.

[82] King's Counsel's reliance on **BMO** is misplaced here. The question as to whether it is fair and reasonable to require the Defendant to bear the loss from the Claimant's careless mistake when the Claimant has the greater power to prevent the loss has nothing to do with the fairness or unfairness of a terms of the contract. The reliance on Pagets Law that the unfairness must be considered in view of the surrounding circumstances at the time the contract was made, contradicts with the suggestion that the court must look at the circumstances that the court in **BMO** considered. The Court is called upon to consider the surrounding circumstances at the time the contract was made and not the circumstances as they exist when these issues have arisen.

[83] These circumstances must be looked at in view of the provisions of section 39 of the CPA, which provide that a customer shall not be made to indemnify another person in respect of liability that may be incurred by the other person for negligence or breach of contract, except in so far as the term satisfies the requirement of reasonableness. Again, an inbuilt exception once the term is reasonable.

[84] On behalf of the Defendant, it was argued that clause 3.1 when read together with clause 1.11 has the effect that the Claimant can only rely on clause 3.1 where the losses flow from the negligence of the Defendant. Clause 3.1 titled "Uncleared Funds" provides as follows:

> *"Any credit entry made in any account of the Customer in respect of cheques received does not make the funds so credited available for withdrawal until the proceeds of the cheque have actually cleared and been realised by the Bank. Further the bank reserves the right to debit the account in reversal of the relevant credit entries if such cheques are returned unpaid and to charge a fee for the reversal of the entry. Cheques*

returned unpaid may be mailed to the Customer's address if not collected within 7 days of the date of the reversal."

[85] It suggests an obligation on the part of the customer to ensure clear funds before making use of the funds and if not, it takes a risk in doing so. The bank also takes a risk in making credit available before the funds are cleared. There is no evidence that NCB advised Ms. Laing that the funds were cleared before she gave instructions for a wire transfer. The Bank, having forewarned the customer that a credit entry does not make the funds available for withdrawal, it could not then be said to be unfair, if the bank reserves the right to debit the account in reversal of the credit entry and also to charge a fee. Based on the fact that this section forewarns the customer that a credit entry doesn't make the funds available for withdrawal, there is no need to include any additional provision that the customer will only be liable for the charges if they are negligent.

[86] In determining the question of fairness, the Court must conduct a balancing act. If for example the clause conveyed a significant advantage to the bank without providing an equal benefit to the customer, then this may result it in being unfair. When clause 3.1 is scrutinized, the purpose of crediting a customer's account is two-fold. It is for the convenience of the customer, to be able to benefit from early access to funds and also for the bank to comply with its mandate to allow prompt access to funds. The customer would have the benefit of credited funds. Would it then be fair for the customer to have the benefit of this but not to bear the burden of it? It is a benefit that he can choose to access or not. If he chooses to take advantage of it, then he should be prepared to bear the consequences of it.

[87] I find that NCB's contractual Terms are consistent with common law and with the Banking Services Act which require the bank to implement prudential requirements and protections. These protections ensure that any customer who wishes to withdraw its funds can have its request met. I also accept that the Terms are part of the Bank's risk management systems and policies that mitigate risks. The clause requiring due diligence serves the purpose of reducing the risk of the Bank's

services being used to commit or facilitate a financial crime or to avoid a breach of statutory obligation. In the context of the circumstances as set out, the clauses appear to be standard clauses in doing banking transaction. I therefore find that the Claimant has proven that all the clauses are fair and reasonable in the context of modern-day banking.

[88] Having found that the Terms were not unfair and unreasonable the Defendant is bound by them. This is regardless of the fact that, there is no evidence of individual clauses being brought to her attention at the time of signing to and agreeing to the Terms. It is of note that no where in the Defendant's evidence did she indicate that she did not understand the full import of the clauses. It cannot be ignored that the Defendant is an Attorney-at-law and should be aware of the consequences of signing and agreeing to the Terms of the Banking Relationship. This brings me now to consider the interpretation of the contractual terms and whether the Defendant acted in breach of any of them.

Whether the Defendant breached the contractual Terms by failing to exercise due diligence or by being negligent or by failing to take reasonable steps to avoid fraud on her account

[89] On behalf of NCB, it was argued that Ms. Laing failed to exercise due diligence, failed to take reasonable steps to avoid fraud on her account and was therefore negligent. It was submitted that these actions by the Defendant rendered her in breach of the Terms of the operation of her account with NCB and in breach of the contract with NCB inclusive of, but not limited to, clauses 1.11 and 5.2.

[90] King's Counsel submitted that her due diligence on her client was wholly deficient, and she failed to take reasonable steps to avoid fraud, forgery or other illegal activities from taking place in respect of her account (including the negotiation of cheques and other bills of exchange). Further, that she conducted minimal due diligence in circumstances where her "client" was a foreign entity, not operating in

Jamaica and that she ignored numerous 'red flags' making her due diligence ineffectual.

[91] Among the failings she was accused of was that she never requested nor received the constitution documents of her client's company, nor sought to independently confirm the content of the emails she received; she never asked for, or obtained, a picture ID. of "Alessandro Sandor" or utility bill in proof of address; she never received the deposit of United States Five Thousand, Nine Hundred an Forty-Four Dollars (US$5,944.00) she requested on account of her services; and if she did do a google search on "Alessandro Sandor" she missed the numerous online warnings of him being a fraudster involved in various bad cheque scams/fraudulent schemes. Further that, the initial email from her "client" sought her assistance with the sale of intellectual property but in the very next email sent the following day the transaction changed significantly to the sale of PSV Brine Preparation Tanks.

[92] On behalf of the Claimant, it was pointed out that Ms. Laing received United States Two Hundred and Eighty-Six Thousand, Four Hundred Dollars (US$286,400.00) purportedly remitted at the request of the purchaser's agent, Farrow Brokerage, before she had even carried out any of the legal services stipulated in her engagement letter. Further, that she never spoke, or interfaced, with a human being representative of her "client" to verify identity prior to wiring in excess of United States Two Hundred and Seventy Thousand Dollars (US$270,000.00) out of her account to a third party on its instructions; there was no correlation between her engagement to provide legal services and the entities in Hong Kong (being "Trinity Int Trading Ltd" and then "WT Textile Ltd"), to which she was directed by her client to transfer money.

[93] It was submitted that her credibility floundered on being confronted with her failure to list the document she alleged that she prepared in Schedule 2 of any of her Lists of Documents, indicating in cross-examination that she lost them electronically due to a google drive failure. NCB submitted that the court is entitled to infer from her

failure to disclose them, that Ms. Laing is not telling the truth about their existence. NCB submitted that the steps she took were wholly inadequate to allow her to know her customer and generally.

[94] The Defendant on the other hand submitted that the case **Tai Hing Cotton Mill Limited v Lia Chong Hing Bank Limited** [1985] 2 All ER 947 reinforced the common law position that whereas a customer has a duty to manage her current account in a manner as to avoid issuing fraudulent cheques or permitting the same to be used for ongoing fraud, the duty does not extend to preventing a forged cheque from being lodged to the account. Further that applying **Tai Hing,** clause 5.2 does not go as far as the Claimant contends that it should. Clause 5.2 requires the Defendant to take reasonable steps to avoid fraud or forgery from taking place when issuing or negotiating cheques or other bills of exchange. Clearly when issuing cheques, the Defendant would be expected to know what funds are available in her account for payment and her duty would be to ensure she acts reasonably in handling that facility. When, however, it comes to receipt of cheques, what amounts to reasonable conduct must be adjudged by what is possible for her to know in advance about the cheque.

