[2019] JMSC Civ 179

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008HCV00715

BETWEEN	**BRANCH DEVELOPMENTS LTD T/A IBEROSTAR ROSE HALL BEACH HOTEL**	**CLAIMANT**
AND	**THE BANK OF NOVA SCOTIA JAMAICA LIMITED**	**DEFENDANT**

IN OPEN COURT

Pamela Benka-Coker QC and Brian Moodie instructed by Samuda & Johnson for the claimant

Michael Hylton QC, Shanique Scott and Melissa McLeod instructed by Michael Hylton and Associates for the defendant

March 9, 10, July 31, 2015 and September 6, 2019

Applicability of Account Agreements – Generally, later contracts rescind or vary previous contracts in relation to the same subject matter – Most recent Agreement applicable – No basis to have recourse to the common law – Implied Plea of non est factum – No duty to explain effect of Agreements – Fraudulent cheques containing forged signatures – Account debited based on the payments on fraudulent cheques – Alleged breach of contract – Express provisions covering customer's duties – Effect of forgery clause – Forgery clause neither unreasonable nor ambiguous – Scope of verification/conclusive evidence clause – Effect of failure to maintain adequate systems and controls to prevent and detect fraud and monitor conduct of employees – No breach of contract – Alleged breach of duty of care – No fiduciary relationship in existence – Any duty of care owed in tort cannot exceed the contractual duty – No tortious liability

D. FRASER J

BACKGROUND

[1] The claimant, Branch Developments Limited t/a Iberostar Beach Hotel (Iberostar) is the owner and operator of the Iberostar Rose Hall Beach Hotel with registered offices at Rose Hall, Little River, Montego Bay in the parish of St. James. The defendant, the Bank of Nova Scotia Jamaica Limited (BNS) is a commercial bank with branches throughout Jamaica, and has its registered offices at the corner of Duke and Port Royal Streets, Kingston.

[2] Between 2004 and 2007, Iberostar opened four accounts at BNS' Sam Sharpe Square, Saint James branch, including a Jamaican dollar current account numbered 800438. During that period, Iberostar and BNS entered into three agreements in relation to this account, each headed "Agreement Regarding Operation of Account". They were dated respectively, September 20, 2004, August 12, 2005 and June 12, 2007 (the Agreements).

[3] These agreements each provided that any two of three persons, namely, Iberostar's financial manager Fransisco Andreu Mestres ("Mr Mestres"), project manager Javier Bethencourt ("Mr Bethencourt") and the Engineer Supervisor, could sign cheques on the 800438 account. BNS was provided with specimen signatures of Mr Mestres and Mr Bethencourt. The project of which Mr. Bethencourt was manager was a hotel being constructed by Iberostar in Saint James.

[4] Between May and July 2007 more than 2,200 cheques were drawn on the 800438 account and honoured by BNS. The claim concerns 75 of these cheques that Iberostar contends were fraudulently prepared by two of its employees and which had forged signatures of Mr. Mestres and Mr. Bethencourt. The impugned employees were Janice Carruthers, the accounts payable clerk for the construction, and Carla Campbell, the accounts payable clerk for the hotel operations.

[5] BNS debited the sum of $34,439,841.26 from account 800438 having payed out these sums on the fraudulent cheques. Iberostar asserts that the forged cheques were unauthorised and should not have been honoured by BNS. BNS maintains that its action in paying out these sums was justified and protected in law based on the terms of the agreements between the parties. Iberostar on the other hand contends that based on the terms of these agreements and the breach of the duty of care which BNS owed to it, BNS is liable to repay the sums paid out, less the amount it recovered from an associate of Ms. Carruthers and Ms. Campbell.

THE CLAIM

[6] By claim form filed 13 February 2008 Iberostar claimed the following relief:

i) A declaration that the purported debit of the 800438 account held by the claimant, with the defendant bank, was unauthorized and of no effect;

ii) $34,439,181.26 being damages for breach of contract and/or negligence;

iii) Costs and Attorneys-at-Law Costs;

iv) Interest on the said amount payable on the 800438 account;

v) Alternatively, interest pursuant to the Law Reform (Miscellaneous Provisions) Act on the amount found to be due to the claimant at such rate and for such a period as the Court shall think fit;

vi) Such further or other relief as to this honourable court may seem just.

THE ISSUES

[7] The issues for determination for the court relate both to matters external to the Agreements as well as those which concern the interpretation and effect of the Agreements themselves. They are:

i) Was BNS in breach of a duty to explain the content or effect of the Agreements to Mr. Mestres and Mr. Bethencourt or to advise them to seek legal advice?

ii) Were the 75 cheques that Iberostar contends were fraudulently prepared by two of its employees, forged?

iii) Were all three (3) Agreements in force at the same time and therefore contradictory, confusing and uncertain?

iv) What is the effect of the "Forgery Clause" in the Agreements?

v) What is the effect of the "Verification/Conclusive Evidence Clause" in the Agreements?

vi) Did BNS negligently cause loss to Iberostar by making payments on forged cheques from account 800438?

vii) What damages, if any, is BNS liable to pay to Iberostar?

THE EVIDENCE

[8] A significant portion of the documentary evidence in this matter was tendered by agreement. These include:

i) The Agreements;
ii) Letter dated May 17, 2007 from Iberostar signed by Mr. Francisco Andreu, Financial Manager and authorized signatory of Branch Developments Limited by which BNS was advised that, "Ms. Carla Campbell and Miss Janice Carruthers are authorized to confirm bank transfers on behalf of Branch Developments Limited until further notice.";
iii) The 75 forged cheques (the relevant cheques);
iv) The BDL Verification Log, June 2007;
v) 12 genuine cheques drawn on account 800438 during the same period and signed by Mr. Mestres and Mr. Bethencourt

[9] As necessary, reference will also be made to the oral evidence of the witnesses who testified in this matter, during the analysis of the issues identified.

ISSUE I: Was BNS in breach of a duty to explain the content or effect of the Agreements to Mr. Mestres and Mr. Bethencourt or to advise them to seek legal advice?

[10] In skeleton arguments settled by Mrs. Benka-Coker QC for Iberostar, it was submitted that account 800438 was opened and in operation prior to representatives of BNS presenting the documents governing the operation of the account to representatives of Iberostar. Queen's Counsel also submitted that at the time these documents were produced by BNS:

> [T]heir content and purport was not explained to the representatives of [Iberostar], although the representatives of [BNS] well knew that English was not the first language of [Iberostar's] representatives, and that they did not understand or communicate very well in English.
>
> The representatives of [BNS] did not advise the representatives of [Iberostar] to seek legal advice on the contents and effect of the documents before signing them.

[11] These submissions were made in a context where counsel for Iberostar also advanced that The Agreements contain conflicting and contradictory provisions which make the rights and responsibilities therein unclear and confusing.

[12] In submissions in response, Mr Hylton QC for BNS, contended that Iberostar never pleaded that its representatives never understood or communicated well in english and therefore did not understand the Agreements; in essence a plea of *non est factum*. Further that Iberostar also did not claim BNS owed or breached a duty to explain The Agreements to Iberostar's officers. Therefore, Queen's Counsel argued, it was not open to Iberostar to belatedly raise those issues. Mr. Hylton advanced that even if those issues had been included in the pleadings, Iberostar still could not successfully rely on them. He relied on **Halsbury's Laws of England**

(2012) and the case of ***Jamaica Citizens Bank Limited v. Leon Reid*** (1995) 32 JLR 1.

[13] Mr. Hylton also submitted that a bank has no duty to explain agreements to customers. For this submission, he relied on ***Manor Windsor Realty Ltd v The Bank of Nova Scotia*** (2011) ONSC 4515.

