COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2011/CLE/gen/1598

IN THE MATTER OF a banking mandate entered into between the Plaintiff and Defendants dated 2nd September, A.D. 1986

BETWEEN

BETTAS LIMITED

Plaintiff

-AND-

HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED

First Defendant

-AND-

THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED (HONGKONG BRANCH)

Second Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mr. Macro Turnquest and Ms. Chizelle Cargill of Lennox Paton for the Plaintiff
Mrs. Tara Archer-Glasgow and Mr. Audley Hanna of Higgs & Johnson for the Defendants

Hearing Dates: 11,12,13 April 2022, 12 May 2022, 13 October 2022

Bank Mandate – Bank Branches – Banker's Duty – Breach of Contract – Bank Account Authorized Signatory – Appointment of Director – Authority to give Directions to Bank- Banker/Customer Relationships - Quincecare Duty – Sierratel Principle - Expert Evidence - Foreign Law Expert – Liberian Law - Interpleader

The Plaintiff, a Liberian corporation whose founders were two brothers, Chandru Kundanmal (“Chandru”) and Sunder Kundanmal (“Sunder”), opened a bank account ("the Account") with the First Defendant in The Bahamas in 1986, following which it deposited USD26,400,000.00 ("the Funds") in the Account. The Funds in the Account, which, according to the Plaintiff, were to be administered by the Second Defendant in Hong Kong, were placed on eight 120-day Term Deposits. A mandate was executed by the then-directors of the Plaintiff in conjunction with opening the Account, and which set out certain of the terms and conditions on which the Plaintiff's account would be managed. The mandate permitted the Second Defendant to act on the instructions of Chandru or Sunder. Sunder was then purportedly appointed the sole director and officer of the Plaintiff on 3 September 1986. Steps were also taken to make Chandru the sole shareholder of the Plaintiff in 1986. In 1989, the Plaintiff, through Sunder, issued instructions that the Deposits should roll over automatically at maturity at the best-prevailing rates.

In 2009, Sunder requested a statement of account for the Account and the current balance of the Account from the Second Defendant. The Second Defendant sought to ascertain Sunder’s authority to issue such instruction in relation to the Account. After considering the information that was provided to establish Sunder’s authority, the Second Defendant deemed it to be insufficient. The Second Defendant did not comply with Sunder’s instructions and invited him to obtain a formal court order from the English Court.

In 2011, Sunder’s son, Adrian Kundanmal (“Adrian”), contacted the Second Defendant claiming to have been appointed a director of the Plaintiff and to be the sole shareholder of the Plaintiff and sought a statement of account for the Account. However, the Second Defendant did not provide Adrian with the information requested and notified the Plaintiff that it was not satisfied that Adrian had authority to direct the Second Defendant on behalf of the Plaintiff in relation to the Account, and that it considered that it had been put on inquiry as to whether Adrian was entitled to act on behalf of the Plaintiff.

In 2011, the Plaintiff commenced this action by Originating Summons against the First Defendant and HSBC Bank Plc seeking, among other relief, a declaration that the Plaintiff was entitled to repayment of the balance of funds standing in the Account. A Statement of Claim was filed on 18 July 2012 introducing, among other things, further claims for declaratory relief and a claim for damages for breach of contract. The Statement of Claim was amended on 15 February 2019 on which occasion the Second Defendant was substituted for HSBC Bank Plc.

The First and Second Defendants filed a Defence on 17 May 2019. The First Defendant denies that it maintained or held any deposits on behalf of the Plaintiff and asserts that the Second Defendant has always maintained that it administered the said deposits on behalf of the Plaintiff.

As for the Plaintiff's claims for breach of mandate, the Second Defendant avers that it has had lawful excuse for not complying with the instructions received from Sunder and Adrian between 2009 and 2011 because it was put on reasonable inquiry regarding Sunder’s and Adrian’s authority to give instructions on behalf of the Plaintiff.

The Defendants say that a court of competent jurisdiction needs to declare, among other things, who has authority to act on behalf of the Plaintiff in relation to the deposits which are managed or held by the Second Defendant. Further, they are in effect in the position of interpleaders.

The Defendants also claim that the Funds are not in The Bahamas and that the Account was not opened with the First Defendant with the effect that The Bahamas is not a proper forum for the determination of this dispute. On the first day of the trial, this arose as a preliminary issue but the Defendants were at pain to demonstrate where in their Defence, the forum issue was pleaded.

HELD: Finding in favour of the Plaintiff and granting a declaration that Adrian is a properly appointed director of the Plaintiff and as such, he is entitled to give instructions to the Defendants, the Defendants are ordered, among other things (i) to transfer the Funds in the Plaintiff's Account in accordance with Adrian's instructions and (ii) to provide the Plaintiff with an account of all the Funds held to its order from the inception of the Account not later than 5 May 2023

1. It is a well-settled legal principle that a defendant who wishes to dispute the jurisdiction of the court must give notice of intention to defend the proceedings and **shall**, within the time limited for service of the defence, apply to the court for a declaration that in the circumstances of the case the court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action. **Such an application must be made by summons or motion and must state the grounds of the application. Such an application must also be supported by an affidavit verifying the facts on which the application is based.**

2. If the Second Defendant had intended to challenge the jurisdiction of the Court, a proper application supported by affidavit evidence ought to have been made. Nothing prevented the Second Defendant from doing so. It is disingenuous for the Second Defendant to rely on an application filed by another second defendant (no longer a party to this matter) in 2012 and which application was never drawn to the attention of the Court during the many case management hearings. The Second Defendant failed to file a fresh application or at the very least, bring the 2012 application to the Court's attention. In addition, the Second Defendant filed an unconditional appearance in this matter and therefore submitted to the jurisdiction of this Court.

3. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identifying the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader: **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018 and **Montague Investments Limited v (1) Westminster College Ltd and (2) Mission Baptist Church** [2015/CLE/gen/00845] and **Glendon Rolle t/a Lord Ellor & Co. v Scotiabank (Bahamas) Limited** [2017/CLE/GEN/01294] [Bahamas Judiciary website] applied.

4. The relationship between the parties was contractual: banker and customer. It is well established that banks are not, for their customers, fiduciaries as trustees or quasi-trustees. Money deposited into the bank becomes the property of the bank and the bank can deal with it as it pleases so long as it repays the money it holds for the customer: **Foley v Hill** [1843-60] All ER Rep 16 (HL) and **Glendon Rolle** applied.

5. On a balance of probabilities, I preferred the evidence adduced by the Plaintiff's witnesses including its expert witness whom I found to be very learned in Liberian law. I found one of the Defendants' witnesses, namely Anurag Saigal to be somewhat helpful. I cannot say the same of the two witnesses and their expert whose evidence was, for the most part, unreliable except for the few occasions when I accepted some of the expert testimony.

6. I make the following findings on the disputed issues namely:

    (i) There is sufficient evidence to conclude that Benedict Young duly transferred his one share in Bettas to Chandru Kundanmal ("Chandru") which gave rise to the issuance of Share Certificate No. 2 in the name of Chandru;

    (ii) Chandru was a former director of the Plaintiff;

    (iii) Sunder Kundanmal ("Sunder") was duly authorized to act on behalf of the Plaintiff since he was duly appointed director and officer of the Plaintiff having been appointed on 3 September 1986;

    (iv) Sunder had the authority to appoint his son, Adrian Kundanmal ("Adrian") who since 1 April 2011, held the positions of Director, President, Secretary and Treasurer of the Plaintiff and is authorized to give instructions to the Defendants.

7. The First Defendant is a separate entity from the Second Defendant and is a proper defendant in this action. It is a company regulated under the Banks & Trusts Companies Regulation Act. In any event, both defendants filed their own respective unconditional appearances in this case. Having done so, the Second Defendant has submitted to the jurisdiction of this Court.

8. On a balance of probabilities, this Court finds that the Plaintiff's Account was established at the First Defendant's branch in The Bahamas but it was administered by the Second Defendant in Hong Kong.

9. Both Sunder and Adrian were authorised to give instructions to the Defendants and, as such, the Defendants are in breach of their Mandate when they failed and/or refused to comply with those instructions.

10. The Second Defendant was an amateur detective and ought not to be placed on inquiry. It is worrisome that none of the Defendants' witnesses were able to state the exact amount standing in the Plaintiff's Account. Without delay, they must provide this information to Adrian.

11. If a third party comes forward to lay any claim to the Plaintiff's Funds even though after thirty seven (37) long years no party has come forward, the Defendants are protected by this Order of the Court which Court has jurisdiction over this matter since both Defendants have submitted to its jurisdiction.

JUDGMENT

Charles Snr. J:

[1] This is a dispute based in contract between the parties. By Originating Summons filed on 22 November 2011 which was subsequently converted to a Writ action on 4 July 2012, the Plaintiff ("Bettas") commenced this action against the First Defendant ("HSBC Nassau") and the then Second Defendant, ("HSBC Bank plc") seeking, among other things, a declaration that Bettas was entitled to repayment of the balance of funds standing in its name in its Account held by the Defendants. A Statement of Claim was filed on 18 July 2012 introducing further claims for declaratory relief and a claim for damages for breach of contract. The Statement of Claim was amended on 15 February 2019 on which occasion the present Second Defendant ("HSBC HK") was substituted for HSBC Bank plc. In the Amended Statement of Claim, Bettas also claims a declaration that the Defendants are obligated to comply with the instructions of Bettas' sole shareholder and sole director, Adrian Kundanmal ("Adrian") (a) to pay to Bettas on demand any or all of the sums that the Defendants owe to Bettas or alternatively all or any part of the sums due on maturity of the term deposits and (b) to provide Bettas on demand with information as to the true state of the Account and the term deposits.

[2] HSBC Nassau and HSBC HK (together "the Defendants") filed a Defence on 17 May 2019. HSBC Nassau denies that it maintained or held any deposits on behalf of Bettas and asserts that HSBC HK has always accepted that it administered the said deposits on behalf of Bettas. HSBC HK contends that it held and managed the deposits on behalf of Bettas and in doing so, it is entitled and required to ensure that it was in receipt of appropriate/legitimate documentation which proved that the persons, other than the ones who were a party to the banking mandate who were attempting to conduct business on Bettas' behalf were duly authorised to do so. HSBC HK further states that it is not satisfied as to the authority of Adrian to act

and to issue instructions on Bettas' behalf. It also avers that a court of competent jurisdiction needs to declare, among other things, who has authority to act on Bettas' behalf in relation to the deposits which it managed or held. Further, the Defendants are effectively in the position of interpleaders.

[3] Although the Defendants have not pleaded that The Bahamas is not the proper forum to determine this dispute nor filed any application challenging the jurisdiction of this Court to hear this matter, they nevertheless raise it as a preliminary issue on the first day of the trial and also, in their submissions.

The parties

[4] Bettas is a company incorporated under the laws of the Republic of Liberia as a Liberian Non-resident Domestic Corporation. Its founders were two brothers Chandru Kundanmal ("Chandru") and Sunder Kundanmal ("Sunder"), both of whom are now deceased. Chandru passed away on 25 July 1995 and Sunder on 23 October 2014. Chandru was a former shareholder of Bettas. Bettas alleges that Sunder was a former director of Bettas but the Defendants put Bettas to proof of that assertion. Adrian Kundanmal ("Adrian") is the son of Sunder and the nephew of Chandru and the purported current sole director and officer of Bettas.

[5] HSBC Nassau is a domestic Bahamian Corporation that operated as a bank and was regulated by the Central Bank of The Bahamas. HSBC HK alleged that HSBC Nassau is not incorporated under the laws of The Bahamas but is only one of its branches and is registered as a foreign company under the Companies Act. As such, it is alleged the HSBC Nassau is not a separate legal entity from HSBC HK. However, HSBC HK has produced no evidence to support this claim. HSBC Nassau ceased trading as a commercial bank in 2014.

[6] HSBC HK is a company incorporated under the laws of Hong Kong. It is an international bank carrying on business in Hong Kong with branches in various countries around the world, including The Bahamas. At all material times, HSBC

HK operated a department called the International Deposits Department which collected funds from international clients, like Bettas and invested the same.

The dispute

[7] Bettas' case is that the Defendants acted in breach of their contractual obligation under a banking mandate (executed in September 1986 by Bettas' then directors) ("the Mandate") and/or the terms of the Term Deposits by failing to comply with instructions given on behalf of Bettas between 2009 and 2011 in relation to its account, initially by Sunder and subsequently by Adrian namely:

1. the instruction of Sunder given on or about 5 February 2009 to provide Bettas with a statement of account and current balance of the Account (the "2009 Sunder instruction") ;

2. the instruction of Adrian given on or about 8 April 2011 to provide a full set of account statements for the Account from 1 January 1995 to date (the "2011 Adrian instruction"); and

3. Bettas' demand for repayment of all funds in the Account, allegedly constituted by the commencement of these proceedings (the "2011 Repayment instruction") (together, the "instructions").

[8] Bettas alleges that Adrian was voted in as its director on 12 March 2009 and has been its sole director since 1 April 2011.