[95] King's Counsel reminded the court that the Defendant gave evidence of her due diligence steps including a zoom meeting with the client, thereby satisfying herself that the business reaching out to her was legitimate and that the business in Jamaica to benefit from the contract was legitimate. Her online checks revealed no information that Sandor was a name associated with fraud at the time. She pointed out that it is a bit 'imperious' to suggest that persons who are deceived are either careless or negligent. It just means the fraudster is skilled and experienced.

[96] The wording of Clause 5.2, she submitted does not go far enough to impose on the Defendant an additional duty of care to prevent presentation of cheques that would return uncleared. The use of the word 'reasonable' suggests that no extraordinary expectation should be placed on the Defendant. What is reasonable

for the Defendant is different from what is reasonable for the bank and is guided by the law in **Tai Hing** whereas what is reasonable for a bank is guided by the law as set out in the case Barclays **Bank plc v Quincecare Ltd and another** [1992] 4 All ER 363 and the applicable regulatory framework. King's Counsel Mrs. Hay submitted that in the circumstances of the case, it is hardly likely that had she done more, she could have avoided lodging the foreign cheque in question and so the loss coming from the fraud (if there was) does not fall at her feet.

DISCUSSION

[97] Clause 1.11 of the Terms required Ms. Laing to act in good faith and with due diligence and to bear alone all consequences of her negligence and to indemnify and hold the Bank harmless in respect of any and all losses or damages arising due to her negligence. Clause 5.2 required her to take reasonable steps to avoid fraud, forgery and other illegal activities from taking place in relation to her account failing which she shall take the full risk associated with any such activity and shall again release, indemnify and hold the bank harmless.

[98] The question of due diligence must be considered in the context of Ms. Laing's profession as an Attorney-at-law and the business that she was conducting, that is to offer legal services and the purpose for which she was using the account. When she lodged this cheque, it was not lodged for her own use, but rather in relation to the transaction she was conducting on behalf of her client. This was not the case of an ordinary customer lodging a cheque for their own purpose. She lodged the cheque for the purpose of sending funds to another person, allegedly a customer of her client. This was a transaction involving a large sum of money. She was operating in the context of 2021 Jamaica, and it is in that context that she has to be judged and not in the context of 2026 Jamaica.

[99] Even in 2021 Jamaica, with the POCA being in place then for over two decades and with amendments being made to include increased obligations on the part of

certain attorneys carrying certain types of transactions, attorneys were expected to be on guard to ensure that they were not facilitating any fraudulent or money laundering transactions. Although there is no evidence that at the time Ms. Laing fell within the framework of Attorneys-at-law who were within the ambit of the POCA provisions, there should have been on her part a heightened sense of awareness of the possibility of persons seeking to use Attorneys-at-law to further their fraudulent transactions.

[100] Both the **N Joachimson** and the **Tai Hing** cases provide useful guidance. **Tai Hing** is distinguishable as there were no express terms akin to what NCB has in its contract. The Claimant is not seeking to extract liability through any implied terms or under the law of tort but in contract law for breach of the Terms. In this case there is an express term requiring due diligence.

[101] The **N Joachimson** case recognised that the terms of the relationship between banker and customer involve obligations on both sides and require careful statement. Among the obligations of the customer highlighted is the obligation to exercise reasonable care in executing his written instructions so as not to mislead the bank or facilitate forgery. The question as to whether Ms. Laing misled the bank must be looked at in the context of the relationship and the obligations on the part of the bank and the test set out in **Tai Hing** which is that the customer owes his bank a duty in drawing a cheque to take reasonable and ordinary precautions against forgery. Should this be extended to include the duty of the customer in lodging a cheque, to exercise due diligence to guard against forgery or fraud and is there an added duty when that customer is an attorney-at-law?

[102] This is to be contrasted with what the Court pointed out in **Tai Hing**, that the business of banking is the business of the bank and not the customer. Taking this into account, it could not then be said that Ms. Laing misled the bank. This is a risk of service, which it is their business to offer. **Tai Hing** rejected the wider duty of care on the part of the customer and that it should be implied into the contract.

[103] An interesting point is made on the question of the risk the bank takes by Bray J in **Kepitigalla Rubber Estate Ltd v National Bank of India** Ltd [1909] 2 KB 1010 where he extrapolated the position that "… the number of cases in which the bankers sustain losses of this kind are infinitesimal in comparison with the large business they do, and the profits of banking are sufficient to compensate them for this very small risk. To the individual customer the loss would often be very serious; to the banker it is negligible". It therefore imposes a duty on the bank to guard against fraud.

[104] I think that to say that Ms. Laing misled the bank would be an inaccurate representation of what took place. She is not in the business of banking. Why would the bank accept her word on whether a cheque is good or not? A bank has never been known to do that. A bank is in the business of banking and has the wherewithal to conduct those checks on their own. However, as the business of banking is for banks, the business of detecting fraudulent clients could not be laid at the feet of the bank. It should be the business of the attorneys-at-law to 'know your client' and this is why due diligence becomes necessary.

[105] Due diligence is important in the context of modern-day Jamaica. Ms. Laing had an obligation to conduct due diligence based on her contract with the bank. This was even more important in the context of circumstances of this case which included the fact that this was a client she has never dealt with before. There is no evidence that this client was referred to her by anyone she knew. For all intents, he was a stranger contacting her by email. Even the very manner in which he first made contact with her, in that he did not address her by name, should have given her pause. Then the Jamaican company, Kinetic Engineering, turned out to have a broker in Canada, Farrow Brokerage. No contact was made by her to this Jamaican company to ascertain that their broker was in fact located in Canada.

[106] The fact that the transaction involved such a large sum of money should have signalled a need to take a closer look. This cheque was sent to her for onward transmission to her client whose account was in Hong Kong. At that time, she had not then completed her draft of the Agreement for Sale of the Brine Equipment but yet she was intending to send funds to her client before the Agreement was fully executed. In the then era of cybercrimes and money laundering, all she had done up to that point was to conduct google searches and check with the Companies Office in relation to Kinetic Engineering.

[107] I am therefore in agreement with the Claimant, that she conducted minimal due diligence in circumstances which required her to do more. There were indeed some red flags. In the initial email from Mr. Sandor, he sought her assistance with the sale of intellectual property, and this changed the very next day to a contract for the purchase of brine equipment. Her clients were supposedly based in the Netherlands by virtue of the address in the engagement letter, but she was asked to wire the funds to his account in Hong Kong. What was the relationship between IBS Precision Engineering BV in the Netherlands and Trinity Int Trading Ltd in Hong Kong? Perhaps there might have been reasonable explanations for these inconsistencies but there was no indication that she observed this or that she asked any questions about these glaring inconsistencies.

[108] At the time she received the cheque she had not then executed the task for which she was engaged which was to draft the contract. There was no evidence of any draft, review and preparation of the agreement of sale. Although in cross-examination she mentioned commencing some work, this was new and did not generate credibility. There is no evidence from her that at the very least the contract had been signed by the parties but yet the broker was sending these funds to her for transmission to her client, and she was sending off the funds before the transaction had properly commenced.

[109] One of the distinct purposes of due diligence checks is to prevent money laundering, fraud and other illegal transactions. In the context of the prevailing conditions in Jamaica and globally, Ms. Laing should be well aware of her duty not to facilitate money laundering or enable her account to be used for the purpose of a fraud or any other illegal activity. In that context she should have taken better steps to know her client. In all the circumstances, I am satisfied on a balance of probabilities that Ms. Laing failed to exercise due diligence checks and in doing so, she failed to take reasonable steps to avoid fraud on her account. I therefore agree with King's Counsel for the Claimant that the failure on the part of Ms. Laing rendered her in breach of her contract with the Claimant.