Analysis

[14] As pointed out by Mr. Hylton, Iberostar did not raise in their pleadings any concern that either Mr. Metres or Mr. Bethencourt had a limited facility with the English language that would have affected their ability to understand the documents presented to them on behalf of BNS. Neither was there any reference in the statement of Mr. Bethencourt or the statement or viva voce evidence of Mr. Mestres raising that issue. I therefore agree with the submission of Mr. Hylton that the issue was raised too late.

[15] He did however go on to submit that even if it was properly raised, it would on the facts, have been bound to fail. I agree with Mr. Hylton that the effect of the contention that English was not Iberostar's signatories' first language and they did not understand the Agreements, amounts to a plea of *non est factum.*

[16] In **Halsbury's Laws of England** (2012) Volume 32 at paragraph 269 the following is stated concerning this plea:

> The plea of non est factum ('mistaken delivery'), or nient son fait, is that by which a man sought to be charged in some claim or proceeding upon a deed alleged to have been delivered by him avers that it is not his deed. This plea is only available where the party sued can show either that there never has been, or that there is not existing at the time of the plea, any valid execution of the deed on his part. If a man taking reasonable care has nevertheless been induced by the machinations of some other person (whether a party or a stranger to the deed) to execute a deed under a substantial mistake (not merely as to the legal effect of known contents of the deed) such that he believed it to be fundamentally different in substance or in kind from what it was, so that when he executed it his mind did not accompany his outward act, he may plead that for this reason that the deed

> is not his deed, and if this plea is established by the evidence, the deed will be altogether void from the beginning. A deed so procured is no more the deed of the person who was thus induced to execute it than is a forged deed. (Emphasis added).

[17] In ***Jamaica Citizens Bank Limited v. Leon Reid*** the Court of Appeal emphasized the high threshold of proof that must be attained to establish the plea. At page 5C it was stated:

> There is a heavy burden of proof on the defendant who is relying on the plea of *non est factum*. He must show that he acted in a reasonable manner. Here is a businessman and company director who deals in real estate yet he is asking the court to believe that he does not know what is meant by security or collateral in relation to his land...
>
> The defendant was not induced to sign a document of a class or character different from that which he intended to sign. He knew that what he signed was meant to deal with his land.

[18] At the time of trial Mr. Mestres was extensively questioned in English and did not once complain of any difficulty in understanding what he was being asked. Nor did the court or counsel, it appeared, have any difficulty understanding his responses. That fact by itself is however by no means conclusive as the account was operational between 2004 and 2007 several years before the trial commenced in 2015. It is conceivable that Mr. Mestres' facility with the English language could have grown substantially over the period between the opening of the account and the time of trial.

[19] The unsustainability of this complaint is however evident from the analysis. There is not one jot or tittle of evidence that Mr. Mestres or Mr. Bethencourt did not understand English or know what they were signing when they executed the Agreements. Conjecture and speculation cannot substitute for evidence. Further, as submitted by counsel for BNS, there is nothing in the evidence to show that they asked for or that BNS undertook to give an explanation of the terms of The Agreements. Mr. Mestres and Mr. Bethencourt having been given the positions they held in the claimant company were men of business, obviously deemed fit to

operate in the Jamaican environment. There is therefore no basis for the contention that they did not or may not have known, the nature of what they were signing. The high evidential threshold to support a finding of *non est factum* could not even remotely be said to have been met. Therefore had it been pleaded, it would have been doomed to fail.

[20] The next question for consideration is, did BNS have a duty to explain to Messrs Mestres and Bethencourt the effect of the Agreements before they signed on behalf of the claimant? In ***Manor Windsor Realty Ltd v The Bank of Nova Scotia*** very similar arguments to those advanced by BNS on this point were unsuccessfully deployed. In that case the claimant was defrauded by its bookkeeper, who over a period of 5 years, fraudulently generated and encashed cheques in her name. The claimant sought to recover its losses from the bank, on the basis that it should not have encashed the cheques. The claimant's representatives complained that at the time of signing, the bank did not bring to their attention certain specific terms (which were similar to the present clauses 7 and 9 of the Agreements). The claimant also contended that overall, its representatives who signed the banking resolution did not fully appreciate the nature and effect of what they were signing, and thus an agreement had not really been concluded with the Bank.

[21] Concerning whether the Bank had a duty to point out the specific terms of the agreement the court held at paragraph 40 that:

> The Bank had no obligation to do so in this strictly commercial relationship. As the court said in *Bank of Montreal v Witkin*, the Bank is entitled to put its own interests ahead of any conflicting interests of its customer. This is the case unless the Bank can be found to be in a fiduciary relationship with the customer. Neither Mr Mustac nor Mr Girard is under any legal disability. Neither is a vulnerable party. Neither was coerced into signing the Financial Services Agreement. There is no suggestion the Bank owed them any fiduciary duty in the circumstances of this case.

[22] Applying the principles from ***Manor Windsor Realty Ltd,*** I agree with counsel for BNS that Iberostar has not shown that the circumstances gave rise to a fiduciary

relationship between itself and BNS. Therefore, only a commercial relationship was formed between Iberostar and BNS. BNS was accordingly entitled to put its own interests ahead of any conflicting interests of Iberostar, and had no duty to explain the nature and effect of the clauses.

ISSUE II: Were the 75 cheques (the relevant cheques) that Iberostar contends were fraudulently prepared by two of its employees, forged?

[23] Section 3(1) and the relevant part of section 3 (2) of the **Forgery Act** provide as follows:

> (1) For the purposes of this Act "forgery" is the making of a false document in order that it may be used as genuine, and, in the case of the seals and dies mentioned in this Act, the counterfeiting of a seal or die; and forgery with intent to defraud or deceive, as the case may be, is punishable as in this Act provided.
>
> (2) A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by, or on behalf or on account of a person who did not make it nor authorize its making; or if, though made by, or on behalf or on account of, the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein;…

[24] In closing arguments, counsel for BNS indicated that while the allegations of fraud and forgery were not admitted in the Defence filed by BNS, it was accepted that Iberostar had led evidence that the signatures had been forged and that BNS had not led any evidence to the contrary.

[25] Accordingly, the court has a basis to find and does find that the signatures of the signing officers of Iberostar were forged on the relevant cheques, allegedly by Janice Carruthers and Carla Campbell.

ISSUE III: Were all three (3) Agreements in force at the same time and therefore contradictory, confusing and uncertain?

The Submissions

[26] In skeleton arguments filed on behalf of the claimant, it is noted that the Agreements dated September 20, 2004 and August 12, 2005 commence by stating that the operation of each account held by the customer with the bank at the date of the Agreement or in the future, at any branch of the bank shall be the subject of the terms and conditions contained in those Agreements. It is further highlighted that by contrast the final Agreement dated June 12, 2007, commences by stating that it is ***"subject to any written agreement between the customer and the bank to the contrary".*** (emphasis in original). Thus counsel contended that the 2007 Agreement contemplated the existence of other written agreements involving BNS and Iberostar and that there could be differences between the 2007 Agreement and other still subsisting Agreements.

[27] Counsel also submitted that none of the Agreements expressly revoked any prior Agreement. Therefore based on the wording of each Agreement, it is contended by the claimant that all three Agreements would have been in force at the same time. It was further submitted that in light of the differences in clause 7 (Verification of Account/conclusive evidence clause) in all three Agreements, the claimant's obligations in the case of fraud/forgeries are uncertain at best and vary depending on which agreement is deemed to be applicable. A detailed cross-analysis of each clause 7 in the respective Agreements was conducted and attempts made to demonstrate the interpretational quagmire that would result from the Agreements being "co-operative".