[9] The Defendants deny the claim for breach of contract and allege, amongst other things, that:

(i) HSBC Nassau does not maintain or hold (and has never maintained or held) any deposit on Bettas' behalf; and

(ii) The circumstances are such that HSBC HK which holds and manages deposits to Bettas' credit in an account numbered 567-264957 ("the Account") which is subject to the terms of the Mandate, has been justified

in refusing to act on the instructions received by it since 2009 by virtue of (a) the express and/or implied terms of its agreement with Bettas pursuant to the Mandate including the fact that the Mandate has not been varied in accordance with its terms so as to give Adrian authority to direct HSBC HK in relation to the Account; (b) its policies and practices in place in relation to deposits and requests being made in relation to the same; and (c) the fact that it has been put on reasonable inquiry as to the authority of Sunder and Adrian to give instructions to HSBC HK on Bettas' behalf in relation to the Account.

Agreed factual background

[10] In September 1986, Bettas, by its then directors Benedict Joseph Young, Cheng Wing Kwong and Ann Mary Pak, executed the Mandate directed to the Manager of HSBC. The Mandate established an International Deposit Account for Bettas and set out certain of the terms and conditions on which Bettas' Account would be managed.

[11] The Mandate permits HSBC HK to act on the instructions of Chandru or Sunder singly.

[12] A document described as a certified copy of the Register of Directors and Officers of Bettas provided that, on 3 September 1986, Benedict Joseph Young, Cheng Wing Kwong and Ann Mary Pak resigned as directors. On the same day, it is Bettas' position that Sunder was appointed Bettas' sole director, president and secretary.

[13] Chandru was Bettas' sole shareholder and was purportedly issued bearer share certificates for shares two and three, representing 100 shares in Bettas.

[14] By letter dated 22 September 1986, HSBC Nassau confirmed that Chandru had visited its office and that he placed USD26,400,000 on deposit ("the Funds") with the HSBC, Bahrain Office, valued as of 22 September 1986. Bettas had transferred

the Funds to HSBC Nassau from its account at Canadian Imperial Bank of Commerce ("CIBC").

[15] On 1 October 1986, HSBC HK, by letter, advised Bettas that (i) it had established the eight US Deposits (Term Deposits) on 22 September 1986; (ii) the Account would continue under the administration of HSBC HK and (iii) Bettas should send all instructions to HSBC HK by letter or by authenticated cable from a bank.

[16] By letter dated 23 February 1987, HSBC HK acknowledged that Sunder was appointed Bettas' Sole Director, President, Secretary and Treasurer.

[17] By letter dated 27 November 1989, Sunder, on behalf of Bettas, instructed HSBC HK that:

> **"(A) All term deposits maturing will have one hundred twenty-day terms at the best prevailing rate and would be rolled over automatically at maturity.**
>
> **(B) Statements, deposits, renewal confirmations, and any other correspondence concerning the subject account should be held at International Deposits Department until further notice."**

[18] On or about 10 June 1985, Dupuch & Turnquest, the then Bahamian Attorneys ("D&T") for Bettas, purportedly prepared a Will for Chandru's Bahamian estate. By the Will, Chandru purportedly appointed Sunder as his sole executor and beneficiary of his Bahamian Estate. On 25 July 1995, Chandru passed away.

[19] On or about 5 February 2009, Sunder purported to give the 2009 Sunder instruction to HSBC HK, for him to be provided with Bettas' statement of account. HSBC HK sought to ascertain Sunder's authority and did not comply with the instruction.

[20] From around 2009 to April 2011, HSBC HK was provided with copies of several documents purportedly relating to Bettas' shares and its directorship for the purpose of establishing Sunder's authority, and subsequently Adrian's, to deal with HSBC HK on behalf of Bettas.

[21] On or about 8 April 2011, Adrian met with HSBC HK's representatives in Hong Kong in relation to the Account. At the meeting, Adrian requested account statements from HSBC HK and provided a purported corporate resolution at the meeting. HSBC HK did not comply with the request.

[22] By letter dated 30 June 2011, the Defendants' English solicitors, Stephenson Harwood LLP ("SH") wrote to Adrian's English solicitors, Reed Smith LLP ("RS") stating that HSBC HK was not satisfied that Adrian had authority to direct them on Bettas' behalf in relation to the deposits or otherwise. Further, SH advised that HSBC HK considered that it had been put on inquiry as to whether Adrian is entitled to act on Bettas' behalf and, as a result, it (HSBC HK) would be at risk of acting in breach of its obligations to Bettas as its customer, if it complied with Adrian's instructions.

[23] Due to the impasse between the English solicitors, SH wrote to RS inviting Bettas to commence an action to resolve this matter.

[24] By letter dated 22 August 2011, Bettas' Bahamian Counsel Lennox Paton ("LP") wrote to HSBC Nassau, with respect to the estate of Chandru and requested that it confirm whether it had any records of assets relating to Chandru or Bettas. On the same day, HSBC Nassau responded to LP advising that it had undertaken a search of its records and confirmed that it had no records of the existence of documentation or a relationship with either Chandru or Bettas.

[25] By letter dated 7 November 2011, SH wrote to RS requesting confirmation on whether Bettas intended to take steps to obtain declaratory relief. SH advised that should it not receive a response by 14 November 2011, HSBC HK would assume that RS's clients no longer maintained that they have any rights or entitlement to direct HSBC HK in relation to accounts opened and deposits made in Bettas' name.

[26] On 22 November 2011, Bettas commenced this action.

[27] HSBC Nassau has, since the commencement of this action, become inactive in The Bahamas. It ceased trading as a bank in 2014 and presently maintains a non-active licence issued by the Central Bank of The Bahamas.

Preliminary issue: forum challenge

[28] Without an application and an affidavit in support, the Defendants, in submissions, attempted to raise, as a preliminary issue, that Hong Kong is clearly the more appropriate forum for the determination of the dispute between Bettas and HSBC HK and that this Court should not enter into the merits of the dispute.

[29] In order to deal with this issue, the procedural history of this matter needs to be restated.

[30] A scrutiny of the Court's file reflected that Messrs. McKinney, Bancroft & Hughes ("MBH") filed a Notice of Conditional Appearance on 17 May 2012 on behalf of the then Second Defendant, HSBC Bank Plc. On 18 May 2012, HSBC Bank Plc filed a Summons that sought to challenge The Bahamas as an appropriate forum to hear the claim. That application had a hearing date of Friday, 30 November 2012 at 9:30 a.m. before the Registrar of the Supreme Court.

[31] On 16 May 2012, the then Registrar, Camille Darville-Gomez, ordered as follows:

> **"IT IS HEREBY ORDERED that leave be granted to HSBC Bank plc, the Second Defendant, to enter a conditional appearance without prejudice to an application to set aside service on it of the Notice of Concurrent Originating Summons filed herein. And that the appearance stands unconditional unless the Second Defendant applies within 14 days to set aside the service of the Notice of Concurrent Originating Summons."**

[32] On 10 August 2012, HSBC Bank Plc filed another Summons before the late Stephen Isaacs J (as he then was) for the action to be dismissed, or alternatively stayed, under the inherent jurisdiction of the Court and/or under Order 18 Rule 19(1)(d) of the Rules of the Supreme Court on the grounds that The Bahamas is not the appropriate forum for the claim brought by the Plaintiff and is otherwise an abuse of the Court's process.

[33] On 11 October 2013, Isaacs J struck out the action on the ground that it is frivolous and vexatious and an abuse of the process of the Court. He further ordered that the Order granting leave to issue and serve the Notice of Concurrent Originating Summons and any future pleadings on the Second Respondent in London be set aside.

[34] Bettas appealed the decision of Isaacs J. On 20 December 2017, the Court of Appeal allowed the appeal and set aside the decision of Isaacs J and restored Bettas' action.

[35] On 15 February 2019, Bettas amended its Statement of Claim. It substituted HSBC HK as the Second Defendant in place of HSBC Bank Plc.

[36] On 1 March 2019, HJ filed a Notice of Appearance and Memorandum of Appearance on behalf of HSBC HK. On the same day, HJ filed a Notice of Change of Attorney on behalf of HSBC Nassau in place of MBH.

[37] On 17 May 2019, the Defendants filed "Defence of the First and Second Defendants". Nowhere in the Defence is there any mention of a challenge to the jurisdiction of this Court.

[38] On 11 June 2019, Bettas filed a reply to the Defendants' Defence.

[39] On 9 September 2020, LP filed a Notice of Referral to Case Management Conference. The case was then assigned to this Court.

[40] On 9 November 2020, I gave directions at the first Case Management Conference. Among the directions was an order that "*any summonses and/or applications are to be filed by 28 September 2021*", each party is to file and serve their statement of facts and issues and for the trial of the action to commence on 11 April 2022 for 3 days ("First Case Management Hearing").

[41] On 20 May 2021, HJ filed a Summons for security for costs. It was dealt with on 29 September 2021. The Court ordered that Bettas do pay security for costs in the

sum of $150,000 by 1 November 2021, failing which the action shall be stayed. Bettas complied.

[42] On 18 January 2022 (outside of the time period for the filing of any applications), the Court heard three other applications. Among them was a Summons by HJ for an order that leave be granted to the Defendants for their witnesses, Horace Kwan Hor Chau ("Mr. Chau"), Tsui Ka Shin (Christina) ("Ms. Tsui") and Anurag Saigal ("Mr. Saigal") to give their evidence by Skype, Zoom, Webex or any other approved electronic means on the ground that they are outside of the jurisdiction. The Defendants also filed a summons for costs in the security for costs application. The other application was filed by LP for an extension of time for Bettas to file their witness statement and for the Court to make further case management directions in the action. The Court acceded to the three applications whilst maintaining the trial dates.

[43] On 7 February 2022, a Pre-Trial Review was held. The Court gave further directions, particularly with regard to the expert witnesses and for the experts to file a Joint Expert Report.

[44] The Defendants actively took part in these case management hearings and made at least three applications, none of which included a summons to challenge the jurisdiction of the Court to hear this matter. However, in both oral and written submissions, the Defendants referred to the Summons filed on 18 May 2012 by the then Second Defendant, HSBC Bank Plc to renew its application for this Court to consider the issue of *forum non conveniens* arguing that, although such an application ought generally to be made at an early stage of the proceedings, the Court could exercise its discretion under its inherent jurisdiction to grant such a stay at this stage of the proceedings because this is an exceptional case since the Defendants, at an early stage, contested the jurisdiction of this Court and expressly argued that The Bahamas was not the appropriate forum for the trial of this dispute. However, the Court of Appeal ordered that the existence of a banking relationship in The Bahamas be tried. The Defendants submitted that if this Court were to find

that there has never been any relationship or account in The Bahamas, then it would ineluctably follow that (i) The Bahamas is not the natural or appropriate forum for the trial of the dispute between Bettas and HSBC HK; (ii) Hong Kong would be an available forum which would clearly be more appropriate for the dispute than The Bahamas and (iii) these proceedings should be dismissed against HSBC Nassau and stayed against HSBC HK.

[45] It is a well-settled legal principle that a defendant who wishes to dispute the jurisdiction of the court must give notice of intention to defend the proceedings and **shall**, within the time limited for service of the defence, apply to the court for a declaration that in the circumstances of the case the court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action. **Such an application must be made by summons or motion and must state the grounds of the application. Such an application must also be supported by an affidavit verifying the facts on which the application is based.**

[46] A notice of intention to defend is not a submission to the jurisdiction if the defendant makes an application, even if that application fails. But if he does not make such an application, he will be taken to have chosen to defend the case on the merits and to have submitted to the jurisdiction: **The Supreme Court Practice 1995,** Volume 1, 12/8 and 12/7-8/2.

[47] In the present case, the Defendants cannot rely on a Summons filed in 2012 by a party who is no longer a party in these proceedings to ground HSBC HK's forum challenge. To rely on another party's Summons filed in 2012 to ground their application is disingenuous especially since it was never drawn to this Court's attention during the many case management hearings.

[48] Consequently, the Court did not permit the Defendants to raise a forum challenge finding that HSBC HK submitted to the jurisdiction of this Court when it filed an unconditional appearance. True, the Court ought not to make orders which cannot

be enforced but there are avenues open to Bettas to apply to the courts of Hong Kong to enforce an order of this Court if it is successful. This submission is, however, premature.

[49] In my judgment, if HSBC HK had intended to challenge the jurisdiction of the Court, a proper application supported by affidavit evidence ought to have been made and drawn to the attention of this Court. Nothing prevented HSBC HK from doing so. To reiterate, such a serious challenge to the jurisdiction of this Court cannot be raised in submissions. More than likely, had it been raised earlier, it would have been dealt with as a separate issue long before the trial would have commenced since a forum challenge, if successful, has the ability of staying the proceedings.

The evidence

[50] The evidence on behalf of Bettas came from Adrian and his expert witness, Counsellor Betty Lamin-Blamo ("Mrs. Blamo"). The Defendants called three witnesses, Mr. Chau, Ms. Tsui and Mr. Saigal. They also called an expert, Mr. Lawrence Rutkowski ("Mr. Rutkowski").

[51] Adrian filed a witness statement on 13 October 2021 which stood as his evidence in chief. He testified that he is the sole director and officer of Bettas and conceded that, according to Liberian law, he is not a shareholder.