[110] On behalf of Ms. Laing it was argued that there is no proof that the cheque was a fraud. However, in the documents relied on by the Claimant there were several references to the cheque being counterfeit and there was no significant challenge to the evidence given by the Claimant that the cheque was returned with the indication that it was counterfeit. Not even Ms. Laing in her evidence gave any evidence to the contrary. I am satisfied on a balance of probabilities that the cheque was in fact a fraudulent item.

Whether the Claimant breached the implied terms of the contract and whether the conduct and representations of the Claimant amount to negligence, negligent misstatement and/or breach of the implied duty of care and skill

[111] The essence of the Defendant's Amended Defence and Amended Counterclaim is that it was the Claimant that breached the implied terms of the contract by its failure or refusal to act with such skill and care to verify the true position with respect to the cheque and that that failure led to the loss and damage which could have been avoided. King's Counsel Mrs. Hay submitted that duties of care can arise in both contract and tort in the banker customer relationship so it is not accurate to speak of the relationship as purely contractual, as it may not matter where the duties of care arise as they appear to be the same.

[112] She relied on the authority **Barclays Bank plc v Quincecare Ltd and another** [1992] 4 All ER 363 where the Court established that when a bank is carrying out the customer's mandate to pay money from the customer's account, with funds in account sufficient to meet the mandate, the bank acts as the agent of the customer, the principal. Accordingly, it was an implied term of the contract that the bank would observe reasonable skill and care in and about executing the customer's orders, but generally that duty was subordinate to the bank's other conflicting contractual duties, such as its prima facie duty when it received a valid and proper order to execute the order promptly on pain of incurring liability for consequential loss to the customer. If the bank executed the order knowing it to be dishonestly given or shut its eyes to the obvious fact of the dishonesty or acted recklessly in failing to make such inquiries as an honest and reasonable man would make, the bank would plainly be liable.

[113] In **Quincecare**, the Court in dealing with the conflict a bank could face between the duty to carry out the customer's mandate and the need to guard against loss, stressed that the bank is not to be placed in the role of an amateur detective and banking must not be made difficult and suggested that a sensible middle ground is that a bank should refrain from carrying through a customer's instructions if it has reasonable grounds to believe fraud is possible. The standard is that of an ordinary prudent banker.

[114] On behalf of the Defendant, it was further advanced that no evidence was given of any checks made to show that the Claimant's servants were prudent, spoke to any manager or made any calls. The circumstances of no hold after two (2) days for a large quantum cheque ought to have put the Claimant on enquiry. The same obtains for the second opportunity that was presented when the funds returned to Jamaica. Checks could have been done then or the hold reinstated. It did not happen then either. **Quincecare** established that duties of care can arise in both contract and tort in the banker customer relationship and that it is not accurate to

speak of the relationship as purely contractual. It might not matter where the duties of care arise as they appear to be the same.

[115] She contended that it is clear that where a bank is negligent in the conduct of a transaction and the negligence leads to loss, the bank must bear the liability of the loss. Had it maintained the hold the transaction would not have taken place. The loss is caused by the Claimant bank.

[116] Mrs. Hay argued that the Claimant's reliance on clause 5.2 of the contract can in no way absolve it from a duty to avoid fraud especially when it is in a better position to detect it. **Quincecare** suggests that the Claimant cannot expect to recover any funds in instances where the bank is negligent. Further, reliance was also placed on **In Cape Caribbean (Antigua) Ltd v RBC Royal Bank of Canada AG** 2023 HC 92 where an Antiguan Court considered a claim brought by a bank's customer who alleged that the email address of one of its officers had been hacked and that the instruction that came into the bank to perform a wire had not come from it. The bank failed to observe the red flags it identified and as a result was negligent and in breach of its fiduciary duty towards it. The bank counterclaimed for an indemnity. Both claims were dismissed but costs were awarded to the defendant bank. There was the recognition that something more must excite attention. King's Counsel submitted that the burden of proof is not on the Defendant but rather on the Claimant to say why their conduct was reasonable and not negligent which they have failed to do.

[117] The Defendant also contended that, the same facts that create the duty of care towards her, ground a special duty in tort towards the Claimant about the statements it makes towards her popularly known as **Hedley Byrne** negligence. Having represented to the Defendant that the cheque was available for her use, on more than one occasion, the Claimant is estopped from denying now that it was. The Defendant relied on the Claimant's representation that the funds were available for use when she saw that the hold was released.

[118] The case **In Motor Traders Guarantee Corporation Ltd v Midland Bank Ltd** [1937] 4 All ER 90 at 94, was also cited on behalf of the Defendant where Goddard J stated that whether or not the bank or its officers exercised due care in any particular case must depend upon the facts of the particular case. The decision in **Motor Traders** establishes that in some circumstances, a bank's failure to follow its own procedures can amount to negligence. In this case the procedure that the Claimant was to have was to hold the cheque for a period longer than two (2) days and to confer with Citibank NA as to validity of the cheque. The Claimant has adduced no evidence capable of rebutting the allegation of negligence.

[119] On the question of negligence on the part of the bank, reliance was also placed on the Bahamian case of **Glendon E. Rolle (T/A Lord Ellor & Co) v Scotiabank (Bahamas) Limited** 2017/CLE/gen/01294. Mr. Rolle, an attorney-at-law sued the bank alleging breach of fiduciary duty and/or negligence "by making an assurance that the bank drafts were clear when they had not been cleared". The bank denied liability claiming to be absolved by contractual provisions and counterclaimed in the amount of the overdraft. The Court found that the bank had a duty to satisfy itself that there are funds to pay before it makes payment out from the account and where it acts without so doing, it takes a risk. The Court found that the bank was negligent in crediting the account with and paying the funds before the cheques cleared. King's Counsel Mrs. Hay commended this authority to the Court as being similar to the instant case and submitted that the Court should find the Claimant negligent.

[120] King's Counsel Mrs. Minott-Phillips on behalf of the Claimant argued that the existence of a duty of care in tort does not expand upon the co-existent duty of care that is an implied term of every contract. Further, that it has been repeatedly stated that there is nothing to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. In this case

it is not in dispute that the parties' relationship was one of banker and customer, and that it is a contractual one.

[121] King's Counsel relied on the case **National Westminster v Barclays Bank International Ltd and another** [1974] 3 All ER 834 at 836 and the case of **David Stewart v NCB** [2025] JMCC COMM 25 to support the point that tort does not apply. She contended that there is no need to go into tort as the contractual relationship governs the relationship between the parties. It confirms the case that as Citibank has no duty of care to Janene Laing, NCB being the middleman cannot owe a duty of care to her.