[28] Counsel further argued that as BNS drafted the Agreements if there were contradictions, inconsistencies and ambiguities between the Agreements in relation to clause 7, the conclusive evidence clause then the *"contra proferentum"* rule would apply and the provisions would have to be construed against the

interests of BNS. In those circumstances, counsel submitted that none of the conclusive evidence clauses in any of the Agreements would apply to protect BNS from the claimant recovering the sums paid out on the forged cheques. Instead the common law principles as stated in the cases of ***London Joint Stock Bank Limited v Macmillan and Arthur*** [1918] AC 777 and ***Greenwood v Martin's Bank Limited*** [1933] AC 51, would apply.

[29] Counsel for BNS on the other hand submitted that there was no conflict or overlap between the Agreements, as the circumstances of the case show that, at any point in time, it was the most recent Agreement that governed the Iberostar Account. Counsel submitted this conclusion can be arrived at in three ways, each of which the court will later address.

Analysis

[30] It is not surprising that counsel for Iberostar sought to argue that the Agreements do not apply and thus there would need to be recourse to the common law to determine the rights and obligations between the parties. The common law position which is of some vintage, though placing some burden on the customer is still far more favourable to Iberostar than the strict terms of the modern Agreements. ***London Joint Stock Bank Limited*** settled the principle that, *"A customer of a bank owes a duty to the bank in drawing a cheque to take reasonable and ordinary precautions against forgery, and if as the natural and direct result of the neglect of those precautions the amount of the cheques is increased by forgery, the customer must bear the loss as between himself and the banker."*

[31] Then later ***Greenwood*** decided that a customer is obliged to inform the bank of any forged payment order as soon as he becomes aware of it. If he does not and the bank's position is thereby prejudiced, he adopts the cheque and is estopped from asserting the forgery.

[32] However, the submissions of counsel for Iberostar on this issue do not find favour with the court. Rather, having considered the competing positions I find I am in

agreement with each of the three bases on which counsel for BNS submitted that at any point in time, it would be the most recent Agreement that governed the Iberostar account. Consequently, there is no basis to have recourse to the common law to determine the relationship between the parties.

[33] In respect of the first basis, I agree that generally, a later contract is deemed to have either rescinded or varied a previous contract or contracts, where they each govern the same subject matter.

[34] In Halsbury's Laws of England Vol. 9(1) reissue, Contracts, it is pointed out at paragraph 1019 that a consensual variation of a contract occurs, *"…where the parties to a contract agree in a subsequent simple contract to vary its terms as between the parties to the original contract by way of a second contract"*. Then at paragraph 1022 it is stated that *"…where a contract is varied it operates according to the variation and the original terms cannot be set up by one of the parties against the other."* As counsel for BNS submitted, a similar rule applies to statutes which is reflected in the latin maxim, ***"****Leges posteriores priores contrarias abrogant"* which means, subsequent laws repeal those which were previously enacted to the contrary.

[35] Each of the three Agreements is headed **"**Re Operation of Account" and each deals with the same subject matter, though with a few changes to some clauses. Given the nature and substance of these documents, I agree with Mr. Hylton that it is clear that the parties intended to amend their agreement with effect from the date of each new document. The effect of this would be that each Agreement would supplement and replace the one before.

[36] The court also agrees with the second submission of counsel for BNS that the words *"subject to any written agreement between the customer and the Bank to the contrary"* in the third Agreement do not mean that any of the two previous Agreements dealing with the same subject matter would also simultaneously apply. It is only reasonable to interpret them to mean that if there were other

agreements in relation to a specific item or area such as in relation to standing orders or letters of credit, those specific agreements would not be altered.

[37] The cogency of the second submission is brought into full relief by the third supporting argument put forward by counsel for BNS which is that, if all three Agreements were simultaneously in force, that would lead to a commercial absurdity and be repugnant to the clear intention of the parties. A situation that, as indicated in the skeleton arguments filed on behalf of Iberostar, would lead to Iberostar having, *"to sift through the competing clauses to determine its rights and obligations under the various Agreements".* This would be an absurd outcome devoid of good commercial sense.

[38] I therefore find that the 2004 Agreement was replaced by the 2005 Agreement, which was then replaced in turn by the 2007 Agreement. Accordingly, only one of these three Agreements governed the operation of the account at any point in time. Hence as of August 12, 2005 the 2005 Agreement applied to the operation of the Iberostar Account, and as of June 12, 2007 the 2007 Agreement applied. Consequently, when the relevant cheques were drawn, (between May and July, 2007), the 2005 Agreement was applicable up to June 11, 2007; then from June 12, 2007 the 2007 Agreement was in effect.

[39] It follows from the above analysis that the "interpretational quagmire" referred to above does not arise. Though there are differences in the wording of the verification and other clauses in the Agreements, no conflict, uncertainty or contradiction between the Agreements is extant, as at all times only one Agreement was operative. The rights and obligations of the respective parties at any point in time are thus to be discerned from an interpretation of the particular Agreement that was applicable then.

ISSUE IV: What is the effect of the "Forgery Clause" in the Agreements?

[40] Clause 9 of the 2005 Agreement states as follows:

> (a) The Customer shall:
>
> (i) maintain systems and controls sufficient to prevent and detect thefts of instruments, forgeries or fraud, unauthorized signatures and any loss resulting from any of these uses, and
>
> (ii) monitor the conduct of employees and agents having banking functions.
>
> (b) The Bank shall not be liable for any loss due to a forged or unauthorized signature, unless the Customer proves to the satisfaction of the Bank that:
>
> (i) The forged or unauthorized signature was made by a person who at no time was the customer's representative, employee or agent,
>
> (ii) The loss was unavoidable despite compliance with (a) above, and
>
> (iii) The loss was unavoidable despite steps to prevent forgery, unauthorized signatures and any loss resulting therefrom.
>
> (Emphasis supplied)

[41] Clause 9 of the 2007 Agreement is in identical terms, save that 1) sub-clause a (ii) does not include the words, "having banking functions"; 2) sub-clause b includes the words "to the satisfaction of the bank"; and 3) it does not include sub-clause (b) (iii). Counsel for Iberostar maintained that as Iberostar had hundreds of employees, the 2007 clause was too wide and the only reasonable interpretation in the context of all the Agreements was that the required monitoring would have to have been restricted to employees and agents having banking functions.

[42] Counsel for Iberostar further submitted that though there are these differences in wording, the substantive provisions of clause 9 in each Agreement, may have the same effect. Counsel advanced that Iberostar complied with clause 9 (a) (i) and (ii) by maintaining appropriate systems and controls. However, it was also contended that sub clause 9 (b) was unreasonable and made it difficult to

determine exactly what obligations Iberostar had assumed and what evidence should be provided in its attempts to fulfill this obligation. Counsel therefore maintained that sub clause 9 amounted to a "limitation clause" which was not clear and unambiguous and hence the *contra proferentum* rule should be applied; the effect of which would be that the claimant should not be called upon to comply with those provisions. Counsel also submitted that the uncertainty related to clause 7 together with the submissions in relation to clause 9 should support the Agreements being construed against BNS.

[43] Counsel for BNS on the other hand submitted that clause 9 of both Agreements required Iberostar to prove two things:

(a) the forged signatures were not made by its representative, employee or agent, and
(b) Its loss was unavoidable despite:
  (i) having systems in place sufficient to prevent and detect fraud and forgeries, and
  (ii) monitoring its employees.

[44] Counsel argued that the clause in each agreement was unambiguous and enforceable. Counsel maintained that Clause 9 was impossible not of performance but of escape, and that Iberostar had proven neither of the two requirements necessary to make BNS liable for its loss.

[45] Both counsel cited the case of ***Tai Hing v. Liu Chong*** [1985] 2 All ER 947, a leading authority from the Judicial Committee of the Privy Council on the corresponding rights and obligations of bankers and their customers, in relation to the prevention and detection of forgeries.