[52] He stated that, on 3 September 1986, Mr. Benedict Joseph Young ("Mr. Young"), Mr. Cheng Wing Kwong ("Mr. Kwong") and Ann Mary Pak ("Mrs. Pak") resigned as directors and on that same date, his father, Sunder was appointed Bettas' sole director, president and secretary. He said that his uncle, Chandru was Bettas' sole shareholder and was ultimately issued bearer share certificates for shares two and three representing 100 shares in Bettas.

[53] Adrian stated that Bettas' corporate documents including the bearer shares that were issued to Chandru, were then transferred to D&T in The Bahamas in September 1986 to facilitate Chandru and Sunder's estate planning. This was confirmed by K.K. Young & Co.'s Letter to D&T on 10 September 1986.

[54] Adrian further stated that, in or about early September 1986, Bettas, acting though its then directors, resolved to open bank accounts at HSBC Nassau and at the then Canadian Imperial Bank of Commence in New Providence ("CIBC"). Accordingly, Bettas' directors resolved by board resolution dated 2 September 1986 that Bettas should:

> **"open US Dollar Account (s) &/or Time Deposit Account with Hong Kong & Shanghai Banking Corporation, Nassau and that either Mr. Chandru Kundanmal or Mr. Sunder Kundanmal be authorised to sign these accounts singly for and on behalf of the Corporation."**

[55] According to Adrian, on 2 September 1986, Bettas' directors also issued a banking mandate in Hong Kong which he believes relates to HSBC Nassau. The mandate sets out the terms and conditions on which Bettas' account would be managed. The Mandate was for an "International Deposit Account" in HSBC's International Deposits Department. Subsequent to the execution of the Mandate, Bettas' then directors forwarded it to D&T to facilitate the opening of the bank account at HSBC Nassau.

[56] Adrian stated that he was informed by his father, Sunder that, to facilitate the opening of Bettas' bank account, he (Sunder) personally attended HSBC Nassau's office in September 1986 to sign various banking documents. He stated that he was advised by Sunder that, at all material times, they (Chandru and Sunder) intended that Bettas would open a Bahamian bank account and it was never their intention to open a Hong Kong bank account. He said that once the account was opened, as far as he is aware, his father was the only person who corresponded with the Defendants on Bettas' behalf concerning the account. The Defendants did not question Sunder's authority to transact business on Bettas' behalf for many years.

[57] Adrian stated that, on 22 September 1986, HSBC Nassau confirmed that his father had visited their office and that Bettas had placed "*a total of USD26,400,000 on deposit with their Bahrain Office value 22 September 1986*." Subsequently, on 1 October 1986, HSBC HK advised Bettas by letter that it understood that Bettas

agreed that its account would continue under its administration and that a new deposit account was opened on 22 September 1986 to establish eight USD deposits for Bettas. Bettas was then assigned client identification number HK-567264957.

[58] As Adrian stated, it appears that, for some reason, Hong Kong decided to re-execute a mandate for Bettas which Sunder and Chandru signed on or about 9 February 1987. On 23 February 1987, HSBC HK advised Bettas by letter that it acknowledged that Sunder was appointed as Bettas "sole director, president, secretary and treasurer. HSBC HK took no issue with this appointment.

[59] On 14 October 1987, Sunder wrote on Bettas' behalf to HSBC HK to discuss converting its USD term deposits to Canadian dollar term deposits and reducing the length of the term deposits.

[60] On 28 December 1987, HSBC HK wrote to Bettas to inform them of the new tariff structure. In that letter, HSBC HK advised that:

> **"As you are aware, your deposit(s) under the above account is held *off-shore* and we, as a "*Post Office," convey your placement, renewal, withdrawal instructions by telex to our overseas office without levying any charges*."** [Emphasis added]

[61] Adrian stated that, on 27 November 1989, Sunder, on Bettas' behalf, wrote to HSBC HK and advised that:

> **"(a) all term deposits maturing would have one hundred twenty day terms at the best prevailing rate and would be rolled over automatically at maturity and (b) statements, deposits renewal confirmations, and any other correspondence concerning the subject account should be held at the International Deposits Department until further notice."**

[62] Adrian further stated that to facilitate Chandru and Sunder estate planning, on or about 10 June 1986, Chandru retained D&T and had the Firm prepare a will for his Bahamian assets which, from what Sunder relayed to him, included Bettas' bearer shares. Under the will, Chandru appointed Sunder as his sole executor and

beneficiary of his Bahamian estate. According to Adrian, Sunder informed him that both he (Sunder) and Chandru believed that Bettas' bearer shares and the funds which they opened at HSBC Nassau would form part of Chandru's Bahamian estate.

[63] Adrian stated that Chandru passed away on 25 July 1995. In 2009, Sunder instructed D&T to commence probating Chandru's Bahamian estate. However, Sunder encountered difficulties in seeking to probate Chandru's Bahamian estate because D&T lost not only Bettas' corporate file but also Chandru's original will. Nonetheless, Sunder obtained a Grant of Letters of Administration for Chandru's will on 16 March 2011.

[64] Adrian said that Sunder advised him that after Chandru passed away he was content to allow Bettas' term deposits to roll over and gain interest as was his earlier instructions to HSBC HK.

[65] Relying on documentary evidence, Adrian demonstrated that, on or about 14 January 2009, Ms. Cella W.C. Leung, Senior Vice President, Commercial Banking of HSBC HK, contacted Nala Management Inc ("Nala"), a Hong Kong Company that serves as Bettas' registered office and agent in Hong Kong, stating that she is trying to get in touch with Sunder *"to discuss matters concerning Bettas."*

[66] Nala informed Sunder of Ms. Leung's request and on 5 February 2009, Sunder, as Director of Bettas, wrote to HSBC HK to request a statement of account and the current balance in Bettas' account.

[67] Then, on 6 February 2009, HSBC HK through Ms. Leung, wrote to Sunder stating: "*we shall revert in due course with regards to your request of statement of account balance for subject account: Bettas Ltd (567-264957).*

[68] Adrian further stated that Sunder advised him that he had made inquiries from D&T concerning Chandru's Bettas' shares and was informed that D&T misplaced Bettas' entire corporate file. Sunder informed Adrian that he discussed with Nala

the issue of having replacement shares issued by Nala for Chandru's shares. On 12 March 2009, Nala, by letter, advised Sunder of the process that was necessary to replace a lost share certificate generally and specifically, in the case of Chandru, who had passed away.

[69] Adrian stated that, on 12 March 2009, Sunder appointed him as director and vice president of Bettas and reappointed himself a director, president, secretary and treasurer of Bettas. Subsequently, Bettas' board of directors resolved to cancel the existing issued shares of Bettas and to issue new share certificates. Subsequently share certificate four was issued to Chandru's estate.

[70] Following this, Adrian said that, on 16 March 2009, Sunder instructed D&T to begin probating Chandru's Bahamian estate. D&T requested HSBC Nassau to confirm whether it held any accounts in Bettas' name. On 20 March 2009, HSBC Nassau responded advising that its records reflected no accounts in Bettas' name.

[71] Adrian stated that, on 16 March 2009, D&T wrote a similar letter to HSBC HK requesting that it confirm that Bettas had an account with it. On 24 March 2009, HSBC HK responded to D&T stating: "*can you please advise who you are representing, the interest of this person in Bettas Limited and his or her legal rights of the requested information. Kindly also provide documentary proof to substantiate your advice."*

[72] On 27 March 2009, HSBC HK responded to Sunder regarding his letter dated 5 February 2009 and advised *"we are currently reviewing your request. To facilitate the process, please provide us with documents which demonstrate your current directorship in Bettas Limited."*

[73] Adrian stated that, on 1 April 2009, Sunder executed a Declaration of Directors and Officers of Bettas certifying Sunder and Adrian's roles in Bettas. According to Adrian, on the same date, Sunder granted him a General Durable Power of Attorney to manage his affairs.

[74] Adrian stated that, given the stance taken by HSBC HK, on 24 April 2009, Bettas instructed D&T to write to HSBC HK to ask what corporate documents it needed to establish Sunder's position as director of Bettas. On 27 April 2009, HSBC HK wrote to D&T advising that it was reviewing its letter and would respond in due course. On 29 April 2009, HSBC HK responded to D&T's letter raising several questions about Bettas' shares and stated that Sunder must have information held by Bettas Ltd since he is holding the office of president, treasurer and secretary of Bettas and they would like Sunder to provide them with all such information.

[75] In his testimony, Adrian asserted that, on 15 May 2009, the LISCR Trust Company in Liberia issued a Certificate of Election and Incumbency of Directors and Officers confirming Sunder and his position in Bettas. On 19 May 2009, D&T wrote to HSBC HK pointing out that, in seeking information about Bettas' accounts, Sunder was doing so in his capacity as "an officer, director, and sole signatory of Bettas Limited."

[76] Adrian further asserted that, on 24 June 2009, D&T wrote to HSBC HK to express its displeasure since it had been almost six months and it had not received a satisfactory response to Sunder's simple request despite having provided numerous documents to HSBC HK to establish Sunder's authority to obtain the information requested.

[77] On 28 July 2009, HSBC HK wrote to D&T to advise that:

> **"…As mentioned, we are giving this matter our prompt attention but since the Account has remained dormant for years and we have not heard from your client until recently, we do need time to thoroughly review the documents provided to date.**
>
> **In the meantime, we noted from the documents you have previously provided that the Will executed by the late Chandru Kundanmal ("CK") specifically said that it covers only his estate in The Bahamas. Neither Bettas Ltd nor the Account constitute assets in the Bahamas and so they are not covered by the said Will. The appointment of your client as the sole executor of the estate of CK in the Bahamas is therefore irrelevant insofar as the Account is concerned…."**

[78] Adrian is puzzled that HSBC HK would say that Bettas' Account is dormant in light of the standing instructions to allow Bettas' term deposits automatically to roll over at maturity.

[79] On 9 November 2009, HSBC HK wrote to D&T to advise that:

> **"HSBC is keen to resolve this claim, albeit through a formal order from a court in the United Kingdom…."**

[80] Adrian stated that nothing happened until 2011 when on 1 April 2011, Sunder executed a Letter of Assignment of Gifts wherein he assigned to him (Adrian) all of Bettas' shares that he was to receive under Chandru's Bahamian Will. Subsequently, on 1 April 2011, Bettas' board of directors resolved that share certificate number four, issued in 2009, should be cancelled and instead resolved that 100 shares should be issued to himself in accordance with the Letter of Assignment of Gifts. This is evidenced by Share Certificate number five, which was issued to Adrian. On the same day, Adrian stated, that after executing the resolution, Sunder informed him that he wanted to resign his position as president, treasurer and secretary of Bettas and asked that he take up the matter with HSBC HK. As a result, Adrian executed a resignation letter on Sunder's behalf and Bettas' board unanimously resolved to accept Sunder's resignation and appointed him (Adrian) as the sole president, treasurer and secretary of Bettas on 1 April 2011.

[81] Adrian said that he was informed by both Sunder and Chandru that they attended the office of HSBC Nassau in The Bahamas to open Bettas' Account. He took on the mantle of pursuing HSBC to obtain more information about Bettas' Account and to resolve the impasse.

[82] On 8 April 2011, he wrote to HSBC HK and requested that they provide him with a full set of account statements for the period 1 January 1995 to date. Adrian also went to Hong Kong in April 2011 to personally meet with representatives of HSBC HK in an attempt to resolve the matter. The attempt was futile.

[83] Adrian stated that correspondence were exchanged between the UK solicitors but as a result of the impasse, he instructed Bettas' Bahamian attorneys to commence the present action. Sunder died on 23 October 2014 and he was the sole executor of Chandru's estate.

[84] Adrian asserted that the Defendants' purported concern that a third party may make a claim to the deposits held in Bettas' Account is without merit since Bettas was incorporated and the funds transferred to the Defendants in 1986 and no third party or parties has/have made a claim to the funds in Bettas' Account or sought to challenge Sunder or his appointment.

[85] Under cross-examination, Adrian asserted that he is an officer and director of Bettas and as such, he has the authority to bring this action. He said that he does not know if there was a resolution passed but HSBC pressed them to file legal action. He was asked for his reason in going to Hong Kong if the Account was in The Bahamas. Adrian stated that he understood that the department which originally existed in Nassau had been moved to Hong Kong and it was the only point of contact where he felt that he would get any additional information.

[86] Adrian said that, although his UK Counsel RS wrote that the accounts were opened and deposits were made with HSBC HK in the name of Bettas in 1986, his understanding is that once the monies were deposited in an account in The Bahamas, HSBC moved them around to different branches including Bahrain, Singapore and Hong Kong and that they should have access to the monies at any location but the original account was opened in The Bahamas. He was 16 at the time when the Account was opened in 1986 but that was his understanding as told to him by Chandru and Sunder. He said that RS misstated the facts. Despite all the letters from attorneys whether in The Bahamas or the UK, Adrian insisted that Bettas has an Account or created the Account in The Bahamas and as far as he knows, the monies are no longer in The Bahamas. He said that all he knows is that HSBC has the monies but he is unsure where it is located since they have moved it around the globe over the 20 years and it was not done with his father's consent.