[122] It was also submitted that NCB did not make any representation to her that the "official check "she negotiated into her account was valid prior to her wiring the funds from her account on January 21, 2021. Further, that the "official check", once established as counterfeit, was counterfeit ***ab initio*** and that the issuance of a fraudulent cheque is a criminal offence, and negotiation of such an item into her bank account constitutes the use of her bank account with NCB to facilitate fraud. Therefore, no valid transaction could flow from Ms. Laing's negotiation into her account as a fraudulent credit on January 11, 2021 of the sum of the United States Two Hundred and Eighty-Six Thousand Four Hundred Dollars (US$286,400.00). She suggested that the Court should be guided by Lord Denning's famous statement in **Lazarus Estates Ltd v Beasley** [1956] 1 Q.B. 702 that,

> *"No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever…"*

[123] She submitted that the representations by the Bank which turned out to be untrue were innocent, in that NCB was conveying information it received from Citibank, NA. The direct cause of the loss was Ms. Laing's negotiation as credit into her

USD account with NCB on January 11, 2021 of a counterfeit item which had no value at all. No representation binding on NCB caused her to negotiate that counterfeit item into her account as a fraudulent credit, and neither of NCB's representations to her in writing made on January 29 and March 25, 2021 could have caused Ms. Laing to wire United States Two Hundred and Seventy-Four Thousand, Three Hundred and Sixty-Six Dollars (US$274,366.00) from her USD account to her "client" on January 21, 2021, being a date that pre-dated both representations. Causation by NCB of its loss is, therefore, a chronological impossibility. Nothing can come from a fraud, it *"unravels everything"*. Ms. Laing's contention that NCB's loss in this case does not flow from her negligence is factually unmaintainable.

[124] King's Counsel contended that based on the evidence, only Citibank, NA could validate and/or clear that instrument and that Bank of New York Mellon and NCB are just the middlemen carrying out the transaction and transmitting information between Citibank and Ms. Laing. The Citibank, NA "official check", having turned out to be counterfeit, Ms. Laing is contractually bound to pay NCB the amount of the debited item on demand.

[125] She further argued that the fact that Citibank first honoured, then dishonoured, the "official check" speaks to the quality of the forgery more than anything else. It is precisely because fraud of this kind exists, and because a prudent bank must guard against loss occasioned by fraud, that its contract with its customers requires them to take reasonable steps to avoid fraud, or to hold the bank harmless if they don't and entitles the bank to reverse any credit entry on a customer's account that results from an unpaid item.

[126] She pointed out that Ms Laing's denial of the Bank's entitlement to recover the whole debit is inconsistent with her acceptance that it is entitled to keep a part of the funds. The fact that Ms. Laing sent the lion's share of the United States Two Hundred and Eighty-Six Thousand Four Hundred Dollars (US$286,400.00) to her

'client' does not absolve her from her liability to make the bank whole in respect of the debited amount of United States Two Hundred and Eighty-Six Thousand Four Hundred Dollars (US$286,400.00) that NCB has demanded from her.

DISCUSSION

[127] The Defendant in her Defence pleaded the existence of an implied term in the contractual relationship which required the Claimant to exercise due care and skill in its transactions and dealings with the Defendant as its customer, including the duty to accurately communicate matters affecting the Defendant. The Defendant also asserted that in addition to or alternative to the contractual relationship, a duty of care in tort arose. Further, that the Claimant was under a duty to make no unqualified negligent misstatement to the Defendant. In relation to negligent misstatement there is a requirement to establish, in line with the **Hedley Byrne** principle, that the Claimant made a false statement, albeit honestly but carelessly. There is no need for a Claimant to prove a pre-existing contract with the Defendant in order to succeed in this tort.

[128] In considering whether there could be a breach of duty by the bank in tort, King's Counsel Mrs. Minott-Phillips stressed that the **Tai Hing** case, which has been applied only recently in **NCB v David Stewart** in this Court by my sister Jarrett J referenced Lord Scarman's noted dicta which enunciated the principle that there is no advantage in searching for a liability in tort when a contractual relationship exists and that the duties of care under tort cannot be more extensive than those found in the contract. Although the **Quincecare** case seemed to make light of this principle, I find the **Tai Hing** principle to still be applicable to the instant case. I do not find that there is any benefit to be derived by the Defendant from seeking liability in tort as the parties had a contract.

[129] In addition to that, the Defendant would be hard pressed to prove that up to this point she has suffered a loss whether financial or otherwise. It is trite that in order

to succeed in an action in tort there must be loss. The Defendant up to this point has not sustained any financial loss. It is the Claimant who has suffered loss. The claim for breach of tort does not take the contract claim any further as tortious duties of care can exist alongside contractual duties of care.

[130] The Terms of the contract between the parties did not include any specific clauses setting out how the Claimant should act in dealing with a customer's order to wire transfer funds from a cheque previously lodged. The Terms of the contract were more replete with obligations on the part of the customer than those on the part of the bank but that does not absolve the bank from obligations towards its customers. The common law recognises that the terms of a contract between banker and customer involve obligations on both sides. This was elegantly stated by Atkin LJ in the **N Joachimson** case relied on by King's Counsel Mrs. Minott-Phillips as follows:

> *"I think there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement"*

[131] In the **Quincecare** case, the Court acknowledged the wide-ranging duties imposed by the common law on bankers towards its customers. The observations of the court related to the relationship of banker and customer in the context of a bank transferring money from a current account on the customer instructions, albeit in this case, not a current account. At page 375 Lord Steyn said this:

> *"Primarily, the relationship between a banker and a customer is that of debtor and creditor. Bud quod the drawing and payment of the customer's cheque as against the money of the customer's in the banker's hand the relationship is that of principal and agent: see Westminster Bank Ltd v Hilton (1926) 43 TLR 124 at 126 per Lord Atkinson. Similarly, when the bank in the present case acted on an order to transfer by immediate money transfer money from the Quincecare current account to Phillip Evans & Co in Bournemouth, the bank was acting as Quincecare's agent. As agent the bank owed fiduciary duties to Quincecare. See Bowstead on Agency (15th den) pp156-160. Prima facie every agent for reward is also bound to exercise reasonable care and skill in carrying out the instructions of*

his principal. Bowstead p 144. There is no logical or sensible reason for holding that bankers are immune from such an elementary obligation.

[132] This case first established what has become known in legal and banking circles as the Quincecare duty. It recognises that liability can arise in both tort and negligence for breaching the duty of care. Steyn J formulated the scope of the duty at page 376 of the judgment in this way:

> *"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,…a banker may in a case such as the present be sued in tort as well as in contract…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 in tort."*

[133] Lord Steyn continued:

. "*…The critical question is what lesser state of knowledge on the part of the bank will oblige the bank to make enquiries as to the legitimacy of the order. In judging..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 protect bank customers and innocent third parties. To hold a bank is only liable when it has displayed a lack of probity would be 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."*

[134] My understanding of the Quincecare standard is that it imposes a duty on banks to observe reasonable skill and care in and about executing the customer's instructions, which includes a duty to refrain from following the customer's instructions where they are put on notice or on enquiry that this may result in a fraud. It therefore requires the bank to conduct a balancing act between carrying out a customer's instructions promptly and guarding against fraud. An example of

a scenario where the bank may be put on notice, as in this case is if they had prior information that Alessandro Sandor was a known fraudster who had previously engaged attorneys-at-law with a view to misappropriating their funds. Of course, this case is not so clear cut.

[135] Reasonable care must be considered in terms of the Quincecare standard. It is clear that the implied duty to exercise reasonable care is an ongoing one. The question whether if the bank had exercised reasonable care, this would have prevented the loss incurred must therefore be a relevant one. **Quincecare** recognises the duty of the bank to exercise reasonable care and skill in carrying out the instructions of its customers. The timing of the transactions and the statements made by the bank's employees should therefore be subject to scrutiny.

[136] King's Counsel Mrs. Minott-Phillips highlighted that Ms. Laing's instructions were given prior to any representations made by NCB as to the honouring of the check. Further, that, NCB gave her no assurance of any kind of the validity of the "official check" prior to Ms. Laing wiring the funds.