Analysis

[46] In ***Tai Hing*** an accounts clerk employed to a customer of the defendant banks forged over 300 cheques drawn on the customer's accounts. The accounts clerk

was trusted by the customer, was largely unsupervised over a period of six (6) years and was in a position to manipulate the accounts for which he was responsible. Further, the customer's system of internal controls was unsuitable to prevent or detect fraud.

[47] At the level of the Judicial Committee of the Privy Council, applying the cases of ***London Joint Stock Bank Ltd v Macmillan*** and ***Greenwood v Martins Bank Ltd,*** it was held, among other things that 1) in the absence of express agreement to the contrary, the customer was not under a duty to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented for payment, nor was he under a duty to check his periodic bank statements so as to enable him to notify the bank of any unauthorised debit items. The only duty the customer had was to refrain from drawing a cheque in such manner as to facilitate fraud or forgery and to inform the bank of any unauthorised cheques purportedly drawn on the account as soon as he, the customer, became aware of it. 2) In order to impose an express obligation on a customer to examine his monthly statements and to make those statements, in the absence of query, unchallengeable by the customer after the expiry of a time limit, the burden of the obligation and of the sanction imposed had to be brought home to the customer. As the contracts entered into between the banks and the customer did not do that, the common law principles applied and the banks were liable to refund the sums paid out on the fraudulent cheques with interest.

[48] In the instant case, contrary to the situation in ***Tai Hing*** there are express provisions covering the duties of the customer to employ systems to reduce the possibility of forgery and limiting the banks liability in the event such systems are absent or ineffective. Lord Scarman writing for the Board in ***Tai Hing*** recognized the possibility of banks legitimately requiring customers to undertake this wider responsibility beyond the limited scope under the common law, when at page 954 he stated, "…*it is always open to a banker to refuse to do business save on express terms including such a duty".*

Did Iberostar have appropriate Systems and Controls as required by clause 9a?

[49] The basis on which the claimant contended that it maintained appropriate systems and adequately monitored its employees was that Mr. Mestres gave evidence of an elaborate computerized system with passwords, checks and balances, with monthly audits designed to maintain the integrity of the system.

[50] However as pointed out by counsel for BNS the requirement was for a system that both prevented and detected forgeries, and the computer system with passwords linked to a server in Spain, could only potentially prevent forgeries or fraud by non-employees, but did not prevent or even detect fraud by Iberostar's own employees. A number of significant weaknesses in Iberostar's system, disclosed in the evidence, were identified by counsel for BNS as follows:

i) The alleged fraudsters were in entire control of every step of the cheque payment and verification process including:

(1) Verifying source documents (such as invoices) to support the paying out of cheques;

(2) Posting/inputting invoice data in the system;

(3) Posting/Keying in of supplier information in the system;

(4) Keeping custody of both the special printer for printing cheques and handling pre-numbered blank cheques;

(5) Recording the cheques printed in an Excel spreadsheet (used as a database for verification purposes and for cheque printing);

(6) Printing cheques;

(7) Posting cheques/payments to the system;

(8) Distribution of cheques to suppliers; and

(9) Verifying (along with other members of the accounts department) the validity of cheques when the Bank called.

(Before going on to list the other weaknesses it should be noted that the weaknesses outlined at i) should be viewed in the context of the fact that neither BNS nor any other institution had or utilised any method of electronic verification of signatures. That was revealed by Mr. Stedric Thompson, witness for BNS who was the Manager at the Scotiabank Sam Sharpe Branch at the time the alleged fraud was perpetrated, in response to questions asked by the court and Mr. Hylton QC.)

ii) The fraud would not be detected when BNS called to verify the cheques, since those verifying the cheques would rely on the information in the system, which the alleged fraudsters had posted.

iii) Even with the elaborate computer password system, there was no way to tell from the system that a particular payment was fraudulent.

iv) Ms. Sommerset the Chief Accountant and supervisor of the alleged fraudsters could only detect a problem after cheques were cashed. She would only be involved in the process when doing bank reconciliation and only unknown payments would be queried to the bank. However, none of the alleged forged cheques created by the alleged fraudsters would have been “unknown” as the bank reconciliation would have been done using the information in the computer system posted by the alleged fraudsters.

v) As Mr. Mestres was also not involved in the cheque generation process except for signing, he would not know until a cheque was cashed and he reviewed the returned cheques, if his signature had been forged.

vi) No evidence was adduced of anyone monitoring Ms. Campbell or Ms. Carruthers (the alleged fraudsters) during the cheque generation process.

vii) In just over two weeks after they commenced working for Iberostar, the alleged fraudsters were able to learn the system and find a way to defraud it.

viii) The alleged forgery was discovered by accident not by any mechanism to prevent or detect fraud. The alleged forged cheques were only reviewed because payments had exceeded budgeted costs and there were signs of double payments not because of concerns about forgery.

ix) Iberostar recognized that the system was flawed, as it has now been "improved" since the fraud by having different people do different things.

[51] The observations and submissions of counsel for BNS find significant support in the previously cited case of ***Manor Windsor Realty Limited v The Bank of Nova Scotia***, which is very similar to the instant matter. In ***Manor*** the claimant's bookkeeper who had defrauded the company, had several responsibilities and was not monitored in fulfilling her duties. She handled all the bookkeeping, paid bills and balanced the firm's bank accounts. Clause 3.2 of the banking agreement between Manor and The Bank of Nova Scotia outlined at paragraph 25 provided as follows:

> You agree to maintain security systems, procedures and controls to prevent and detect: theft of funds, forged, fraudulent and unauthorized instructions and electronic transfer of funds, losses, due to fraud or unauthorized access to the service.

[52] At paragraph 6, the cheque generating process was described as follows:

> When invoices came in, Mr Mustac [the manager] would review them, initial them to signify they should be paid and give them to Styles [the fraudster] to pay. Manor's cheques required two signatures, one from each of Mr Mustac and Mr Girard…. Mr Mustac kept the cheques in a locked drawer to which only he and Styles had access. Once Mr Mustac approved an invoice for payment he would give the invoice to Styles along with one of the cheques with Mr Girard's signature. Styles would then fill in the cheque on the computerized accounting system. The system would enter the debit in the company's ledger. Styles would then print the cheque and return the completed cheque along with the invoice to Mr Mustac. Mr Mustac would

> then sign the cheque, furnishing the second required signature. Then Styles would mail the cheque out.

[53] At paragraph 27 the court assessed and considered whether ***Manor*** had proper systems in place to detect and prevent fraud and found as follows:

> While Mr Mustac and Mr Girard thought the requirement of two signatures on every cheque was a reasonable security precaution, they took no other steps to monitor or supervise Ms Styles, Although Manor's accountant apparently prepared financial statements every year, he did not perform an audit, and I have no evidence of whether he reviewed cheques and bank statements when he prepared the unaudited financial statements for Manor every year. He did not testify. From all this, I conclude Manor had no effective systems, procedures and controls in place to prevent and detect Styles' fraud.

[54] It is therefore manifest from the evidence and a consideration of ***Manor's*** case, that in breach of clause 9 a (i) and (ii) Iberostar failed to 1) maintain systems and controls sufficient to prevent and detect fraud and 2) monitor the conduct of its employees who were the alleged fraudsters. It should be noted that even if the submission of Iberostar that the requirement to monitor employees in 9 (a) (ii) would have to be restricted to those having banking functions, the alleged fraudsters would definitely fall into the category, given the extensive responsibilities they bore in the cheque generation, payment and verification processes.

Is Clause 9b unreasonable and ambiguous?