[87] Adrian stated that he is the only one with a share issued in his name but he believes that the share transfer in his name is ineffective based on the legal advice which he was given. He explained that he believes that the shares still reside in Chandru's estate. He accepted that he is not the shareholder of Bettas but he considers himself a validly appointed director and officer of Bettas.

[88] Adrian stated that he is not aware that Bettas disclosed two versions of the resolution appointing him as its director. In any event, he stated that they are substantially the same. He is also unaware whether the Minutes of the Meeting on 3 September 1986 which resolved that Sunder be appointed Sole Director, President, Secretary and Treasurer, is the only document from which he derived his position as Bettas' director and officer. He stated that he is an officer and a director of Bettas because he was appointed by his father, Sunder, who was an officer and director and from whom HSBC took instructions for the better part of 20 years. He stated that the two resolutions also appointed him as a director.

[89] Adrian was questioned on the resignation letter dated 1 April 2011 which he signed on behalf of his father. He stated that his father asked him to sign it notwithstanding that he was alive. On the same day, his father signed the "Unanimous Written Consent of the Board of Directors of Bettas before a Notary Public in Maryland, USA. He explained that the Notary Public came to their house to have the Unanimous Written Consent signed because his father was not very ambulatory. She left before getting the resignation letter signed and his father instructed him to sign on his behalf.

[90] Adrian stated that it was not Sunder's intent to set up a trust fund under Chandru's name for the money that Bettas holds. He asserted that Bettas will continue to hold the money in a new bank once the challenges with HSBC are over.

[91] Under re-examination, Adrian stated that the Minutes of the Meeting by the Board of Directors on 2 September 1986 resolved that Bettas should open a US Dollar

Account (s) &/or Time Deposit Account with HSBC Nassau and that either Chandru or Sunder be authorised to sign these accounts singly for and on behalf of Bettas.

[92] He was shown several documents and he maintained that Bettas' Account was set up in Nassau.

Anurag Saigal

[93] Mr. Saigal filed a witness statement on 13 October 2021 which stood as his evidence in chief. He has been employed by HSBC HK for about 17 years. He is the Wholesale Chief Operating Officer of HSBC HK. He was not personally involved in any of the events relating to Bettas but his knowledge is derived from his review of documents in the possession of HSBC HK. He stated that based upon his review and consideration of the contemporaneous and current documents, an account in the name of Bettas had been opened with HSBC HK in September 1986. According to him, HSBC HK considers that it has been put on inquiry as to whether Adrian is entitled to act on Bettas' behalf and considers that it would be at risk of acting in breach of its obligations to Bettas, as its customer, if it complied with Adrian's instructions.

[94] In paragraphs 7 to 10 of his witness statement, he specifically addressed the resolutions as to the shareholding and authority to act on Bettas' behalf and from paragraphs 11 to 15, he focused on the Mandate. As he understands it, the effect of the Mandate was that Bettas opened an International Deposits account with HSBC HK in September 1986 and purported to appoint Chandru and Sunder as authorised signatories of the Account in their personal capacities and not as Bettas' directors. He stated that correspondence between Bettas and the Defendants appear to confirm that Bettas opened an account with HSBC HK.

[95] Mr. Saigal stated that he is not aware of any communications between the Defendants and Bettas subsequent to the November 1989 letter until 2009.

[96] Under cross-examination, it was drawn to his attention that there was communication in 1995.

[97] Mr. Saigal testified that HSBC HK attempted to locate the directors and owners of Bettas between 2002 and 2009. He said that the 5 February 2009 letter was the first communication HSBC HK had received from anyone purporting to act on Bettas' behalf in nearly 20 years and, to his knowledge, Bettas has not given an explanation for this.

[98] Mr. Saigal further commented on the 2009 correspondence with D&T whereby HSBC HK (i) requested that D&T advise it as to who it was representing and the interest of that person in Bettas along with the person's legal right to the requested information; (ii) requested documentation in order to substantiate the rights of the requesting party; and (iii) indicated that the requested information was necessary to determine whether D&T's client had the right to receive information as only Bettas itself acting through its officeholders has a right to the same. He also stated, that by letter dated 27 March 2009 which was sent from HSBC HK to Sunder, he was informed that his request for a statement of account for the Account was under review and he was requested to provide documentation evidencing his directorship in Bettas.

[99] According to him, he found discrepancies with the share certificate dated 25 March 2009 and he found many other discrepancies with the share certificates, the will, the 2009 power of attorney and other documents which were tendered on behalf of Bettas which put the Defendants on inquiry.

[100] Under cross-examination, Mr. Saigal confirmed that he did not personally perform a search of HSBC Nassau's accounts to confirm whether Bettas did not in fact have an account at it. He accepted that a reference letter would normally be addressed to the bank that one is hoping to do business with. He accepted that the reference letter from CIBC was sent, on behalf of Bettas to HSBC Nassau for the purpose of Bettas opening an account at HSBC Nassau.

[101] He was referred to a letter dated 1 December 1986 wherein HSBC HK wrote a reference to HSBC Nassau for Bettas. He says that "*it looks a little odd. I don't*

know maybe if the address is different, but if they are the same branch this looks a little odd." He said that this would usually be done where a party is seeking to open an account.

[102] He accepted that while Bettas' Funds could have been deposited in The Bahamas, they could have been administered by HSBC HK, although he acknowledged that he was not too sure about the practice. He also acknowledged that he did not know the practices for HSBC HK's International Deposits Department.

[103] Mr. Saigal stated that, as far as he was aware, there was no communication between the Defendants and Bettas from November 1989 until 2009. However, he admitted that this statement was incorrect based on the Defendants' own documents which showed that Sunder visited HSBC HK on 1 August 1995. He was also shown an internal memo between HSBC personnel and according to him, it appears that HSBC did receive instructions from Bettas on 1 August 1995 with respect to the holding of mails.

[104] Mr. Saigal also accepted that HSBC HK must have had a reasonable basis for assuming that Bettas had an account with HSBC Nassau otherwise it would not be randomly writing to HSBC Nassau on 1 August 1995 inquiring whether such an account relationship existed.

[105] Mr. Saigal also admitted that, based on the memo dated 4 December 2008, from Steve Smith, Head of Global Banking and Markets Central Compliance to Andrew Tilke of HSBC, HSBC HK did not really make any effort to try and trace the beneficial owners. The memo stated (in part):

> **"At a recent HBAP London Branch ALCO meeting, the subject of Bettas Ltd was discussed….**
>
> **Background**
>
> **In 2002, we discovered the underlying IDD clients holding deposits with HBAP London branch had not been identified to UK standards….It was noted that one particular account "Bettas Ltd" held a very significant sum of money on their account. The**

remediation team in Hong Kong was unable to trace the directors and/or beneficial owners of the account. The account was subsequently inhibited and marked as "dormant."

The balance on the Bettas Ltd dormant account today stands at a staggering CAD$105m equivalent to GBP 56m.

Actions taken to date

Whilst the money is held by HBAP London branch, the relationship rests with HBAP Hong Kong. However, since 2002, I don't believe anyone in Hong Kong had made any real effort to try and trace the beneficial owner.

In September 2007, we commissioned the services of the Business Intelligence Unit in London to undertake some research. Using a tracing Agency, they managed to locate two individuals who were connected to the account.

Mr. Sunder Kundanmal –was an authorised signatory to the account. He has been traced to the following private address:

……

We have also established that Mr. Kundanmal has an active HSBC Canada credit card account and the corresponding address is …..

…….

Clearly, we need to be careful how we handle this issue. It is not inconceivable that the origin of these funds has criminal links.

….

I would imagine that any approach is going to come as a surprise. It is 22 years since the account was opened and approximately 15 years since the last deposit was made. They may be very suspicious as to our motives and how we were able to trace them. We should not alert either of them to the value of the unclaimed deposit. …

As to how we traced them, I think it would be fair to say that we managed to trace them relatively simply and quickly from records provided to us at the time of account opening."[Emphasis added]

[106] Mr. Saigal accepted that 'hold mail' was a service that HSBC HK offered and that there was no limit on how long a customer could use this service. More importantly, he accepted that there is no evidence that the Defendants ever raised any concern with Bettas about its use of the hold mail service.

[107] He asserted that he does not have any documents that Bettas' Account was dormant for 20 years.

[108] Mr. Saigal admitted that the Defendants did not raise any concern with Sunder about his signature on any documents. He also admitted that no other person had come forward to the Defendants in the past 14 years to lay claim to any of Bettas' funds and that HSBC HK's main concern was whether Sunder and now Adrian have authority to act on Bettas' behalf.

Tsui Ka Shin (Christina)

[109] Christina filed a witness statement which stood as her evidence in chief. She is currently the head of Jade, Premier and International, Hong Kong of HSBC HK. Between 2010 and 2013, she was the Senior Vice-President of Business Banking and Commercial Banking. Her role was client-facing and entailed dealing with enquiries from existing commercial and business clients and occasionally walk-in enquiries from commercial clients who would attend HSBC HK's offices with queries or issues which they wish to resolve.

[110] She stated that, in her portfolio, she deal with and meet hundreds of customers each year and does not recall the details of this matter, the name Bettas or Adrian. However, from contemporaneous documents which she had been shown, she understood that there was a meeting between Adrian and representatives of HSBC HK in early April 2011 ("the 2011 meeting"). She has no recollection of it.

[111] Christina did not recall receiving an email from Adrian dated 12 April 2011 but she believes that she may have requested this information on a follow-up call with Adrian after the 2011 meeting.

[112] Her involvement in this matter ceased around the time that SH were instructed. Her understanding was that the decision of the legal and compliance department was not to provide Adrian with statements in relation to the Account or to pay over any funds associated with the Account on the basis of the inconsistencies and

unexplained irregularities in the corporate documents purporting to relate to Bettas that were produced by Sunder and later, Adrian.

Horace Kwan Hor Chau

[113] Mr. Chau also testified on behalf of the Defendants. He relied on his witness statement which was filed on 13 October 2021. He joined HSBC HK in 1995 as a banker.

[114] Under cross-examination, he confirmed that he was not an employee of either HSBC Nassau or HSBC HK in 1986. He was never an employee of HSBC Nassau and had no personal knowledge of this matter. He had no knowledge of the Defendants' banking practice in 1986 when Bettas' Account was opened. He nevertheless accepted such practice would be different from today.

[115] Mr. Chau admitted that he did not personally review HSBC Nassau's files in this matter and just read the documents exhibited to his witness statement. He could not independently verify what Mildred Johnson ("Ms. Johnson"), had done to conclude that Bettas had no account at HSBC Nassau but he believed the contents of her First and Second Affidavits.

[116] Mr. Chau admitted that there was no independent verification of HSBC Nassau's client database. He could not speak to Central Bank but admitted that Central Bank gave no reason for its decision for the downgrade of the licence of HSBC Nassau from an unrestrictive banking category to a non-active category and that HSBC Nassau still has a banking license in The Bahamas.

[117] Mr. Chau stated that based on Ms. Johnson's position and the letter from Central Bank, there is no account for Bettas in The Bahamas.

[118] He agreed that the letter dated 22 September 1986 stated that Chandru visited HSBC Nassau office and placed funds with that branch and not with the HSBC HK office.

[119] Mr. Chau stated that it is not possible for Bettas to set up the Account in Nassau but for it to be administered in Hong Kong. He said that he was not aware of the account balance of Bettas.

[120] Mr. Chau acknowledged that from 27 November 1989, HSBC HK had standing instructions to have the term deposits automatically rolled over but he could not say whether those instructions are still in place. He accepted that the Defendants have accepted that Sunder was a former director of Bettas and that, in 2009, there was nothing on their files to suggest that Sunder did not have capacity to operate Bettas' Account. He also acknowledged that Bettas made a deposit in 1995 and that, contrary to the Defendants' case, there was not 20 years of silence on Bettas' behalf. Notwithstanding that admission, he nonetheless maintained that Bettas' Account was dormant for 20 years. As Counsel for Bettas correctly stated, this directly contradicts the Defendants' own documentary evidence as well as the oral testimony of Mr. Saigal.

[121] Mr. Chau admitted that Bettas' Funds are now in Hong Kong and he was not aware of anyone besides Bettas who is claiming the Funds. He also admitted that HSBC HK was "stuck" with the Funds until this matter is resolved.

Factual findings on witnesses of fact

[122] On a balance of probabilities, having observed the demeanour of the witnesses as they testified, I prefer the evidence of Adrian as opposed to that of the Defendants' witnesses. I do however accept some aspects of the evidence of the Defendants' witnesses especially that of Mr. Saigal. I found Christina and Mr. Chau's evidence to be unreliable especially when they testified during cross-examination.

[123] With respect to Mr. Saigal, he had no personal knowledge of any facts relating to the establishment of the Account since he only joined HSBC HK in 2005. He did not personally perform a search of HSBC Nassau's accounts to ascertain whether or not Bettas had an account with it. He admitted that the Defendants did not raise any concern with Sunder about his signature on any documents and that no other

person has come forward to lay a claim to any of Bettas' funds and that HSBC HK's main concern was whether Sunder and now Adrian has authority to act on Bettas' behalf.

[124] Christina's role in these proceedings appear to be minimal since she did not seem to recall anything not even any of the dealings she had with Adrian. I did not believe her given the enormity of the funds that HSBC HK admitted that it is holding as an "interpleader" for Bettas. That said, her evidence was rather unhelpful.