[137] The chronology of events included that Ms. Laing lodged the cheque to her account on January 11, 2021 and on January 13, 2021 she noticed that the funds were "clear". She then gave instructions for the wire transfer to be done on said day. The next time she interacted with the Bank was on January 20, 2021 when the cheque was returned with the narration "Refer to Image". Should this have put the bank on notice? According to the bank the narration "Refer to Image" was understood to mean that it was not scanned properly which they did and resubmitted it. According to Ms. Laing, she was advised by the Bank's agent Mr. Robinson that it was returned for want of declaration of the sum. Whether it was returned for the purpose of scanning or for declaration of sums, I don't think either of these scenarios was sufficient to put the bank on notice that something was wrong with the cheque itself as the issue had more to do with seeking clarity and/or compliance with money laundering preventative measures.

[138] The last wire instruction from Ms. Laing came on January 21, 2021. That wire was successful and by January 25, 2021 the funds had landed in the account of the fraudster. Any relevant actions or lack thereof on the part of the bank would have to be considered up to January 25, 2021 as nothing the bank did or did not do after would have made a difference as once the funds got into the hands of the fraudster it was lost to both customer and bank.

[139] It was on January 25, 2021 that the first indication came from the bank that the check had been dishonoured. It was after that time that Ms. Laing alleged that Mr. Robinson gave her conflicting information, first that the cheque did not look counterfeit and then on January 29, 2021 that the cheque had cleared. King's Counsel Mrs. Minott-Phillips made heavy weather of the fact that none of these were written instructions and so ought not to be considered as it was a term of the contract that only correspondence in writing should be acted upon. Regardless of this, I do not think that the Court is prohibited from considering oral statements made simply because the bank seems to want to confine its liability only where statements are made in writing. It is however, not necessary for the purpose of the discourse here to decide definitively on this point.

[140] The first indication NCB had of the cheque being dishonoured was on January 25, 2021, when it received that information. It was not until March 25, 2021 that Mr. Robinson sent Ms. Laing an email indicating again that the cheque had been validated and honoured by Citibank. Then on March 31, 2021 the same Mr. Robinson called to say the cheque was returned and on April 8, 2021 she was advised that Citibank had confirmed that the cheque was fraudulent.

[141] There was nothing to suggest any fact that would put the bank on enquiry at the time when Ms. Laing requested the transfer to be done. However, the subsequent inconsistent statements made regarding the validity or otherwise of the cheque would certainly have been something that would necessitate further enquiries. I

am of the view that in the face of the inconsistent positions that the bank was faced with, they should have been put on notice and inquiry. The question asked in **Quincecare** is a relevant one "what lesser state of knowledge on the part of the bank will oblige the bank to make enquiries as to the legitimacy of the order". Although courts are hesitant to impose too burdensome an obligation on bankers, the law should guard against fraud and exact a reasonable standard of care in order to protect customers and combat fraud.

[142] The precise requirement as stated in **Quincecare** is that the sensible compromise which strikes a fair balance in 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. Similar to this is the circumstance as observed in the **Cape Caribbean** case requiring proof of something more that excites attention, something more being similar to being put on notice, where the bank failed to observe red flags that it identified.

[143] The nature of the inconsistences in this case would have been sufficient to put the bank on notice and on enquiry but there is a problem here. The inconsistencies that would put the bank on inquiry came after the Defendant gave the order to do the transfer. No inquiries at that point would have made a difference. I think it important to state though that had the conflicting information come to the bank's attention before executing Ms. Laing's orders, they would have been required to demonstrate what steps they took to show that reasonable care was exercised. In this case however, there is no evidence of failure to exercise reasonable care before executing the order of Ms. Laing.

[144] There is therefore merit in the Claimant's submissions that the representations made to Ms. Laing were made after she has already given the bank the wire instructions so it could not be said that she acted on the misrepresentations of the bank. The Defendant has failed to prove that the bank failed to exercise due care according to the Quincecare standard in giving effect to the Defendant's request

to execute the wire transfer. The Defendant has therefore failed to prove that the misstatements made by the Claimant resulted in any loss.

[145] Though the Quincecare duty has served to guide bankers and customer alike, it is not always relevant in every situation where breach of duty is alleged. What is clear to me is that the Quincecare duty does not restrict the categories of breach of duty of a bank. The Quincecare duty is relevant to the bank's duty to refrain from acting on the payment instructions if it has reasonable ground to believe that there is an attempt to defraud the customer, however, there are other categories outside of this fact scenario in which a bank can be found to breach their duty to exercise due care and skill. This may include where a bank acts contrary to a customer's instructions resulting in loss to the customer or even where a bank fails to adhere to its own policies. In the instant case, the Defendant asserts that the bank failed to exercise reasonable care when it lifted the hold off or cleared the funds after two (2) days, despite having a policy in place that funds from foreign cheques are to be held for ten (10) days.

[146] The question of whether the bank cleared the cheque within two (2) days is a question of fact. According to Ms. Laing, when she first contacted the bank's agent and told her about the cashier's cheque and the amount, the agent indicated that it would be cleared no longer than ten (10) days after she lodged it on January 11, 2021 to her client account. She said on January 13, 2021 she noted from her online check available cleared funds in her client account. This caused her to go into the bank and initiate a wire transfer of the funds to Citibank in Hong Kong. There is no denial on the part of the bank with respect to the fact that the instructions of Ms. Laing to effect the wire transfer were carried out.

[147] During cross-examination of Ms. McKenzie, she insisted that it was not the duty of NCB to clear the cheque and that only the issuing bank could clear the cheque. She explained that releasing the hold does not mean that the cheque is cleared because the item can only be cleared by the person or institution that issued it.

She also explained that only NCB can release the hold on cheques and thereafter accepted that NCB based on its licence has to be prudent and careful about the release or hold on any item irrespective of the amount. She also accepted that it being a large sum of money and from an overseas bank increased the duty on NCB to be careful with the release of the hold.

[148] Although there is some issue as to whether Ms. Laing's account reflected cleared funds or not, the Bank has not been able to counter the evidence of Ms. Laing that the hold on the funds was released after two (2) days. Ms. Laing alleged that throughout the transaction she was in dialogue with Mr. Orlando Robinson and has even tendered into evidence conversations to support this. The bank did not present any evidence from Mr. Robinson to dispute her assertions on this point.

[149] I find the evidence of Ms. Laing to be credible in this regard. There was an initial hold on the funds which was lifted after two (2) days. I also accept that Ms. Laing was told that based on the type of cheque the Bank would hold it for ten (10) days. The fact that the Bank saw it fit to place a hold on the funds when initially lodged suggests that they recognised their obligation to carry out checks before releasing the hold. The question for the Court is whether when the bank released the hold on the funds they acted with reasonable care in accordance with the implied term of the contract and whether it breached its duty of care towards the Defendant.

[150] A similar question arose in the Bahamian case of **Glendon E Rolle (T/A Lord Ellor & Co) v Scotiabank (Bahamas) Limited** 2017/CLE.gen/01294 cited on behalf of the Defendant. Glendon Rolle, an attorney-at-law alleged that he had suffered loss and damage as a result of the bank's breach of fiduciary duty and/or negligence. The Bahamian Supreme Court found that the bank owed no fiduciary duty to him to act in his best interest. In dealing with the issue as to whether the bank was negligent to have released the funds to the account and effected the wire transfers without having cleared the bank drafts, the Court said at paragraphs 82 to 84.:

> *"It cannot be disputed that a bank presented with a cheque to be paid out of the payee's account at another bank is obligated to take reasonable steps to determine that it is not fraudulent....In carrying out that instruction (especially where the account of which the money to be paid is at another bank) the bank will want to satisfy itself that the payor actually has the funds since it is paying the payee on behalf of the payor. It is merely the intermediary. It seems, therefore that it is in the bank's interest (although that interest is common with that of the payee) to satisfy itself as to the validity of the cheque. In the present case, as the party paying the Plaintiff (subsequently to be reimburse by the payor's bank), it is incumbent on the bank to satisfy itself that the payor had money from which they could pay to the Plaintiff. So the Bank takes a risk as it did in this case, to pay the Plaintiff prior to assuring itself that it would be paid by the payer's bank*.