[55] A number of Canadian cases have also considered clauses largely similar to clause 9 and determined that the respective banks were not liable to compensate customers for honouring forged cheques.

[56] In ***Jaguar Transport Ltd v TD Canada Trust*** 2004 MBQB 219, a decision of the Court of Queen's Bench of Manitoba, an employee of the plaintiff presented cheques with forged signatures to the defendant bank which honoured them.

[57] In resisting the customer's suit seeking compensation, the bank successfully relied on paragraph 12 of its agreement with the customer (outlined at paragraph 6 of the judgment which provided that:

> Although we are liable for direct losses or damages caused by our negligence, we will not be liable for indirect or consequential loss or damage regardless of the cause of action. In no event will we be liable for any loss or damage resulting from:
>
> a) the actions, or any failure to act, of any other person;
> b) a forged or unauthorized signature or a material alteration on any instrument, unless you prove (i) it was made by a person who was at no time your employee or agent; and (ii) its occurrence was beyond your control;
> c) our failure to perform or fulfill any obligation due to any cause beyond our control; or
> d) incomplete or incorrect information supplied to us by you.
>
> (Emphasis added by the Manitoba court).

[58] In ***Austral Import Inc. v Bank of Montreal*** 2006 ABQB 428, a decision of the Court of Queen's Bench of Alberta, the plaintiff's office manager forged 95 cheques which were honoured by the bank when they were presented for payment. Included in the account agreement between the bank and the customer were the following provisions at clause 6.8:

> The Corporation agrees to maintain procedures and controls to detect and prevent thefts of Instruments or losses due to fraud or forgery involving Instruments.
>
> The Corporation further agrees that the Bank shall have no responsibility or liability whatsoever for any loss due to a forged or unauthorized signature unless: (i) the forged or unauthorized signature was made by a person who was at no time the Corporation's agent or employee; (ii) the loss was unavoidable despite the Corporation having taken all feasible steps to prevent loss arising from forgery or unauthorized signatures; (iii)

> the loss was unavoidable despite the Corporation having in place the procedures and controls to supervise and monitor the agents and employees of the Corporation; and (iv) the loss was caused solely by the Bank's negligence, fault or willful misconduct.
>
> The Corporation will diligently supervise and monitor the conduct and work of all agents and employees having any role in the preparation of the Corporation's Instruments and in the Corporation's bank statement reconciliation or other banking functions. (Emphasis supplied)

[59] Madam Justice S.M. Bensler in ruling in favour of the bank, conducted a review of a number of Canadian cases. This review showed the similarity in the common law position between Canada, England and Jamaica. After reviewing the facts and authorities, the learned judge stated at paragraph 32 as follows:

> The Bank was notified within the 30 day period with regard to the nine cheques that cleared in March, 2003. The Bank is in breach of its contract with Astral with regard to these cheques. Under clause 6.7 of the Account Agreement, the Bank is liable for any losses. However, I have found the loss to Austral was caused not by the Bank's breach of authority but by Ms. Yaremchuk's forgery. The Bank has no liability for these losses as they are specifically excluded under clause 6.8, which deals with losses due to fraud and forgery. The risk for this type of loss lies on the customer with four exceptions. None of these exceptions applies as the loss was not caused solely by the Bank and was not unavoidable. In addition, clause 6.8(i) states that the Bank shall have no liability if the forger is an employee of the corporation. There is a rule of construction that a specific rule takes precedence over a general rule: *BG Checo* at p. 24. As such, the clause governing forgery applies and the Bank bears no liability for any of the losses suffered by Austral as a result of the 95 cheques forged by its employee. (emphasis supplied)

[60] It is common ground that the alleged fraudsters, Ms. Carruthers and Ms. Campbell were employees of Iberostar at the time the relevant cheques were drawn.

Iberostar has admitted just that in its pleadings at paragraph 7 of its Particulars of Claim, and in the statements of Ms. Sommerset and Mr. Mestres received into evidence; a fact which is also accepted and relied upon by BNS. The Canadian cases which I find highly persuasive have upheld clauses very similar to clause 9 that exempt banks from liability where cheque forgery is carried out by an employee of the business that has suffered loss by the bank honouring a fraudulent cheque. I therefore see no basis to hold that clause 9(b) is either unreasonable or ambiguous. The combination of the fact that the alleged fraudsters were employees of Iberostar and the previous finding that the systems and controls referenced under 9(a) were inadequate to prevent fraud provide an insuperable hurdle to the claim for breach of contract, which, based on the Forgery Clause must fail.

ISSUE V: What is the effect of the "Verification/Conclusive Evidence Clause" (Clause 7) in the Agreements?

Relevant Legislation and Agreements

[61] Based on the resolution of Issue III, it has already been determined that a) the Agreements were never co-operative; b) the 2005 Agreement was applicable up to June 11, 2007; and c) the 2007 Agreement was in effect from June 12, 2007. Accordingly, it will be the relevant clauses in those agreements that primarily need to be assessed.

[62] The "verification/conclusive evidence clauses" have to be viewed in the context of 1) Section 24 of the **Bills of Exchange Act** and 2) Clause 6 of the Agreements which outline the procedures for sending of statements of account.

[63] Section 24 of the **Bills of Exchange Act** provides as follows:

> Subject to the provisions of this Act, where a signature on a bill is forged, or placed thereon without the authority of the person whose signature it purports to be the forged or unauthorised signature is wholly inoperative and no right to retain the bill or to give a discharge therefore or to enforce

payment thereof against any party thereto can be acquired through or under that signature unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority. (Emphasis supplied).

[64] Clause 6 of the 2005 Agreement provides:

> In respect of those accounts for which statements of account are issued, the customer hereby instructs the Bank to send (by mail or otherwise) statements of account to the Customer at the address of the Customer recorded in the books of the Bank. The customer agrees that if a statement of account is not received within 10 days after the end of the cycle established by the Bank for the preparation of such statements the customer will notify the Bank not later than five days thereafter.

[65] Clause 6 of the 2007 Agreement is in the same terms as clause 6 in the 2005 Agreement, save that there is an additional sentence at the end which states, *"Failing such notification by the customer the statement shall be deemed to be received by the Customer 15 days after the end of the cycle."* (Emphasis supplied)

[66] Clause 7 of the 2005 Agreement reads:

> (a) Upon receipt from the Bank of a statement of account of the Customer, the Customer will check the credit and debit entries in the said statement and examine all the cheques and vouchers included therewith;
>
> (b) The Customer will within thirty days of the delivery of a statement to the Customer, or if the Customer has instructed the Bank to mail the said statement, within thirty days of the mailing thereof to the Customer, notify the Bank in writing of any errors or omissions therein or therefrom;
>
> (c) At the expiration of the said 30 days, except as to any errors or omissions or challenges of which the Bank has been notified, and except as to any amounts improperly credited to the Customer's account, it shall be finally and conclusively settled in all respects save as set out in (d) below, as between the Bank and the Customer that:
>
> (i) The amount of the balance shown in such statement is true and correct,
>
> (ii) The said cheques and vouchers are genuine,

(iii) All amounts charged to the said account are properly chargeable to the Customer,

(iv) The Customer is not entitled to be credited with any amount not shown on the said statement,

(v) The Bank is totally and irrevocably released from all claims by the Customer in respect of any and every item in the said statement; and

(vi) The Customer fully and completely acknowledges that the Customer will have no further action against or recourse to the Bank in respect of the debit entries in the said statement, and all cheques and vouchers included therein. (Emphasis supplied).

(d) Nothing herein contained shall preclude the Customer from later objecting to any payments made on unauthorized or forged endorsements provided notice in writing is given to the bank forthwith after the Customer has acquired knowledge thereof.