[125] Like Mr. Saigal, Mr. Chau also had no personal knowledge of any of the matters in this case. His evidence mainly consisted of his reliance on the affidavits of Ms. Johnson to demonstrate that Bettas never had an account with HSBC Nassau although I find as a fact that both Chandru and Sunder visited HSBC Nassau where the Account was initially set up. It was at that branch that USD 26,400,000 was deposited. I also find as a fact that the movements of Bettas' Funds around the globe to Bahrain, London and Hong Kong was not within Bettas' knowledge, control and consent.

[126] While the Defendants invited this Court to treat Adrian's evidence with caution, I found him to be clear and straightforward in his evidence. He was obviously peeved that he and Sunder were given the 'runaround' especially since the Defendants had never questioned Sunder's authority to give instructions. It seemed to me that the Defendants were imperturbable for years when no-one came forward to inquire about Bettas' Account but as soon as Sunder and Adrian presented themselves, they began to insinuate that the Funds might be the proceeds of money laundering which they accepted and opened an account at their Nassau branch. There are aspects of Adrian's evidence which he accepted that he had no personal knowledge because he was only 16 years old when the account was set up in 1986. He accepted that he was not present when Chandru was appointed as Bettas' shareholder or when his father, Sunder, was appointed as its director. However, he was able to speak about events that were relayed to him by Sunder and Chandru.

[127] The Defendants have categorically stated that they refused to comply with Sunder's instructions even though he was an authorised signatory on the Account. Although they said that they were put on inquiry, they had made no real attempt to contact Sunder even though Sunder's address remained consistent for years and he had a longstanding banking relationship with HSBC Canada where he held a valid credit card account at the time.

[128] The fact that nothing was done for some years by Bettas was explained by Adrian. He stated that the family was/is very wealthy so there was no need to go after the Funds.

[129] The Defendants pleaded at paragraph 24 that "they are in effect in the position of interpleaders".

[130] The law is where a person holds property to which he claims no ownership and two or more persons are in dispute as to who is the true owner of the property, the person holding the property may apply to the court to adjudicate on the disputed ownership so that he can safely deliver the property to the true owner. Such an application is for interpleader relief. In other words, the person is not interested in the property but only seeks to have the court determine the rightful owner. In the present case, HSBC HK acknowledged that it holds Bettas' Funds and it says that it is not interested in the Funds. Nevertheless, it is actively defending the claim. It seems to me that HSBC HK has misconstrued the interpleader relief.

[131] The Court observes that, even after eleven years since the claim was filed, no one except Sunder and Adrian have come forward to seek information about the Funds in Bettas' Account. In fact, no one other that Sunder and Adrian have come forward to seek information about the Account since it was set up in 1986.

[132] The Defendants alleged that they were "put on reasonable inquiry." They have failed to plead any facts that could put them or any reasonable bank on inquiry. The corporate resolutions and issuance and cancellations of shares referred to in paragraph 29 of the Defence were all done in accordance with Bettas' Articles of

Association and are valid. Their very own Mr. Steve Smith, in his 2008 memo, stated that no real attempt was made to find and trace anyone associated with Bettas' Account although they had addresses and telephone numbers for Sunder.

Expert witnesses

[133] Bettas is a Liberian Company consequently, expert evidence on Liberian law concerning Bettas' shareholders, directors and officers was fundamental to this dispute. Bettas adduced expert evidence from Mrs. Blamo. Indisputably, she is well qualified to give expert evidence on Liberian corporate law.

[134] Mrs. Blamo was admitted to practice law in Liberia as an attorney in 2004 and then admitted as a counsellor of the Supreme Court of Liberia in 2007. She also served as the Solicitor General of Liberia from 2013 to 2018. She has extensive private law practice and has served as an Assistant Professor, teaching various law courses. Even the Defendants have accepted her expertise without demur and acknowledged that she has distinguished credentials as an attorney and counsellor of the Supreme Court of Liberia.

[135] The Defendants relied on the expert evidence of Mr. Rutkowski. Bettas contended that he is not qualified to opine on Liberian law. Mr. Rutkowski is a New York attorney who is not called to the Liberian Bar and has not practised as an attorney in Liberia. His online resume described him as a lawyer whose area of practice is admiralty and maritime law. After hearing both sides on this issue at a separate hearing, the Court deemed Mr. Rutkowski an expert in Liberian law. Bettas submitted that Mr. Rutkowski's purported expert evidence should be ignored or, if the court was minded to consider it, give it very little weight, if any.

[136] Having heard both experts and having analysed their evidence and their reports, on a balance of probabilities, I prefer Mrs. Blamo's expert evidence to that of Mr. Rutkowski. I found her to be more experienced in Liberian law than Mr. Rutkowski. That does not mean that I have discounted his evidence in totality. However, where

his evidence conflicts with that of Mrs. Blamo, I prefer her evidence which she gave in a convincing and clear manner.

[137] Mr. Rutkowski is a New York lawyer. It was clear to me that his evidence was merely an attempt by the Defendants to grasp at something to justify their refusal to allow Sunder and Adrian to operate Bettas' Account over the past 14 years.

Expert points of agreement

[138] In order to narrow the scope of the dispute raised in this action, at a case management hearing on 7 February 2022, the Court directed that the experts file and serve a Joint Expert Report on Liberian corporate law. The experts complied. They met on zoom at 5:00 p.m. Liberian time to discuss and agree on the issues which are before this Court. They filed a Joint Expert Report on 18 March 2022.

[139] The experts had nine issues to consider. They are as follows:

1. Whether there is sufficient evidence to conclude that Mr. Young duly transferred his one share held in Bettas represented by share certificate No. 1 to Chandru which give rise to the issuance of share certificate No. 2 in the name of Chandru?

2. Whether there is sufficient evidence to conclude that Chandru was duly issued share certificate No. 3 representing 99 shares in Bettas?

3. Whether Adrian was duly issued shares of Bettas and if so, is he entitled to hold or does he in fact hold the entire share capital of Bettas?

4. Whether Sunder was duly appointed director and officer of Bettas, and if so, when was Sunder duly appointed?

5. Whether Sunder was authorised to act on behalf of Bettas if he was duly appointed an officer and director of Bettas?

6. Whether Adrian is a duly appointed director and officer of Bettas and, if so, since when was he appointed a director and officer of Bettas?

7. Whether Adrian is authorised to act on behalf of Bettas if he was duly appointed an officer and director of Bettas?

8. If it is determined that Adrian is not a shareholder of Bettas, is Adrian nonetheless authorised to act on behalf of Bettas if it is determined that he is duly appointed director and officer of Bettas?

9. Whether Adrian's resignation of Sunder under the Power of Attorney issued by Sunder was a corporate act which affects the business and management or was it a personal act which could be delegated?

AGREED POINTS

	POINTS	STATEMENT OF COMMON VIEW OF THE EXPERTS
	The appointment of Adrian as Director if Sunder was duly appointed as Director	The experts agree that if Sunder was duly appointed Director, and Officer of Bettas, then logically his appointment of Adrian as Director of Bettas on 12 March 2009, to fill a vacancy on the board was valid. *Article III, § 3* of the by-laws of Bettas *(*1986) which is consistent with the Liberian Business Corporation Act ("the BCA"), provides that the majority of the remaining directors may fill vacancies on the board, or the shareholders may fill such vacancies.
	The appointment of Adrian as Officer if Sunder was duly appointed as Director	The experts agree that if Sunder was duly appointed Director, then logically his appointment of Adrian as an officer of Bettas was done in conformity with the bylaws and the BCA.
	Whether Adrian was duly issued shares or does he in fact hold the entire share capital of Bettas?	The experts agree that the *situs* of shares of Liberian corporations for all intents and purposes except taxation is Liberia. The experts disagree whether the shares were held by Chandru. **However, both experts agree that if the shares were issued to Chandru, then they are not a part of his Bahamian Estate. Upon the death of Chandru, only a legally appointed representative of his estate was and is authorized to report to the corporation that the certificates are missing, and request for the issuance of a new certificate upon the terms set by the board. The board lacked the authority to unilaterally cancel share certificates Nos. 2 & 3 and issue share certificate No. 4 in the name of a deceased person. The Bahamian Will does not cover the shares and there is no evidence from the record to support a transfer of shares to Sunder. Sunder could not validly assign or transfer to Adrian what he did not own. There is nothing in the record to support the validity of the issuance of share certificate No. 5 in the**

		name of Adrian. Share certificates Nos. 2&3 were issued in registered form.
		The experts agree that the Power of Attorney issued to Adrian was personal in nature and did not grant him authority to act on behalf of Sunder as a proxy in relation to the business and the management of the affairs of Bettas. The board resolution accepting the resignation of Sunder signed by Adrian on behalf of Sunder, was a corporate act. However, acceptance of the resignation by Bettas was not necessary to give effect to the resignation.

[140] Both experts agreed that the purported cancellations and issuance of shares to Adrian is void as a matter of Liberian law. Bettas says that it was never Adrian's position that he was issuing instructions to the Defendants in his capacity as a shareholder but that Adrian and Sunder were issuing instructions to the Defendants in their capacities as directors.

[141] Additionally, both experts determined that Bettas' shares form part of Chandru's Liberian estate. As such, Bettas' shares did not fall within Chandru's Bahamian estate and his Bahamian Will is irrelevant for this Action.

DISPUTED POINTS

Whether or not there is sufficient evidence to conclude that Benedict Young duly transferred his one share held in Bettas represented by share certificate No. 1 to Chandru which give rise to the issuance of share certificate No. 2 in the name of Chandru?

[142] Mr. Rutkowski opined that there is insufficient evidence to conclude that Mr. Young transferred his one share held in Bettas represented by share certificate No. 1 to Chandru which give rise to the issuance of share certificate No. 2 in the name of Chandru.

[143] Mrs. Blamo's opinion is that there is sufficient evidence to presume that Mr. Young's one share was regularly transferred to Chandru which gave rise to the issuance of share certificate No. 2.

[144] What I gleaned from the exhibits which were tendered during the trial was that, on 5 August 1986, the first meeting of the Board of Directors of Bettas was held with

two members present: Mr. Young and Cheng Wing Kwong ("Mr. Kwong"). The Board adopted the by-laws of the corporation and the transfer of subscription of one share to Mr. Young was accepted. The Board resolved that a share certificate be issued to Mr. Young in consideration of the payment of $10.00. The Board then appointed Mr. Young as President, Mr. Kwong as Secretary and Ms. Pak as Treasurer. Consequently, share certificate No. 1 was issued to Mr. Young, holder for one Registered and/or one Bearer shares of Bettas without par value. According to Mrs. Blamo, under Liberian law, the Board did have authority to adopt the bylaws of the Corporation consistent with Article H of the Articles of Incorporation of Bettas and to appoint the officers of Bettas.

[145] On 6 August 1986, Mr. Young sold and transferred his one share in Bettas to Chandru for and in consideration of $10. Share certificate No. 1 was cancelled and share certificate No. 2 was issued to Chandru holder for "one Registered and/or Bearer shares. According to Mrs. Blamo, the bylaws of Bettas adopted on 5 August 1986 provides that the transfer of registered shares shall be made only on the books of the corporation by the registered holder in person or by an authorised attorney and upon surrender of the certificate of such share. The "Register of Members," certified to be the true copy by K.K. Young & Co., confirms the transfer of one share by Mr. Young to Chandru. Mrs. Blamo stated that under Liberian law, the transfer of Mr. Young's share to Chandru was done in accordance with the bylaws of Bettas and the laws of Liberia.

[146] I prefer the evidence of Mrs. Blamo to that of Mr. Rutkowski. On a balance of probabilities, I find that there is sufficient evidence to conclude that Mr. Young duly transferred his one share held in Bettas to Chandru which gave rise to the issuance of share certificate No. 2 in the name of Chandru.

Whether or not there is sufficient evidence to conclude that Chandru was duly issued share certificate No. 3 representing 99 shares in Bettas?

[147] In paragraph 7 of their Defence, the Defendants averred that:

> **"….<u>the Defendants do not deny</u> that Sunder Kundanmal is a former director of the Plaintiff or <u>that Chandru Kundanmal is a former shareholder of the Plaintiff</u>. However, the Defendants put the Plaintiff to strict proof with respect to when Sunder Kundanmal ceased to be a director of the Plaintiff; <u>the date that Chandru</u> passed away and/or <u>ceased to be a shareholder of the Plaintiff</u>; by whom and the date when Adrian Kundanmal was appointed a director of the Plaintiff; and/or how and when Adrian Kundanmal became the sole shareholder of the Plaintiff."**[Emphasis added]

[148] Notwithstanding their pleaded case, the Defendants did a *volte face* and through their expert, Mr. Rutkowski indicated that there is insufficient evidence of an instrument transferring 99 shares in Bettas to Chandru.