[151] On behalf of the Bank, it was argued that the outcome would have been the same even if the bank had complied with the 15-day hold period since it was not advised of the fraudulence of the draft until after the period. However, the court explained that the negligence alleged is not of the bank failing to comply with their hold period and that if that were the case it would be correct to say there was no causal link between the failure to hold the funds for the period, since in any event, the notice of fraudulence did not come until the period had expired.

[152] The central question was whether the bank acted reasonably and the Court stated that the Bank takes a risk by not ensuring before they release the funds that the payor will pay them and so found the bank's actions to be negligent. The case cited before me was the Supreme Court decision, however, in the course of my research I encountered the decision of the Court of Appeal **Glendon E Rolle (T/A Lord Ellor & Co.) v Scotiabank (Bahamas) Limited** SCCiv App & CAIS No. 112 of 2022 where the Court of Appeal in a unanimous decision upheld the decision of the Supreme Court.

[153] The Court of Appeal found that the bank's action amounted to gross negligence. The Court of Appeal's decision made the position even clearer and found that the bank had full immunity under the SBFSA specifically because a fraudulent item

was involved, and secondly, the SBFSA specifically gave the respondent the right to recover the funds claimed in the counterclaim.

[154] The Court of Appeal specifically addressed the issue of whether the SBFSA agreement which the Appellant signed gave the bank immunity from the negligence claim. The Court took into account the fact that the appellant had full capacity to contract and that, as counsel and an attorney-at-law, would have been fully aware of the danger of signing a document which he did not have the opportunity to review. Although the appellate court found some element of unfairness they did not consider whether the SBFSA was in fact unfair under the Consumer Protection Law because this was not pleaded as part of the appellant's case.

[155] The Court of Appeal also upheld the Judge's finding that "the bank took a risk by making the funds available before conclusively determining the validity of the bank drafts as "significant". They found this to be tantamount to saying that the bank's conduct was undertaken with actual appreciation of the risks involved, but with serious disregard of or indifference to an obvious risk," Evans J who wrote the judgment of the court wrote. "*In my view the bank was operating on the basis that any loss which resulted from the risk which they took would fall on the appellant*."

[156] Although he found that the Bank's actions constituted gross negligence and wilful misconduct and was inconsistent even with the bank's own internal policy, he came to the conclusion that Rolle had agreed to such a position by signing the SBFSA. The SBFSA specifically stated that neither Scotiabank, nor its directors, officers and employees, can be held liable for "a forged, unauthorised or fraudulent use of services, cheque or instruction". Although Evans JA commented that the conclusion seems unfair, he could not say that it is not consistent with the terms of the agreement. Further that, the appellant being of sound mind and meeting all the requirements of capacity, signed the agreement of his own free will. He has not

shown that the agreement breached any law or was inconsistent with any regulatory or industry requirements.

[157] In the instant case, the alleged impugned act on the part of the bank was two pronged, firstly releasing the hold on the funds in the account in two (2) days without it being cleared and secondly releasing the hold before the holding period of ten (10) days had expired. The bank failed to lead any evidence to explain why the funds were first held and then lifted after two (2) days. Taking into account that this transaction involved a large sum of money and the funds were being wired to an international destination, I find that the Bank took a risk when it released the funds after two (2) days without any indication of cleared funds. In this regard they failed to exercise reasonable care.

[158] I also accept that the bank, having first held the cheque, and having advised Ms. Laing that it would be held for ten (10) days failed to adhere to its own standard when it released the hold on the cheque after two (2) days. In this regard, I also find that the bank took a risk when it did so. Where the bank failed to apply its own standard regarding the hold period, this reflects a failure on the part of the bank to exercise due care and in that regard the bank is in breach of the contract to exercise reasonable care. The question for the court is whether it is that breach that led to the loss. The consequence of these risks must be examined firstly from the perspective of whether this is what resulted in the loss and secondly from the perspective as to whether the Terms provided for what would happen where a bank takes such a risk.

[159] If the bank had waited ten (10) days before releasing the hold, then Ms. Laing would no doubt have made the transfer upon the release of funds and which would still take it up to January 21, 2021. It would not have made a difference as the questions surrounding the legitimacy of the cheque first arose on January 25, 2021. The Defendant has failed to show a causal link between the bank's failure to adhere to its own policies and the loss of the funds to the fraudster because

even if the bank had waited the ten (10) days it would not have made a difference since the questions surrounding the cheque did not arise until the ten (10) day hold period had passed. I have found that the cause of the loss was not due to the bank's failure to exercise due care in lifting the hold before ten (10) days had expired

[160] In respect of the Bank having lifted the hold without ensuring clear funds, it is clear that this failure led to Ms. Laing having the benefit of the credited funds in respect of which she requested the wire, which instructions the Bank's agent carried out promptly and this led to the funds being sent to the fraudster. I accept that the bank took a risk and therein failed to exercise due care. However, the bank at the inception of the contract provided for this risk.

[161] The bank contemplated this risk and by virtue of clause 3.1 set out clearly that any credit entry made does not make the funds so credited available for withdrawal until clearing of the funds. This is a clear statement by the bank that it is expected that they can make credit entries in respect of cheques received and that does not make the funds so credited available for withdrawal until the proceeds of the cheque have actually cleared and been realised by the bank. On entering the business relationship with NCB, Ms. Laing agreed to these clauses. She at no point expressed that she did not understand these clauses. Making credit entries in respect of cheques was a contemplation of the bank and inferentially Ms. Laing having signed the agreement. It appears to be a standard service and industry practice which allows a customer to draw on the funds early. The benefit is that the customer can receive a credit even before funds are actually cleared and realised.

[162] This is an important feature of certain clients operating certain types of accounts. The clause stood to benefit the customer in that they could access funds even before it is cleared. It was obviously a risk taken by the bank which they contemplated and provided for by virtue of clause 3.1 The Bank protected itself by retaining the right to reverse the customer's account and charge the account if the

cheque is later dishonoured. The bank went on to protect itself further by virtue of clause 5.2 where it required the customer to take such steps as are necessary to avoid fraud, forgery and other illegal activities in respect to its account, failing which the customer takes the full risk associated with it and shall release, indemnify and hold the bank harmless in respect of any damages or losses arising therefrom. The risk really falls on the customer and that is why it is important for the customer to conduct their due diligence checks on the person who gave them the cheque as they would be in a better position to know the client than the bank.

[163] The Defendant in the instant case finds herself in a similar position to that of Mr. Rolle. She was at the time an attorney-at-law having full capacity to contract. She agreed under clause 1.1 to bear alone the consequences of her actions and to indemnify the bank. Legally speaking, she is obliged to indemnify the bank for the loss occasioned. In the conduct of her account, Ms. Laing has also failed to show that she took the required steps in relation to the transaction with Mr. Sandor to avoid the fraud which he committed on her. I find instead that the direct cause of the loss of United States Two Hundred and Eighty-Six Thousand, Four Hundred Dollars (US$286,400.00) was Ms. Laing's failure to exercise due diligence in respect to the transaction she has conducted before lodging what turned out to be a fraudulent cheque to her account.