[67] Clause 7 of the 2007 Agreement is quite similar to Clause 7 in the 2005 Agreement. Sub-clause (a) in each Agreement is identical. There are however slight differences in sub-clause (b) that partly relate to the fact that Clause 6 in the 2007 Agreement contains a deeming provision that is absent from the 2005 Agreement. The chapeaux to sub-clause 7(c) is modified in the 2007 Agreement to remove reference to sub-clause (d), there being no sub-clause (d) in the 2007 Agreement. The other change to sub-clause (c) in the 2007 Agreement is that paragraph 7(c) (v) is more detailed in its provisions than in the 2005 Agreement.

[68] The sub-clauses and relevant paragraph within sub-clause (c) that are included in the 2007 Agreement, which are different from those in the 2005 Agreement are set out below:

Clause 7 (b)

Within thirty days of receiving the statement (actually or deemed pursuant to clause 6, whichever is earlier), the Customer shall, notify the Bank in writing of any errors or omissions therein or therefrom, or any challenge to the contents of or balance shown on the statement.

Clause 7 (c)

At the expiration of the said 30 days, except as to any errors, omissions or challenges of which the Bank has been notified as required by this clause, and except as to any amounts improperly credited to the Customer's account, the statement shall be deemed to be final and conclusive evidence that:

(i) ….

(v) the Bank is totally and irrevocably released from all claims by the Customer in respect of any and every error, omission or possible challenge to the contents of or balance shown on the statement,

The Submissions in Summary

[69] Apart from the submission, that has not found favour with the court, (that there was inherent conflict caused by differences in the Agreements which were co-operative), counsel for the claimant advanced the following arguments in relation to Clause 7:

i) In the event that Clause 7 of the 2005 Agreement is the applicable provision, BNS would not be able to advance the conclusive evidence clause argument in light of Clause 7(d);

ii) If Clause 7 of the 2007 Agreement is found to be applicable it may not satisfy the rigorous test of clarity set down in ***Tai Hing***; See ***Financial Institutions Services Ltd v Negril Negril Holdings Ltd & Anor (Jamaica)*** [2004] UKPC 40 paras 43 & 44, the dissenting judgment of Laskin J in ***Arrow Transfer Company Limited v Royal Bank of Canada Royal Bank of Canada, Bank of Montreal, Canadian Imperial Bank of Commerce and Anthony Ernest Seear*** (1972) S.C.R. 845, 866 et seq. and **A Stitch in Time Saves Nine** J.I.B.L. 1998, 13(11), 370 – 373.

iii) The use of the words <u>forged cheques and fraud</u> in Clause 7(b) of the 2004 Agreement and their deletion from the subsequent Agreements can only properly be construed by the customer as the bank's decision to omit this specific matter from Clause 7 of the 2005 and 2007 Agreements.

iv) The existence of Clause 9 which directly addresses the question of forgery and unauthorized signatures casts further doubt/uncertainty on the conclusive nature of Clause 7 in relation to those specific issues.

v) The requirement for notification in writing set out in Clause 7 of the Agreements was to ensure that BNS was sufficiently appraised of any errors and ambiguities so that it could properly investigate them. It was not therefore a condition precedent to BNS being vested with liability.

vi) BNS also could not rely on Clause 7 because the bank statements that were to be sent monthly were usually sent late or not at all.

[70] Conversely, counsel for BNS submitted that Clause 7 in this case meets the test laid down in ***Tai Hing*** as it is clear, unambiguous and creates a binding obligation on Iberostar, who did not query its bank statement, within the stated time period. See ***Tai Hing***, ***Morrell v Workers Savings and Loans Bank*** [2007] UKPC 3 and ***Arrow Transfer Company Ltd v Royal Bank of Canada, el al***.

[71] Counsel also submitted that the combined effect of clauses 6 and 7 was that BNS's statements were deemed to be conclusive evidence against Iberostar 45 days after the end of the relevant month, unless within that time BNS received a written objection to these statements. Counsel contended that Iberostar should therefore have sent a written objection to BNS by July 15, August 14, and September 13, respectively, if it were objecting to the relevant cheques, but there was no evidence coming from Iberostar that any such written objection had been sent, except a letter dated August 22, 2007.

[72] Counsel for BNS therefore advanced that Clause 7 could be successfully relied on in relation to the May and June 2007 bank statements, but candidly conceded that it could not be relied on in relation to the July 2007 bank statements, as the objection in respect of the cheques reflected on that statement, was made on August 22, 2007, within the stipulated time period, which would have ended on September 13, 2007.

Analysis

[73] The first consideration is which agreement applied at the point when the statements would have been deemed conclusive evidence against Iberostar, if the relevant clause 7 was found to be valid. Based on the time frame that the fraud related to and within which it was discovered, the only two agreements in contention for application would be the 2005 and 2007 agreements.

[74] Clause 6 in both agreements stipulates that statements should be received within 10 days after the end of the cycle and if not received within that time Iberostar should notify BNS within 5 days. Clause 7 in both agreements provide in effect that any challenge to the statements should be within thirty days of the receipt of the statements. Therefore, the combined effect of clauses 6 and 7 in both those agreements is the same, in that BNS's statements were deemed to be conclusive evidence against Iberostar 45 days after the end of the cycle, unless within that time a written objection to them had been sent by Iberostar to BNS.

[75] In the witness statement of Julie Thompson-James, which was received as her evidence in chief, she stated that, *"the cycle established by the Bank for the preparation and issuance of bank statements is a monthly cycle ending on the last day of each month."* This evidence as to the cycle was uncontradicted by Iberostar. BNS therefore contends, that the statements relating to the relevant cheques were issued on each of the last days of the months of May, June and July 2007.

[76] Further, neither in its pleadings nor evidence did Iberostar allege that it did not receive any of the relevant statements. However, Mr. Mestres in his witness statement, received as his evidence in chief stated that, *"the June 2007 statements…were not received by the hotel until 3 or so weeks into the next month."* Significantly though, there is no evidence that pursuant to clause 6 Iberostar notified BNS within 5 days after the end of that cycle, the end of June 2007 that it had not received the statements. Therefore, given the 45 day period within which Iberostar had the opportunity to object to the relevant cheques that

should have been issued after each monthly cycle, in respect of the May, June and July 2007 statements written objections should have been sent by July 15, August 14 and September 13, 2007 respectively, to prevent those statements being deemed to be conclusive evidence against Iberostar.

[77] The first relevant date for the application of clause 7 in whichever agreement applies is accordingly July 15, 2007, a date when the 2007 Agreement was already in force. It is therefore clear that the 2005 Agreement is not applicable to any of the relevant cheques in respect of clause 7. Hence the reliance placed by Iberostar on sub-clause 7(d) in the 2005 Agreement which would have operated to preserve the right of Iberostar to object to payments made on forged endorsements, once notification in writing was given to BNS forthwith after the forgery was discovered, is without foundation. Not only does the 2005 Agreement not apply, even if it did, assuming for the moment the clause was valid, it is likely Iberostar would have been unable to rely on sub-clause 7(d). That is so as there is no evidence that any notice in writing, (which I find to be a condition precedent to BNS's liability), was given to BNS forthwith, after the fraud was discovered.

[78] It being settled that the relevant clause 7 for consideration is the one in the 2007 Agreement, its validity now has to be considered. The case of ***Tai Hing***, earlier reviewed, set the acknowledged standard in relation to the validity of verification/conclusive evidence clauses. It established that to expressly require a customer to examine his monthly statements, and to make those statements, in the absence of a query, deemed after a set time period irrevocably accepted, the burden of that obligation and the implication of non-compliance, had to be clearly and unambiguously brought home to the customer.