[149] Mr. Rutkowski stated that while he has reviewed copies of Certificates numbered 2 and 3 of Bettas reflecting Chandru as the owner of all of the shares of Bettas, he has not seen any instruments of transfer. He further stated, in paragraph 17 that:

> **"While the existence of a copy of a stock certificate in Mr. Young's name marked "cancelled" gives rise to the inference it has been transferred and the issuance of Certificates numbered 2 and 3 suggest CK as the then owner thereof, this is all a matter of inference without sufficient evidence for me to conclude all proper procedures took place…."**

[150] On the other hand, Mrs. Blamo opined that there is sufficient evidence to deduce that Chandru purchased directly from Bettas' 99 shares of the corporation's stock and was duly issued certificate No. 2 representing 99 shares. At paragraph 7.8 of her expert report, she stated:

> **"On 6 August 19868, Chandru Kundanmal also purchased the remaining ninety-nine (99) shares of stock of Bettas and share certificate No. 3 was issued to "Chandru Kundanmal holder" for "ninety-nine Registered and/or Bearer shares". The "Register of Members" certified to be the true copy of K.K. Young & Co. confirms that on August 6, 1986, ninety-nine (99) shares of Bettas' stock were issued in the name of Chandru Kundanmal as is reflected in share certificate No. 3. Given the facts stated above, under Liberian law, Chandru Kundanmal's purchase of the ninety-nine "Registered and/or Bearer shares" of Bettas was done in conformity with the bylaws of the corporation and the applicable laws of Liberia."**

[151] On a balance of probabilities, I accept Mrs. Blamo's evidence and the Defendants' pleaded case that Chandru was a former shareholder of Bettas.

Whether Sunder was duly appointed director and officer of Bettas Limited and if so, when was he appointed? If he was duly appointed, was he authorized to act on behalf of Bettas?

[152] In considering this issue, it is necessary to look at the Minutes of the Meeting of the Board of Directors which took place on 3 September 1986 ("September 1986 Meeting"). Present at that meeting were Mr. Young and Mr. Kwong. Under the sub-heading: RESIGNATION & APPOINTMENT OF DIRECTORS & OFFICERS; it is stated:

> **"It was resolved that the resignation tendered by the following persons be hereby accepted:-**
>
> | | |
> |---|---|
> | **Benedict Joseph Young** | **Director & President** |
> | **Cheng Wing Kwong** | **Director & Secretary** |
> | **Ann Mary Pak** | **Director & Treasurer** |
>
> ***It was further resolved* that Mr. Sunder Kundanmal be appointed as Sole Director, President, Secretary and Treasurer of the Corporation."**

[153] Mr. Rutkowski opined that, under Liberian law, it is not permissible that the then full current board of directors resigned and Sunder was appointed as sole director, president, secretary and treasurer of Bettas. According to him, once the directors in office resigned, they are no longer empowered to fill any vacancies because they are no longer directors. Doing so would usurp the rights of the shareholder(s). According to him, Mr. Young could have resigned and the remaining directors could have elected Sunder to replace Mr. Young then in turn they could have resigned but that is not what they did. Hence, to be valid under Liberian law, at the minimum, the shareholder (s) of Bettas would need to ratify this act.

[154] On the other hand, Mrs. Blamo opined that, under Liberian law, Sunder was duly appointed a director and officer of Bettas at the September 1986 Meeting and he remained a director up to his death on 23 October 2014. Sunder was also

appointed president, secretary and treasurer at that meeting and he resigned those positions on 1 April 2011.

[155] Mrs. Archer-Glasgow for the Defendants argued against the reliance on the presumption of regularity. Mr. Rutkowski's views cast significant doubt upon whether Sunder was validly appointed as a director of Bettas.

[156] Learned Counsel submitted that, in the absence of any reliable evidence of what occurred at the September 1986 Meeting, such as an agenda or transcript, the Minutes are the only evidence that the Court has of what actually occurred. She submitted that it cannot be without significance that the Minutes of that meeting were certified (i.e. signed) by the sole participants of the September 1986 Meeting, namely, the Chairman and Secretary.

[157] According to the Minutes, the Board resolved that the resignations tendered by the directors of Bettas be accepted and in the following paragraph stated that "*it was further resolved*" that Sunder be appointed "sole director, president, treasurer and secretary of Bettas. The Defendants argued that the phrase "*it was further resolved*" carries meaning and significance regarding the timing of the resolutions. Draftsmen ordinarily use the phrase "it was further resolved" to indicate that additional or consequential matters were decided. While it is possible that the phrase may mean "*likewise*" as Mrs. Blamo suggested under cross-examination, it is not the natural construction of the phrase and that construction should not be relied upon in the absence of any indication it was intended.

[158] Mrs. Archer-Glasgow next submitted that Mr. Rutkowski's interpretation of the Minutes is further supported by the fact that those Minutes record the acceptance of the resignations of the then current directors of Bettas *before* the appointment of Sunder as they specifically refer to it being **further resolve**d that Sunder "*be appointed as Sole Director*…" According to her, the directors had already resigned when they purported to appoint Sunder.

[159] According to the Defendants, the presumption of regularity relied upon by Mrs. Blamo to support her analysis of the validity of Sunder's appointment at the September 1986 Meeting is untenable. The presumption of regularity is a rebuttable evidential presumption. On the presumption of regularity, the Defendants relied on the English Court of Appeal in **Shannan v Viavi Solutions UK Limited** [2018] EWCA Civ 681. The presumption of regularity:

1) will usually be of assistance only where there is no proof one way or the other and it is more probable that what was intended to be done was done as it ought to have been done to render it valid;

2) does not really add anything to the power of the court to make a finding of fact on the balance of probabilities based on inferences drawn from circumstantial evidence;

3) is "*no more than a rebuttable statement founded on common sense, of the inference it will normally be appropriate to draw in a given situation where primary evidence is lacking*" and

4) is not inevitable, as "*the trier of fact may refuse to make the usual or natural inference, notwithstanding that there is no rebutting evidence*".

[160] The Defendants submit that the presumption of regularity should ***not*** be applied to the conduct of the September 1986 Meeting as:

1) the issue of Sunder's appointment as a director has important implications for Bettas' case, therefore, the regularity of the September 1986 Meeting ought to be a matter upon which affirmative proof is required rather than a matter resolved by the application of a presumption;

2) the Minutes of the September 1986 Meeting are the best evidence available as to what transpired. If the Minutes cannot be relied on at face value, then the same holds true of all the corporate documents adduced by Bettas;

3) this is not a case where the actual observance of all due formalities can be inferred as a matter of reasonable probability;

4) at the time of the September 1986 Meeting, Bettas' corporate affairs were already not in order. According to Adrian's testimony, Sunder originally planned for Bettas' shares to be bearer shares but there was an administrative mistake and;

5) in addition, the directors at the September 1986 Meeting adopted a different procedure than that which was used to appoint them. It would not be surprising if the procedure they adopted miscarried.

[161] Mr. Rutkowski concluded that Sunder was not duly appointed. The crux of his opinion revolves around his interpretation of the minutes of the September 1986 Meeting. In the minutes, the directors did two things: (i) they sought to accept their resignation and then they sought to appoint Sunder as the sole director, president, secretary and treasurer. Both acts are captured in the same resolution. There is no evidence of what transpired at that meeting and in what sequence these events took place. However, Mr. Rutkowski acknowledged that there are two scenarios of what could have happened at the meeting namely:

(1) The directors could have resigned first and then they would not be empowered to appoint Sunder ("Scenario A") or;

(2) One of the directors (according to Mr. Rutkowski, Mr. Young) could have resigned and the remaining directors could have elected Sunder to replace the director who resigned and then the remaining directors could have resigned ("Scenario B").

[162] Mr. Rutkowski conceded that there is no evidence of the sequence of the events and that the directors' resolution does not reflect the order of events. Nevertheless, he opined that Scenario A is most likely what occurred and surmised that because Sunder could not have been validly appointed, he could not have appointed Adrian.

[163] Mr. Turnquest, appearing as Counsel for Bettas, contended that Mr. Rutkowski is wrong in that he failed to give any consideration to Bettas' by-laws and the Liberian Business Corporation Act ("the Liberian BCA"), which both require that there is always a minimum of one director. Thus, it would have been impossible for all the directors to resign at once and leave Bettas with no directors. Mr. Turnquest further contended that Mr. Rutkowski also failed to consider the possibility that the resignations and appointment could have taken place concurrently. The Defendants argued that it is difficult to think that Mr. Rutkowski, who has been advising on Liberian law for over 40 years, would not have been aware of the provisions of Bettas' by-laws and the Liberian BCA prescribing a minimum number of directors. The fact is he did not speak to the requirement that both stipulate that there be always a minimum of one director.

[164] Mrs. Blamo stated that the normal practice would be for Sunder's appointment to take place *prior* to the other directors resigning as there is no suggestion that the parties were attempting to achieve anything other than the appointment of Sunder as the sole director, president, secretary and treasurer and the resignation of the other directors. The Register of Directors and Officers of Bettas reflects Sunder's appointment as a director and the other directors' resignation on 3 September 1986. According to Mrs. Blamo, in the absence of any evidence to the contrary, the court must proceed on the assumption that Scenario B is the most plausible. I agree. Indeed, the director's resolution does not definitively state that the other directors resigned before they appointed Sunder.

[165] In addition, as Mr. Turnquest correctly argued, to the extent that there is any ambiguity as to the sequence of events on 3 September 1986, the Court is entitled to rely on the presumption of regularity to find that Scenario B is the most plausible.

[166] The principle is of ancient vintage. Lindley LJ in **Harris v Knight** (1890) 15 PD 170 at pp 179–180 stated:

> **"The maxim, 'Omnia praesumuntur rite esse acta,' is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. <u>The maxim expresses an</u>**

> **inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried in effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect."**[Emphasis added]

[167] In **Gosford Christian School Ltd v Totonjian** [2006] NSWSC 725, the Court had to determine the sequence of various resolutions executed on the same date, without any evidence of the order of execution. In this case, Barrett J noted:

> **"[110] As the sole effective signatory, Mr Warren must be presumed to have intended the three documents to have the force they were obviously designed to have. His intention was that each should have effect according to its terms; and it was a series of acts on his part alone that was necessary to produce that outcome. He is shown to have performed all of the necessary acts, in that his signature appears on each of the three documents. The gap in the evidence as to the sequence in which the documents were signed may be filled by resort to the presumption of regularity, *omnia praesumuntur rite esse acta*….**
>
> **[111] The rule described by Lindley L.J. applies here. I accordingly infer, as a matter of probability (which is all I need find), that Mr Warren signed the documents in the order necessary to give efficacy to his actions, that is, that he signed the appointment document, followed by the special resolution document, followed by the ordinary resolution document."** [Emphasis added].

[168] Mr. Turnquest contended that the presumption of regularity must be taken to apply in this case with the result that Scenario B is what most likely occurred. I agree. Indeed, the parties completed all the appropriate acts to achieve what they were seeking to do notably:

(1) The 3 September 1986 Resolution was executed confirming Sunder's appointment as director and the other directors' resignations were accepted.

(2) The directors submitted formal resignations letters on 3 September 1986.

(3) The Register of Directors and Officers reflect Sunder's appointment as a director on 3 September 1986 and the other directors' resignation on the same day.

(4) Sunder subsequently proceeded to act as Bettas' sole director for 23 years without question by the Defendants. HSBC HK also acknowledged in a letter to Bettas on 23 February 1987 that Sunder was appointed Bettas' *"sole director, president, secretary and treasurer"* and did not seek to raise any questions about his appointment then. Now, as the Defendants are called upon to provide a statement of Bettas' account, this issue surfaced.

[169] On a balance of probabilities and preferring Mrs. Blamo's expert evidence to that of Mr. Rutkowski, I agree with Mr. Turnquest that the Court is entitled to rely on the presumption of regularity to hold that the sequence of events on 3 September 1986 would correspond with Scenario B, to the extent there is ambiguity over the sequence of the resignations and appointment.

[170] At 7.13 of her Report, Mrs. Blamo addressed the issue of whether Sunder was authorized to act on behalf of Bettas if he was duly appointed an officer and director of Bettas. She opined that under Liberian law, except as provided for in the Articles of Incorporation and the Liberian BCA as to actions which requires shareholder's approval, all corporate powers are exercised by the board of directors or by the officers of a corporation under the authority of the board of directors. The day-to-day management of the corporation's bank account is not an action which requires shareholder approval both under the Articles of incorporation and the by-laws of Bettas or under the law. The by-laws of Bettas specifically provides that the affairs, business and property of the corporation shall be managed by its board of directors. Mrs. Blamo stated that although the Liberia BCA has been amended

many times since 1977 when it became effective, the provision in respect of the management of the business of the corporation has never been amended and remains the law today.

[171] According to Mrs. Blamo, under Liberian law, Sunder, as a duly appointed director of Bettas, was duly authorized to act on behalf of Bettas up to the time of his death having been appointed on 3 September 1986 without objection and given the fact that he controlled the affairs of Bettas in executing documents including giving instructions to the Defendants, without any hindrance or objection by the shareholders or anyone. Under Liberian law, Sunder, as a duly appointed officer of Bettas, was authorized to act as an officer on behalf of Bettas up to the time of his resignation on 1 April 2011.

[172] I therefore find that Sunder was duly appointed director and officer of Bettas Limited on 3 September 1986 and was duly authorized to act on behalf of Bettas as he had done for 23 years without demur by the Defendants.