[164] The Claimant had pleaded that at best Ms. Laing was duped by the fraudster into believing the fraudulent cheque was valid or at worst she participated in a fraudulent scheme. There has not been a scintilla of evidence to suggest that Ms. Laing was involved in any fraudulent scheme. The clear and undisputed inference to be drawn from the evidence is that she was duped by her client into believing that the cheque was valid.

[165] It may on the face of it appear to be unfair that a customer of the bank who has been duped by a fraudster would be required to pay back the bank all this money but that is what the customer agreed to and it appears to be standard industry

practice that banks use to protect not only themselves but to protect the money other depositors have in the bank. As has been said in banking relationships, prudence requires it.

Whether there was any misrepresentation by the Claimant that caused the Defendant to act to her detriment and whether the Claimant is estopped from recovering the sums lost and whether the Defendant is obliged to hold the bank harmless?

[166] On the question of estoppel, King's Counsel for the Defendant contended that the learned authors of **Paget's Law of Banking 16th Edition**, paragraph 28.14 at page 846 state:

> *A claimant who is prima facie entitled to recover money paid under a mistake will be estopped from doing so if: (a) they made a representation of fact which led the defendant to believe that they were entitled to treat the money as their own; and (b) relying on this representation, the defendant acted to their detriment.*

[167] She also cited Lord Denning in the judgment of **Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd** [1981] 3 All ER 577 where at page 584, he said that the doctrine of estoppel is one of the most flexible and useful tools in the armoury of the law and enunciated the following principle.

> *When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands. (Emphasis added)*

[168] This principle was adopted by the **Jamaican Court of Appeal in Tikal Ltd (T/A Super Plus Food Stores) v Tewani Ltd** [2021] JMCA Civ 38**.** King's Counsel Mrs. Hay submitted that the Claimant would be estopped from recovering money paid on the basis that it made a representation to the Defendant by way of its online banking platform that showed the funds as being available in her account. The Defendant having been told that the cheque was cleared or no hold existed, acted on that information in a manner consistent with her contract with the Claimant. The Defendant acted solely on the basis that there was a representation made to her that there were available funds to complete the transaction. In the circumstances it would be unfair and/or unjust for the Claimant to recover from the Defendant having provided the representation on which she relied.

[169] On behalf of the Claimant, it was contended that the law does not permit estoppel in these circumstances and that Ms. Laing's estoppel defence ought to be rejected. King's Counsel Mrs. Minott-Phillips relied on the case **National Westminister Bank Ltd v Barclays Bank International Ltd and another** [1974] 3 All ER 834 where the court had to consider whether the mere fact that a banker had honoured a cheque on which his customer's signature had been undetectably forged carried with it an implied representation by the banker to the payee that the item was genuine, and decided that it did not. The court said that in deciding whether or not to honour a customer's cheque, at any rate when it is in proper form and the customer's signature appears to be genuine, a bank owes no duty of care to the payee.

[170] The estoppel defence failed and the bank succeeded on its claim for recovery of the funds from the individual who received the benefit. Kerr, J, said:

> *"It seems to me…that Mr Ismail can in the present case only succeed in raising an estoppel against the plaintiffs [National Westminster Bank] if the mere fact of a banker honouring a cheque on which his customer's signature has been undetectably forged carries with it an implied representation that the signature is genuine. I cannot see any logical basis for this. At most, it seems to me, the paying banker is thereby representing no more than that he believes the signature to be genuine…This is different from a*

> *representation that the signature is in fact genuine.* ***Furthermore, I think that the law should be slow to impose on an innocent party who has not acted negligently an estoppel merely by reason of having dealt with a forged document on the assumption that it was genuine****."*

[171] NCB submitted that, applying that reasoning, Ms. Laing's estoppel defence ought to be rejected. On these facts Citibank, NA could not have been considered by NCB as estopped from recovering the value of the "official check' when it realized subsequently that the "official check" was forged. The factual situation here is not dissimilar to the one in **National Westminister Bank Ltd v Barclays Bank International Ltd and another** where the forged cheque was honoured by the paying bank on which it purported to have been drawn. Subsequent to honouring the cheque, the signature on it was discovered to have been forged. In that case the court said

> *"…since in my judgment the mere payment of this forged cheque did not imply any representation on the part of the plaintiffs [National Westminster Bank] that it was in fact genuine, so as to lay the foundation for an estoppel against them on this ground, there is no bar to the plaintiff's right to recover money as having been paid under a mistake of fact."*

DISCUSSION

[172] Traditionally, equity does not intervene unless common law remedies are inadequate. The estoppel defence as explained by Lord Denning stipulates that when the parties proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow them to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[173] I have to determine whether the release of the hold on the cheque caused Ms. Laing to act to her detriment. The **National Westminster Bank** case was relied on by the Claimant for the proposition that the mere payment of this forged cheque did not imply a representation on the part of the plaintiff that it was in fact genuine so as to lay the foundation for estoppel. On my reading of this case, I found it to be distinguishable, firstly because the relationship under consideration was that between a bank and a payee. In this case Ms. Laing was not only the payee but also the customer of the bank with whom the bank held a duty of care. In his dicta Kerr J made this distinction at pages 840 and 841 of the judgment as follows:

> *"I consider, first, that in deciding whether or not to honour a customer's cheque, at any rate when it is in proper form and the customer's signature appears to be genuine, a bank owed no duty of care to a payee. Whether or to what extent a bank decides to give credit to a customer is a matter for the commercial decision of the bank alone and in no way the concern of the payee of any cheque which is honoured. It is settled law that if a bank honours a cheque or bill in the mistaken belief that it has sufficient funds from its customer to do so, then the money cannot be recovered back, because a mistake of this nature only operates between the bank and its customer and not between the bank and the payee: see the authorities in Paget's Law of Banking". Although the matter was not fully argued or pressed before me, I can accordingly see no basis for any suggestion that a bank owes a duty of care to a payee in deciding to honour a customer's cheque, at any rate when this appears to be regular on its fact. But in view of my conclusion* on the facts that the plaintiffs were in no way negligent, the defence of estoppel by negligence and the counterclaim in negligence must in my judgment fail in any event."

[174] Kerr J went on to consider the issue of whether the plaintiffs are estopped from seeking to recover the money on the ground that by paying the cheque they impliedly represented that it was valid and that their customer's signature was genuine, once the payee has acted to his detriment in reliance on the payment. On route to his arriving at a decision, he discussed a number of authorities from the UK, Canada and even from the Commonwealth. The most recent one at the time was a decision of the Supreme Court of Ceylon in **Imperial Bank of India v Abeyesinghe** (1927) 29 Ceylon L.R. 257. He said the utmost that could be taken to be established was *'that the proposition is good as between a bank and its customer, but in the absence, at all events, of any negligence in actually honouring*

the signature I do not think that any duty or obligation towards a third party in the situation of the defendant can be founded upon it". This reinforces my view that there is a distinction to be drawn between the duty owed by a bank to its customer vis a vis that owed to the payee.

[175] I have found the action of the bank in lifting the hold when it did to be in breach of the duty to exercise due care, however, I have also found that this was not what resulted in the loss but rather that the cause of the loss was the failure on the part of Ms. Laing to exercise due diligence. Essentially what took place in the instant case is that NCB decided to give Ms. Laing credit. This takes us back to the contractual terms and conditions. This was contemplated for in clause 3.1 of the Terms. Inherent in that clause was an indication that even when credit entries are posted to the customer's account it is not synonymous to having cleared funds. Any instructions or accessing of the funds by the customer would be done at the customer's risk with the knowledge that they would have to indemnify the bank if it turns out that the cheque is not cleared.