[79] Years earlier in ***Arrow Transfer Company Limited,*** which was not cited before the Board in ***Tai Hing***, the Supreme Court of Canada was called upon to determine the effect of a verification/conclusive evidence clause agreement. In that case, over a five year period, a chief accountant defrauded his employer of a significant sum of money by forging the approved signing officers' signatures on 73 cheques

drawn on the employer's account at Royal Bank, made out to cash, fictitious persons or accounts held by the forger, and then funnelling the proceeds to himself. It was not until an audit revealed that the 73rd cheque was forged that the fraud was revealed and the notice given to the Royal Bank. Before the fraud commenced, the employer had signed a verification agreement with the Royal Bank in which it agreed to verify each statement of account which it received from Royal Bank, and, within 30 days after the time when the statement should have been received, to notify Royal Bank of any debits wrongly made in the account. At the end of that period, the account as kept by Royal Bank became conclusive evidence that it only contained debits correctly made, subject to 1) errors of which timely notice had been given to Royal Bank and 2) payments made on forged or unauthorized endorsements.

[80] The employer brought an action against Royal Bank seeking to recover the sums paid out on the forged cheques on the basis that the payments were made without authority. Royal Bank in its defence relied on the verification agreement. No notice had been given to Royal Bank except in relation to the last cheque. At both first instance and in the British Columbia Court of Appeal, the verification agreement was found to shield the bank from liability, save for the proceeds of the 73rd cheque, in respect of which it had received notice. On appeal to the Supreme Court of Canada it was held by a majority of 4:1, (among other things), that 1) the claim brought by the employer against the bank was completely answered by the verification agreement and the debits made in the employer's account in respect of the forged cheques paid by bank were "debits wrongly made"; 2) the payment was not made on a forged endorsement; and 3) except as to the 73rd cheque the employer had failed to give the required notice as to debits wrongly made — hence as to the first 72 cheques the account became conclusive evidence that it contained no debits that it should not have contained and Royal Bank was not liable for any claim in respect of them.

[81] On the point of the scope of the protection offered to Royal Bank by the verification clause, and in particular the phrase “debits wrongly made”, Martland J in a paragraph I find somewhat difficult to understand stated on page 851 that:

> There is the further fact that the verification agreement does refer to forgery, in relation to payments made on forged endorsements. Such payments are within one of the two exceptions to the conclusive nature of the account. The fact that a specific exception was created in respect of a forgery of that kind indicates that the agreement is applicable in respect of a debit wrongly made in relation to a cheque on which the signature of the drawer is forged.

[82] In a powerful dissent Laskin J held that the verification agreement did not establish a settled account which was unchallengeable after a certain time had passed as there was no settlement made that covered forgery of the drawer’s signature. At page 868 Laskin J stated:

> [T]he principal question is not whether the bank has sought to protect itself against its breach of a fundamental term of its relationship with its customer, but rather whet is the scope of protection which it has achieved under a document which is more a contract of adhesion than a bargained arrangement.

[83] Later on the same page he also stated:

> I find it strange that a bank which seeks by contract to throw risk of all forged drawer signatures upon its customer is so reticent about referring expressly to such an eventuality.

[84] He accordingly found that there was every reason to construe the words in the clause *contra proferentem*, and that they did not provide protection against the forgery of the drawer’s signature. It is also worth noting here, as pointed out by counsel for Iberostar, that while the verification agreement in the ***Arrow Transfer*** case referred to forgery, the verification clauses in the 2005 and 2007 Agreements in this case, unlike the clause in the 2004 Agreement make no such reference.

[85] Jack C.C. Teo in the article **A Stich in Time Saves Nine** written in 1998, 12 years after ***Tai Hing*** and 26 years after ***Arrow Transfer,*** while referring to the ***Arrow***

Transfer case suggested that, *"If the "verification agreement" had to be reconsidered in light of the "rigorous test" in Tai Hing, a different conclusion might well be reached."* Interestingly however, despite that view expressed 21 years ago, at least in Canada, it appears from a review of subsequent authorities that the majority position expressed in ***Arrow Transfer*** still holds sway.[1]

[86] The effect of a conclusive evidence clause has also been previously considered in Jamaican cases. In ***Morrell v Workers Savings and Loans Bank***, clause 4 of the customer account agreement was very similar to clause 7 in the instant case. One of the questions which arose for the court to decide, (though it had not been pleaded), was whether clause 4 provided the bank with a complete defence to claims relating to debits and credits on the claimant's account, where no notification in writing of challenge to the statement had been given within the time limited.

Clause 4 read:

> Upon receipt from the Bank from time to time of a statement of account of the Customer together with cheques and other debit vouchers for amounts charged to the said account appearing therein, the customer will examine the said cheques and vouchers and check the credit and debit entries in the said statement and within 30 days of the delivery thereof to the Customer or if the Customer has instructed the Bank to mail the said statements and cheques and vouchers within 30 days of the delivery thereof to the Customer or if the Customer has instructed the Bank to mail the said statement and cheques and vouchers within thirty days of the mailing thereof to the Customer will notify the Bank in writing of errors or omissions herein or therefrom and at the expiration of thirty days except as to errors or omissions of which the Bank has been so notified, it shall be conclusively settled as between the Bank and the Customer that the said

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[1] See for example:
Canadian Pacific Hotels Ltd. v. Bank of Montreal [1987] 1 SCR 711, 1987 CanLII 55 (SCC); ***Don Bodkin Leasing Ltd. v. The Toronto-Dominion Bank*** 1998 CanLII 1101 (ON CA); and ***Productions Mark Blandford inc. v. Caisse populaire St-Louis de France*** 2000 CanLII 10274 (QC CA)

> cheques and vouchers are genuine and properly charged against the Customer…

[87] The learned trial judge and the Court of Appeal (by a majority) found that the clause met the ***Tai Hing*** test and protected the bank from liability. On further appeal by ***Morrell*** to the Judicial Committee of the Privy Council the appeal was dismissed, but the Board declined to express a concluded view on the validity of the clause, as they preferred to decide the case on the facts, that the banks accounting was correct and the claimant/appellant's was not, as had been done in the courts below.

[88] In ***Financial Institutions Services Ltd v Negril Negril Holdings Ltd & Anor (Jamaica)***, one of the issues the Board of the Judicial Committee of the Privy Council had to resolve was also how a clause being relied on as a conclusive evidence clause, should be construed.

[89] The relevant articles in the standard-form account-opening agreement were Article 11 which authorised the bank to charge interest on overdraft balances and Article 13 which so far as important for the analysis read:

> The customer further agrees to notify the Bank in writing of any objection or claim which he may have with regard to the periodic statement of account supplied by the Bank to the customer or to any communication sent to him by the bank relative to the Bank's internal or external audits or inspection. If the customer does not communicate his objections to the Bank as aforesaid within ten days of the date of any monetary or other statement then it shall be understood that the customer shall have accepted the accuracy of the notified balance and the Bank shall be released from any responsibility or obligation for any claim arising from any inaccuracy which should have been brought to its attention by the customer. Bank statements and cancelled cheques will be sent monthly by ordinary mail to the customer's address appearing on the Bank's records on such dates as the Bank shall decide from time to time.

[90] The Board noted at paragraph 43 that though the facts, (which involved an objection to the rate of interest charged), and the contractual terms were very

different from those in ***Tai Hing,*** they derived assistance from the general proposition in ***Tai Hing*** at page 110 that,

> Clear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation upon the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts.