Whether Adrian was duly appointed director and officer of Bettas and if so, since when was he appointed? If Adrian was duly appointed officer and director, is he authorized to act on behalf of Bettas?

[173] Mr. Rutkowski opined that Sunder was not a director duly elected pursuant to Liberian law and therefore he had no authority to appoint Adrian on 12 March 2009. Consequently, Adrian may not be authorized to act on Bettas' behalf. Following from my previous finding that Sunder was duly appointed as a director and officer of Bettas on 3 September 1986 and was duly authorized to act on behalf of Bettas as he had done for 23 years, he had the authority to appoint Adrian as director and Vice President of Bettas on 12 March 2009. On 1 April 2011, the position of Vice President was declared vacant and Adrian was duly appointed president, secretary and treasurer. As Mrs. Blamo persuasively opined and which I accept, under Liberian law, Adrian as a duly appointed director and officer of Bettas is duly authorized to act on Bettas' behalf.

Whether Adrian's resignation of Sunder under the Power of Attorney issued by Sunder is a corporate act or a personal act which could be delegated?

[174] In paragraph 26 of his expert report, Mr. Rutkowski stated that if one were to conclude that the Minutes of the September 1986 Meeting were a mere error of form, one might conclude that Sunder's appointment of Adrian might stand as Sunder appointed him to fill one of the two vacancies that arose out of the 1986 resignations. However, Mr. Rutkowski is deeply troubled by the director action of 1 April 2011 whereby the directors of Bettas through the sole action of Adrian accepted Sunder's resignation and appointed Adrian as sole director, president, treasurer and secretary. He agreed that such an action could have been taken by the directors but Adrian appeared to have signed on his own behalf and that of Sunder. According to Mr. Rutkowski, this is quite improper absent a proxy from SK in favor of Adrian. No proxy is part of the record. He opined that the Power of Attorney was personal and did not extend to matters relating to Bettas and consequently, the acts done on 1 April 2011 were personal acts.

[175] Mrs. Blamo agreed that the Power of Attorney issued by Sunder to Adrian was personal in nature as it specifically states:

> **"The agent shall have the power and authority to manage all of my affairs…and exercise all powers in my best interest and for my welfare."**

[176] According to Mrs. Blamo, the act of resigning as a director of a corporation is a personal act and not a corporate act which relates to the business and management of the affairs of the corporation. Thus, a director's resignation can be effected by an attorney-in-fact with proper authority. Mrs. Blamo noted that, in her view, that a Liberian court *may* question Adrian's resignation of Sunder as a director because Sunder had signed several documents on the same day in his capacity as director and he did not resign himself. She however added that although the court *may* question the resignation, she is unable to definitively determine whether a Liberian court may invalidate the resignation based on the presumption of regularity and because Adrian had actual authority.

[177] Both experts agreed that the Power of Attorney issued by Sunder to Adrian was personal in nature. It is a fact that Sunder signed several other documents on 1 April 2011 in his capacity as director but he did not resign himself. Mrs. Blamo opined that the Liberian court may question the resignation letter signed by Adrian on his father's behalf accepting the resignation of Sunder as a director of Bettas. This Court may likewise do the same.

[178] Sunder and Adrian signed the "Unanimous Written Consent of the Board of Directors of 1 April 2011" before a Notary Public wherein the board resolved: (1) *to accept the resignation of Mr. Sunder Kundanmal as President, Secretary and Treasurer only*; it did not state that the board resolved to accept the resignation of Sunder as director; (2) *to appoint Mr. Adrian Kundanmal as President, Secretary and Treasurer* and to declare the position of Vice-President vacant.

[179] The Court has before it, documentary evidence that on 12 March 2009, Adrian was duly appointed director and Vice-President of Bettas. On 1 April 2011, Adrian, was appointed president, secretary and treasurer and his previous position of Vice-President was declared vacant. Therefore, as at 1 April 2011, Adrian held the positions of director, president, secretary and treasurer of Bettas and since the resolution which Adrian signed on 1 April 2011 on behalf of Sunder, is questionable (which I accept), Sunder was still a director of Bettas until his death. As he is now deceased and, as I understand Liberian law as expounded by Mrs. Blamo, who evidence I preferred, Adrian is now the sole director, president, secretary and treasurer of Bettas.

What is the status of a Certificate of Election and Incumbency of Officer and Directors issued by LISCR Trust Company, specifically does such certificate verify or confirm the information it relays as being true and accurate?

[180] On 15 May 2009, LISCR Trust Company, registered agent of Bettas executed a Certificate of Election and Incumbency of Officers and Directors and the Declarations of Directors and Officers establish an evidentiary presumption of the matters stated therein. However, this presumption could be displaced by

alternative evidence. Certifying that according to their records, Sunder was a duly appointed director and the president, secretary and treasurer of Bettas and Adrian was director and Vice-President.

[181] Mr. Rutkowski opined that the Certificate of Election and Incumbency of Officers and Directors and the Declarations of Directors are not definitive proof of the matters stated therein.

[182] Mrs. Blamo opined that these documents establish an evidentiary presumption of the matters stated therein. However, this presumption could be displaced by alternative evidence. I agree with the opinion of Mrs. Blamo.

The issues as identified by the parties

[183] The parties have identified and agreed that the issues which arise for determination are:

1. Whether HSBC Nassau is a company incorporated under the laws of the Commonwealth of The Bahamas or a branch of HSBC HK without separate legal entity from HSBC HK?

2. Whether the Account was established with HSBC Nassau or HSBC HK and with which entity does Bettas currently have a banker-customer relationship?

3. Whether Bettas is entitled to the payment/transfer of the balance of funds standing in its name in the Account and if so, by whom (i.e. which of the Defendants) and to whom/which account?

4. Whether Adrian is a duly appointed director and officer of Bettas and, if so, since when was he appointed?

5. What are the terms of the Mandate?

6. Whether the Defendants, or either of them, are obliged to comply with instructions given by Adrian purportedly on behalf of Bettas in relation to the Account and, if so, which of the Defendants and on what basis?

7. Whether the Defendants or either of them have ever, since receipt by HSBC HK of the 2009 Sunder instruction, been obliged to comply with the instructions of Sunder and/or Adrian given purportedly on Bettas' behalf in relation to the Account and, if so, during what period or periods and on what basis?

8. Whether the Defendants or either of them have ever, since receipt by HSBC HK of the 2009 Sunder instruction, had any lawful excuse for refusing and/or failing to comply with the instructions of Sunder and/or Adrian given purportedly on Bettas' behalf in relation to the Account? In particular, were the Defendants or either of them put on inquiry such that it was reasonable not to comply with instructions from Sunder and/or Adrian?

9. Whether the Defendants have, at any time, been in breach of contract or in breach of the term deposits by failing to provide bank statements and/or repay the sums in Bettas' account or which are subject to term deposits at maturity as instructed or at all?

10. Is Bettas entitled to the declarations it seeks? Is Bettas entitled to an account of the amounts deposited in the Account and, if so, what are such amounts? and

11. Whether Bettas has suffered loss or damage as a result of any breach of contract or breach of the term deposits that has taken place and, if so, the extent of such loss or damage?

Non-agreed issue

[184] As a result of a concession by Adrian that he is not a duly appointed shareholder of Bettas the sole non-agreed issue is whether Bettas has provided to HSBC HK

a compliant amending resolution varying the terms of the Mandate to give Adrian authority to direct HSBC HK in relation to the Account.

The primary issues

[185] A few issues have already been determined as a result of the expert evidence. Dissecting the remaining issues, the following broad issues arise for determination:

1. Whether HSBC Nassau is a company incorporated under the laws of the Commonwealth of The Bahamas or a branch of HSBC HK without separate legal entity from HSBC HK?

2. Whether the Account was established with HSBC Nassau or HSBC HK and with which entity does Bettas currently have a banker-customer relationship?

3. Whether the Defendants, or either of them, are obliged to comply with instructions given by Adrian purportedly on behalf of Bettas in relation to the Account and, if so, which of the Defendants and on what basis?

4. Have the Defendants acted reasonably after allegedly "being put on inquiry"?

Issue 1: Whether HSBC Nassau is a company incorporated under the laws of the Commonwealth of The Bahamas or a branch of HSBC HK without separate legal entity from HSBC HK?

[186] The Defendants alleged that Bettas led no evidence to support its assertion that HSBC Nassau is a Bahamian company that is distinct from HSBC HK. The Defendants therefore invited the Court to accept the uncontroverted evidence of Mr. Chau where he stated:

> **"The Hongkong and Shanghai Banking Corporation Limited carried on business as a bank in Nassau, New Providence as a branch of HSBC Hong Kong (the Bahamas branch hereinafter referred to as "HSBC Bahamas Branch"). HSBC Bahamas Branch is registered as a foreign company under the Companies Act, Chapter 308 of the**

Revised Laws of the Commonwealth of The Bahamas…." [Emphasis added]

[187] The Defendants submitted that the Court ought to accept the first-hand evidence of Mr. Chau having acted as the leave cover for the then CEO of HSBC Nassau from 6-16 July 2005 and the letterhead used by HSBC Nassau in its letter to Bettas dated 22 September 1986 where it expressly referred to it being "*Incorporated in Hong Kong with limited liability*."

[188] According to Bettas, it framed its claim against the Defendants as being two separate entities. The Defendants initially confirmed this position, as HSBC Nassau entered an unconditional appearance and applied to strike out the action. However, subsequently HSBC HK entered an unconditional appearance in the action.

[189] In paragraph 4 of their Defence, the Defendants pleaded that prior to becoming inactive, HSBC Nassau carried on business as a commercial bank in New Providence. In particular, it is not incorporated under the laws of The Bahamas but rather, at all material times, was a branch of HSBC HK and is registered as a foreign company under the Companies Act and it has no separate legal entity from HSBC HK.

[190] Bettas submitted that HSBC HK has produced no evidence to support this claim and Mr. Chau has also not produced any document to verify his averment.

[191] Bettas next submitted that, that aside, the legal status of HSBC Nassau is ultimately irrelevant because (a) its position is that its Account was opened in The Bahamas and is ultimately governed by Bahamian law and (b) if the Defendants share the same legal personality in the form of HSBC HK, the latter has unconditionally submitted to the Court's jurisdiction and the Court can decide the substantive issues in this case.

[192] The fact that HSBC HK claims that the account is established in Hong Kong does not preclude the Court from deciding the issues in this case given its unconditional appearance. Further, there has been no suggestion that Bahamian law and Hong Kong law on the issues before the Court are different. In addition, the Defendants have not alleged this, nor have they sought to adduce expert evidence on Hong Kong law.

[193] The Court observed that, in her Affidavit filed on 13 August 2012, Ms. Johnson, then Manager in the Compliance, Human Resources and Corporate Services Department of HSBC Nassau stated:

> **"I am a Manager, in the Compliance, Human Resources and Corporate Services department of The Hongkong and Shanghai Banking Corporation Limited, a company regulated under the Banks & Trust Companies Regulation Act, Chapter 315 of the Statute Laws on The Bahamas. It is a branch of HSBC incorporated in Hong Kong."**

[194] This is repeated in her Third Affidavit filed on 28 November 2012.

[195] It is pellucid that there seems to be conflicting evidence as to whether HSBC Nassau was **registered** as a foreign company under the Companies Act, Chapter 308 or whether it is a company **regulated** under the Banks & Trusts Companies Regulation Act. The latter Act was enacted to make fresh provisions *to regulate banks* and trust companies *within* The Bahamas.

[196] In addition, as Bettas correctly pointed out, HSBC Nassau filed its own unconditional appearance in this action on 6 January 2011 and if the Defendants are the same entity, there would be no reason for HSBC HK to have subsequently filed an additional appearance in this action on 1 March 2019.

[197] In any event, this Court has found that HSBC HK has unconditionally submitted to its jurisdiction and this Court is ably placed to determine the substantive issues in this case. Furthermore, the Defendants have failed to provide any documentary evidence to verify its assertion that HSBC Bahamas has no separate legal personality from HSBC HK.

Issue 2: Whether the Account was established with HSBC Nassau or HSBC HK and with which entity does Bettas currently have a banker-customer relationship?

[198] In answering this question, a good starting point is to look at the nature of a banker/customer relationship. The terms of the contract between Bettas and the Defendants are set out in the terms of the Mandate. However, there are some general principles of law which govern that relationship. One primary one is that of the banker-customer relationship as was restated in **Glendon Rolle t/a Lord Ellor & Co.** [2017/CLE/gen/01294] - Judgment delivered on 22 July 2022 (Bahamas Judiciary website) (now under appeal) where this Court had to consider the banker-customer relationship. At paras. 73-75, this Court stated:

> **"[73] On the other hand, Learned Queen's Counsel Mr. Farquharson contended that the relationship between the parties is not a fiduciary one but one in contract of debtor/creditor. In support, he cited the seminal case of Foley v Hill [1843-60] All ER Rep 16 (HL) where Lord Cottenham LC stated at pp.19-20:**
>
> > **"Money, when paid into a bank, ceases altogether to be the money of the customer; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the customer to be placed there for the purpose of being under the control of the banker. It is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is to all intents and purposes the money of the banker, to do with it as he pleases. He is guilty of no breach of trust in employing it; he is not answerable to the customer if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of the customer, but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the customer, when demanded, a sum equivalent to that paid into his hands. That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situations of banker and customer, the banker**

is not an agent or factor, but he is a debtor. Then the analogy between that case and those that have been referred to entirely fails, and the ground upon which those cases have, by analogy to the doctrine of trusteeship, been held to be the subject of the jurisdiction of a court of equity, has no application here, as it appears to me…. [Emphasis added]

[74] Palpably, the relationship between banker and customer is a legal relationship that starts after the formation of a contract. When a person who opens a bank account in the bank and banker gives his acceptance for the account, it binds the banker and the customer in the contractual relationship.