[176] I could not in these circumstances find that the conduct of the bank amounted to an implied representation that the funds are cleared. There is also no evidence that there was any communication to Ms Laing that the funds were cleared. In order to ground a claim for estoppel. Ms. Laing would have to prove that there was a representation by the bank either direct or implied. The conduct of the bank could not be interpreted as an implied representation intended to induce Ms. Laing to adopt a course of conduct which resulted in her detriment and loss. Ms. Laing took that risk under circumstances where she should have been aware of the consequences, having previously agreed the Terms. She cannot succeed in the Defence of estoppel.

Whether the Defendant was unjustly enriched by the transaction?

[177] The Claimant's claim for unjust enrichment was claimed as an alternative to breach of contract. Strictly speaking, since I have found that the Defendant was in breach of the contract, there is no need to consider whether the Defendant was unjustly enriched by virtue of the credit entry being made to her account, but I will say a few words on it. It is asserted that Ms. Laing has unjustly enriched herself at NCB's expense by paying money she sourced from that false credit to her "client" in circumstances where NCB's account with its correspondent bank has been debited for the unpaid item of United States Two Hundred and Eighty-Six Thousand, Four Hundred Dollars (US$286,400.00). It was submitted on behalf of the Claimant that it has sustained loss in the amount of United States Two Hundred and Eighty-Six Thousand, Four Hundred Dollars (US$286,400.00) resulting from its customer, Ms. Laing, breaching her contract with the bank causing it to suffer loss and damage in that amount, and in her being unjustly enriched in that amount.

[178] The Defendant contended that she realised no benefit from the cheque but rather incurred significant loss. It was argued that the Claimant has failed to identify the basis on which the claim is made. In this case, it cannot reasonably be argued that the Defendant's receipt of the funds was not thought by all concerned to be her entitlement. As the evidence revealed, the transaction proceeded only because the Claimant permitted it. She contended that the law as it relates to unjust enrichment must be considered in a similar manner as was done in the case **Morris Dean v Bevon Morrison and Caribbean Vibes Limited** [2023] JMCC COMM 35. At paragraph 9 of the judgment, Palmer Hamilton J states:

> *[9] I wish to note that the Claimant's claim for unjust enrichment and restitution walk hand in hand. As such, the law relating to both will be dealt with together. In so doing, I rely on the following excerpt from the Halsbury's Laws of England, Volume 88 (2019) paragraph 410 which deals with the structure of an unjust enrichment claim and stated that*
>
> > *It is generally accepted that there are four elements of an unjust enrichment claim: (**1) the defendant must have been enriched; (2) the enrichment must have been at the expense of the claimant; (3) that enrichment must have been unjust; and (4) there are no applicable defences. The***

claimant must satisfy the court that the first three elements of the claim have been satisfied.

[179] The Defendant also placed reliance on **Canadian Imperial Bank of Commerce v Donald Desrochers** 2020 ONSC 7629 where the Claimant withdrew and encashed funds from the CIBC account of a company in which he was an officer. He also lodged the funds to the account of another company with which he was associated. He knew that to withdraw the funds, two officers' signatures were needed. The bank sued him to recover the funds on the basis of mistake of fact seeking restitution by means of unjust enrichment. Desrochers defended to say he was an innocent recipient of the funds. The Court ultimately rejected the defence but explored what must be proved at paragraphs [34] to [42]. Ultimately, the defence will prevail if the payment made to the Defendant was as a result of the Defendant's right to receive it and there was no evidence that the Defendant knew she was not entitled to receive the payment.

[180] It was submitted that Ms. Laing fits in the category of what is set out as a defence in **Desrochers**. She received funds which she immediately paid out of her account on two (2) occasions. The Defendant believed that the Claimant's representations that the funds were available for wire and changed her position by sending out those funds from her account. What remained was made the subject of a lien by the Claimant. If good faith is queried, the Court may look at the Defendant's efforts to retrieve the funds when the Claimant asked for her assistance.

DISCUSSION

[181] The funds credited to the Defendant's account were initially as a result of her right to receive it however, as it turned out she had no right to retain it after the cheque was established to be a fraud. It is difficult to see how the Defendant is enriched as none of the funds remain accessible to her. The funds sent to her client have been lost to her and the funds currently in the Defendant's account in the sum of

some United States Eleven Thousand Eight Hundred and Eighty-Eight Dollars (US$11,888.00) are not accessible to her as the bank has a hold on it. In those circumstances, the Claimant would be hard pressed to prove unjust enrichment by the Defendant.

Collective Responsibility

[182] During the submissions I had enquired of the parties if collective responsibility arises. King's Counsel Mrs. Hay in her submissions contended that although the law recognises collective responsibility as a feature of contract law, it does not arise as there was a failure to plead it. She further contended that there is nothing on the Claimant's pleadings that give rise to contributory fault in relation to the issue involved. I agree with the submission and see no basis to consider the question of collective responsibility.

The Counterclaim

[183] In the Counterclaim, the Defendant claims damages for breach of contract and for Negligence and Negligent Misstatement. Although I found that the Claimant failed in its duty to exercise reasonable care in lifting the hold before ensuring the cheque was cleared and before the expiration of the ten (10) days hold period, I was not satisfied on a balance of probabilities that it was this failure that resulted in the loss sustained. It is noted that it is only the Claimant that at this point has proved that it has sustained a loss. The Defendant has not sustained any financial loss. In any event, I have also found that the Defendant having agreed to the Terms she is bound to indemnify the Bank in respect of the loss it sustained. Based on my findings on the issue of negligence, negligent misstatements and breach of contract, the Defendant's counterclaim fails.

[184] The Defendant also asserts that the Claimant caused or permitted a lien on her account and caused impairment of her business facility with NCB. However, in light

of my finding that she is required to indemnify the bank, the Bank would be justified in freezing her accounts until she makes good on the outstanding sums.

[185] She also complained that unauthorised changes were made to her account, by changing her client trust account to a personal account. Further, the Claimant also changed without authority, the personal account of the Defendant to a client trust account. These unauthorised charges exposed the Defendant to disciplinary sanctions with the General Legal Council for comingling of client trust money. The Defendant accepts that the changes were subsequently reversed.

[186] During cross-examination Ms. McKenzie reluctantly admitted that unauthorised changes were made to the Defendant's account. On behalf of the Defendant, it was submitted that the Defendant is in breach of clause 1.7 of the contract. However, the Claimant has not identified in what manner clause 1.7 is breached and it is not clear to me where the breach arose.

[187] There is something inherently wrong with changing the designation of a customer's account behind the back of the customer and to do so in the case of a client account could have put the Defendant in jeopardy of disciplinary sanctions from the General Legal Council. However, the Claimant has not presented any evidence that she was subject to any sanctions or suffered any loss as a result of the Claimant's action. Therefore, this claim also fails.

[188] My orders are as follows:

1. Judgment on the Claim is for the Claimant against the Defendant/Counterclaimant.
2. Damages awarded in the sum of US$286,400.00 or in the alternative the Jamaican Dollar equivalent using the Bank of Jamaica average selling rate for the US dollar applicable on the date of payment.
3. Interest on such damages at a rate of 3% per annum from the date of judgment to the date of payment.

4. The Defendant's Counterclaim fails. Judgment on the Counterclaim is for the Claimant.
5. Costs to the Claimant to be agreed or taxed.

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Stephane Jackson Haisley
Puisne Judge