[91] In applying that general principle at paragraph 44 the Board noted that:

> [T]heir Lordships attach some significance to the references in Article 13 to "accuracy" and "inaccuracy" (suggesting errors of computation rather than errors of principle) and also to the Article's stated effect in releasing the Bank "from any responsibility or obligation for any…claim arising from and inaccuracy". This suggests a release of the Bank from claims for consequential loss as a result of a customer being misinformed about his financial position. <u>The account-opening agreements are standard-form documents which must be construed against the Bank which prepared them, and their Lordships see no reason to give the clause any wider effect.</u> It is not therefore an obstacle in the Companies' way… (Emphasis supplied).

[92] BNS has already conceded that the verification clause cannot assist its defence in relation to the forged cheques on the July 2007 statement as the written notification from Iberostar objection to them having being paid out was received within the window allowed for objection to prevent the statement becoming conclusive. Can it rely on the clause in relation to the May and June statements?

[93] From the review of the cases conducted, in neither of the two Jamaican cases from the Judicial Committee of the Privy Council did the decision favour the position of BNS on the verification clause. In ***Morrell***, the case was decided on a factual basis and in ***Financial Institutions Services Ltd v Negril Negril Holdings Ltd & Anor (Jamaica)*** the Board declined to give the clause an effect that would be wide enough to make the clause effective for the bank as it was held its terms suggested that it covered "errors of computation rather than errors of principle." This in a context where the question whether interest should be charged on the account was clearly an error of principle and was not merely computational.

[94] Clause 7 of the 2007 Agreement in the instant case, which established Iberostar's responsibility to examine the statement of account and all cheques and vouchers included, and to notify BNS in writing of, "any errors omissions therein or therefrom or any challenge to the contents of or balance shown on the statement", is, I find, of similar effect to the clause interpreted in ***Financial Institutions Services Ltd v Negril Negril Holdings Ltd & Anor (Jamaica),*** and has not met the ***Tai Hing*** test for extension to cover forgery.

[95] It is acknowleged that the issue of principle relating to whether or not interest has properly been charged is different in character and nature than the question of debits occasioned by forgery. However, my conclusion is additionally based on two other factors. Firstly, there is no mention of forgery in Clause 7 of the 2005 or 2007 Agreements. It was included in clause 7 of the 2004 Agreement, therefore it was specifically removed in the latter two agreements. One of the bases on which the decision was made in the ***Arrow Transfer*** case that the phrase *"debits wrongly made"* included debits made in respect of forged cheques was because forgery was mentioned in the verification agreement, albeit as an exception. Though I have already indicated my discomfort with that reasoning, the fact remains it is a point of distinction between the ***Arrow Transfer*** case and the instant matter.

[96] Secondly, following closely on that first point must be the fact that there is a separate clause 9 which deals extensively with the obligations of Iberostar in relation to forgery. This strengthens the conclusion that the scope of the verification/conclusive evidence clause was not intended to extend to cover forgery.

[97] Accordingly, I hold that clause 7, the verification/conclusive evidence clause cannot be relied on by BNS to avoid liability in this matter.

ISSUE VI: Did BNS negligently cause loss to Iberostar by making payments on forged cheques from account no. 800438?

[98] From the particulars of negligence outlined in the claim Iberostar alleged that BNS was negligent in that it:

i) Failed and or omitted to consult the duly authorized signatories to the Account, to verify the authenticity of the said cheques which were presented for payment for substantial sums.

ii) Paid and or encashed the said cheques bearing obviously forged signatures.

iii) Failed and or omitted to question the person presenting the said cheques to verify the authenticity of the said cheques.

iv) Failed to consult the duly authorized signatories to the account after observing that a number of teenagers and young persons, presented the said cheques for substantial sums, for encashment.

v) Encashed cheques for substantial amounts made payable to individuals when they knew or ought reasonably to have known from the Claimant's prior operation of the said account, that the vast majority of cheques drawn by the Claimant on the said account were made payable to Companies and/or businesses.

vi) Failed to take such care as was reasonable in the circumstances, to ensure that the said cheques were duly authorized.

[99] The first consideration under this issue is the definitive statement of the Judicial Committee of the Privy Council in ***Tai Hing*** at page 957, relied on by counsel for BNS. Lord Scarman writing for the Board stated:

> Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, <u>their</u>

> Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: …
>
> Their Lordships do not, therefore, embark on an investigation whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract. (Emphasis supplied).

[100] Based on this dictum, I agree with the submission of counsel for BNS that any duty of care owed by BNS to Iberostar in tort cannot be greater than the duty found expressly in contract. Therefore, as BNS has succeeded in relation to its defence related to clause 9 under issue IV, Iberostar cannot succeed in its claim for negligence. However based on submissions by counsel for BNS, I will go on to consider whether if there was a basis for separate tortious liability the facts would have supported such a finding.

Particulars ii, iii and iv (Cheques were obviously forged; failed to question at presentation; failed to make queries based on the "youth factor")

[101] I accept the submission of counsel for BNS that in relation to particulars ii, iii and iv, Iberostar has not led any evidence to prove these allegations and therefore the issues can be easily refuted as follows:

i) Mr. Mestres indicated in his evidence when referring to the relevant cheques that the signature "was similar, but not [his] signature". This suggests that the untrained eye could not distinguish between good and bad cheques. In that context, it could not be said that the cheques were "obviously forged". Additionally no handwriting expert was called to support the assertion that the relevant cheques were obvious forgeries.

ii) No witness gave evidence concerning whether any of the persons who presented cheques were questioned and there was no evidence about the ages of those who presented the cheques. These particulars have therefore not been proven.

Particulars i and vi (Failing to checking with Signatories and to ensure that the cheques were authorized)

[102] I accept the submissions of counsel for BNS that a bank has no common law duty to check with the signatories on a commercial account to verify each cheques. Such a duty would be impractical given the large number of cheques *(during May – July 2007 over 2,200 cheques were drawn on the Iberostar account)* and critically the Agreements contained no such contractual duty.

[103] Further as indicated by Mr. Stredic Thompson, a banker for 29 years, the usual practice in the banking sector was that the banks would not check with signatories who are normally important people likely to be unavailable, but would consult the companies accounts department.

[104] However based on the evidence I accept that, even if BNS had checked with the signatories, the result would not have been different. Mr. Mestres testified that he could only verify the cheques using information which the alleged fraudsters entered in the system.

[105] BNS did follow the accepted practice. The BDL Verification Log received in evidence as an exhibit revealed that checks were made with the accounts department for all the relevant cheques encashed at BNS. Each cheque was endorsed with the name of a person from Iberostar's Accounts Department who verified that the payments were valid and some were even verified by Iberostar's Chief Accountant, Shireen Sommerset. BNS therefore took appropriate measures to ensure that the cheques were verified by a representative of Iberostar before payment.

Particulars v – (Payment to individuals)

[106] I accept the submission of counsel for BNS that given the large number of cheques negotiated between May and July 2007, (over 2,200), and the fact that a number of genuine cheques were made payable to individuals, (as confirmed by Mr.

Mestres), for example to employees of Iberostar, there is no basis to expect that BNS should have detected that the cheques were fraudulent from the fact that the relevant cheques were made payable to individuals. In support of this submission BNS also produced in evidence a number of cheques made out to individuals that were not relevant cheques, but were genuine.

ISSUE VII: What damages, if any, is BNS liable to pay to Iberostar?

[107] As the result of the determination of issues I, III, IV and VI means that Iberostar has failed to establish any breach of contract or negligence on the part of BNS, there is no basis on which Iberostar can recover the damages claimed.

CONCLUSION

[108] Based on the discussion above the court makes the following order:

i) Iberostar is not entitled to a declaration that the debit of the account no. 800438 held by Iberostar, with BNS, was unauthorized and of no effect;

ii) BNS has not breached the Agreements with Iberostar, nor was BNS negligent in paying out sums on the relevant cheques;

iii) Judgment on the claim for BNS;

iv) Costs to BNS to be agreed or taxed.