[75] In the present case, the relationship between the Plaintiff and the Bank was a contractual one of banker and customer. It is also well established that banks are not, for their customers, fiduciaries as trustees or quasi-trustees. Money deposited into the bank becomes the property of the bank and the bank can deal with it as it pleases so long as it repays the money it holds for the customer. Accordingly, contrary to what Mrs. Hassan submitted, the bank owed no fiduciary duty to the Plaintiff to act in his best interest."

[199] In **N. Joachimson v Swiss Bank Corporation** [1921] 3 KB 110 at page 127, Aktin LJ summarized the general law on the relation between a banker and customer as follows:

"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. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. 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. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing it is not necessary now to determine. The result I have mentioned seems to

> **follow from the ordinary relations of banker and customer, but if it were necessary to fall back upon the course of business and the custom of bankers, I think that it was clearly established by undisputed evidence in this case that bankers never do make a payment to a customer in respect of a current account except upon demand."**

[200] The relationship between a bank and its customer is a confidential one: **Tournier v National Provincial and Union Bank of England** [1924] 1 KN 461. The Court of Appeal held that confidentiality was an implied term in the customer's contract and that any breach could give rise to liability in damages if loss results.

[201] In addition, a bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part regarding operations within the contract with its customers. In **Stephen Cromik v Ansbacher (Bahamas) Limited and another** [2013/CLE/gen/00791] – 2020 Bahamas Judiciary website. In **Cromik**, Mr. Davis QC relied on the case of **Karak Rubber Co Ltd v Burden and others (No. 2)** [1972] 1 ALL ER 1210. At page 1225, Brightman J relied on the conclusion reached by Ungoed-Thomas J in **Selangor United Robber Estates Ltd v Cradock (a bankrupt) (No 3)** [1968] 2 All ER 1073 at 1118,1119 where he stated:

> **"…a bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which vary almost infinitely…."**

[202] Now, in addressing the issue of whether the Account was established with HSBC Nassau or HSBC HK, Bettas asserted that it established its Account in The Bahamas at HSBC Nassau and it was to be administered by HSBC HK. On the other hand, the Defendants asserted that the Account was established with HSBC HK in Hong Kong. They say that there is overwhelming evidence to substantiate their assertion and that Bettas has failed, on a balance of probabilities, to establish the existence of any banking relationship with HSBC Nassau.

[203] The Defendants submitted that there was no *viva voce* evidence led for and on Bettas' behalf from any person with personal knowledge of the circumstances surrounding the creation of the Account. Adrian's testimony purported to speak to Sunder and Chandru's intentions and understanding regarding the Account. However, Adrian's evidence as to these matters must be discounted because it is untested hearsay.

[204] I pause to remark that both Chandru and Sunder are deceased and the only person who may have some knowledge of the Account is Ms. Johnson but she was not called by the Defendants. She was an employee of HSBC Nassau.

[205] The Defendants contended that none of the material in the documentary record which Bettas relied upon established that the Account was created with HSBC Nassau and argued that there is cogent evidence that the Account was established and is with HSBC HK. They further argued that:

1. there is a conspicuous absence in the documentary record before the Court of ***any*** correspondence between Sunder, Chandru or Bettas on the one hand and HSBC Nassau on the other in relation to the Account from 23 September 1986 to 16 March 2009, when an inquiry was made of HSBC Nassau on behalf of Sunder *qua* Executor of Chandru's Will as to whether HSBC Nassau had any accounts in the name of Bettas;

2. account statements provided to Bettas originated from HSBC HK and not HSBC Nassau which suggests that HSBC HK was and is the party maintaining the Account;

3. the face of the Mandate states that it is "d*ated in Hong Kong*" and refers to an "*International Deposits account*". By contrast, the standard form mandate used by HSBC Nassau in 1986 and the standard form which it used in 2012, exhibited to Ms. Johnson's Third Affidavit and the Chau Statement, are specific to "Nassau" and contain no reference to an International Deposits account;

4. Mr. Chau in his testimony firmly disagreed with the suggestion put to him by Bettas' Counsel that HSBC Nassau would or might have accepted HSBC HK's form of mandate;

5. Bettas' own legal representatives corresponded on the basis that the Account was established in Hong Kong:

   (i) in an email from Charles M. Hewetson of Reed Smith LLP to Sunil Gadhia dated 14 June, 2011, it was stated:

   > **"As you are aware, our clients' position is that Mr. Adrian Kundanmal has the right and entitlement to direct HSBC in relation to accounts opened and deposits made with HSBC in the name of Bettas Limited in Hong Kong in 1986."; and**

   (ii) in a letter from Reed Smith LLP to Stephenson Harwood LLP dated 12 July, 2011, it was stated:

   > **"One issue that our client has been considering is the appropriate venue for any such application. The relevant bank accounts were opened in Hong Kong in 1986 but it is understood that the proceeds are currently held in certificates in London. However, our client has not yet identified any records of the basis on which the transfer to London happened. In order to minimise the risk of unnecessary legal and Court costs being incurred, please would you provide the Bank's explanation on this issue. .."** [Emphasis added]

[206] Learned Counsel Mrs. Archer-Glasgow submitted that, while Adrian attempted to distance himself from this correspondence in cross-examination, the fact remains that these legal representatives would have been acting upon his instructions as the sole purported director of Bettas. She asserted further, that there is no evidence that HSBC Nassau agreed to act as Bettas' banker and established an account for Bettas in its International Deposits Department. According to Mrs. Archer-Glasgow, the evidence before the Court is that HSBC Nassau *never had* an "International Deposits Department" and both Mr. Saigal and Mr. Chau confirmed the affiliation between the International Deposits Department and HSBC

HK in their evidence. This affiliation is corroborated by the fact that the term "Ref: International Deposits Department" appears on HSBC HK's letterhead used in correspondence with Bettas - and *only* HSBC HK's letterhead.

[207] Mrs. Archer-Glasgow next submitted that, despite conducting several searches of HSBC Nassau's records, it could not locate any record of an account in Bettas's name despite maintaining a database/customer list and following the introduction of AML legislation in 2000, HSBC Nassau was obliged to account for funds held and/or managed by it. She added that, in 2014, HSBC Nassau successfully applied to the Central Bank to be downgraded to a non-active banking license.

[208] Mrs. Archer-Glasgow asserted that there is a preponderance of evidence that supported its case that the Account was established with and is presently maintained by HSBC HK. She further asserted that the documents that Bettas relies upon are either equivocal, irrelevant or they support the Defendants' case.

[209] As earlier stated, Bettas holds a contrary view. It asserted that all the contemporaneous evidence suggests that its Account was established in The Bahamas. Like the Defendants who opined that Bettas could have brought several witnesses including D&T, Bettas says that the Defendants produced no witnesses with first-hand knowledge of how the Account was set up or what searches its employees did to ascertain that Bettas' Account was not established in The Bahamas.

[210] Learned Counsel Mr. Turnquest argued that the Defendants sought to rely on the affidavits of Ms. Johnson to support their claim that there is no record of HSBC Nassau having an account for Bettas in The Bahamas. Ms. Johnson did not appear at trial to give evidence and she could have. No attempt was made by them to subpoena her to give evidence. Mr. Turnquest further argued that none of the Defendants' witnesses ever worked at HSBC Nassau or made any attempt to do an independent search of its records to confirm Ms. Johnson's affidavit evidence. According to him, the Defendants' witnesses' positions were to simply take Ms.

Johnson's affidavit evidence as reliable and they made no attempt to call any witness with any first-hand knowledge of HSBC Nassau's affairs. Each party invited the Court to draw adverse inferences.

[211] The law is "*he who asserts, must prove*." Therefore, Bettas has to prove its case on a balance of probabilities.

[212] Bettas submitted that the Defendants have sought to make several points to support their position that no account was set up in The Bahamas.

[213] Firstly, the Defendants asserted that the Mandate states that it is *"dated in Hong Kong."* According to Mr. Turnquest, this is nothing more than a red herring as Bettas' then directors were based in Macau and presumably used a standard Hong Kong mandate which would have been easier to obtain. It stands to reason that if Bettas' directors wanted to set up an account in Hong Kong, they would have sent the executed mandate to HSBC HK in Hong Kong. However, this was not done. The Mandate was sent it to The Bahamas. This reasoning seems plausible.

[214] Secondly, HSBC Nassau allegedly did not have an "International Deposit Department." The Defendants called no witnesses from HSBC Nassau to substantiate this assertion. None of the Defendants' witnesses were around in 1986 and cannot speak to the Defendants' practices and departments at that time. None of them worked in The Bahamas at the time so they cannot speak to the practices of HSBC Nassau.

[215] Thirdly, in her Affidavit, Ms. Johnson alleged that she searched HSBC Nassau's files and database and it revealed that Bettas had no account with HSBC Nassau. As Mr. Turnquest alluded to, there is no independent evidence to verify the thoroughness of Ms. Johnson's alleged searches of HSBC"s records. She was not called as a witness for the Defendants. Bettas could have also subpoenaed Ms. Johnson if they wished to. In the absence of her being called as a witness, the Court is tasked to decide the case on what it has before it but I agree that there was no independent evidence and her evidence was not subject to cross-

examination. Nonetheless, the Court will give her evidence whatever weight, if any, it deems fit.

[216] Fourthly, the Central Bank must have believed that Bettas did not have an account with HSBC Nassau since it permitted it to cease operations. However, no witness was called from the Central Bank to speak on why it allowed HSBC Nassau to cease its operations. I agree with Mr. Turnquest that it is irrelevant that HSBC Nassau ceased its operations in 2014 as Bettas never alleged that its Funds were being held by it in The Bahamas. Moreover, HSBC Nassau retains its banking license and is still subject to the Central Bank's oversight pending the resolution of this matter.

[217] The evidence, as I found it, is that Chandru wanted to place assets in The Bahamas to facilitate his estate planning. To this end, he executed a Bahamian Will on 10 June 1985 which listed Sunder and his family as beneficiaries of his Bahamian estate. It was hoped that Bettas' assets would form part of Chandru's Bahamian estate and therefore all its shares and other corporate documents were transferred to The Bahamas to be held by D&T. To facilitate Chandru's estate planning, Bettas was incorporated with Chandru as its sole shareholder.

[218] On 2 September 1986, Bettas' then directors resolved, in a resolution, to open an account with "Hongkong & Shanghai Banking Corporation, **Nassau**…" The letter from K.K. Young & Co to D&T on 10 September 1986 confirmed the various corporate documents and the documents "for opening US Dollar Account(s) &/or Time Deposit Account with Hongkong & Shanghai Banking Corporation, **Nassau**..."

[219] On 16 September 1986, Mr. T.R. Hilts, Manager of CIBC in Nassau wrote a reference letter to HSBC Nassau for Chandru and Sunder stating:

> **"The subject customers have been dealing with this Bank since mid 1977 and our experience has been entirely satisfactory.**

> **<u>These customers carry substantial deposit balances</u> and as noted above, the accounts are handled in a satisfactory manner."** [Emphasis added]

[220] Mr. Saigal acknowledged that it is normal banking practice to address a bank reference letter to the bank that the customer was seeking to open an account at.

[221] HSBC Nassau's letter to Bettas on 22 September 1986 confirmed:

> **"…the recent visit to this office by Mr Chandru Kundanmal and advised that our Hong Kong Office have placed a total of USD26,400,000.00 on deposit with our Bahrain Office value 22 September 1986."**

[222] In his affidavit, Sunder confirmed that he <u>also</u> visited HSBC Nassau's office for the purposes of opening Bettas' account in The Bahamas. True, like Ms. Johnson, he was not cross-examined as to the veracity of his affidavit but he has departed this terrestrial bliss, unlike Ms. Johnson. In any event, it is for the Court, looking at all the facts and circumstances, to give his affidavit evidence what weight, if any, it deems fit. In doing so, I accept Sunder's affidavit evidence that he also visited HSBC Nassau for the purposes of opening Bettas' account in The Bahamas.

[223] Indeed, Bettas' Account Statements dated 22 September 1986 reflects that the statements are addressed to "Bettas Limited c/o HSBC **Nassau** Office."

[224] In addition, HSBC HK, in its letter to Bettas on 1 October 1986 states:

> **<u>"International Deposit *Account No. 567-264957*</u>**
>
> **We acknowledge receipt of the account documents and advise that the new deposit account was opened on 22 September 1986 to establish eight USD deposits for the Company. The relevant confirmation has been forwarded to you under separate cover.**
>
> **<u>As advised by our Nassau Office, we understand that you agree that the account should continue to be under our administration. All instructions should therefore be directed to this office by letter or authenticated cable from a Bank</u>."**

[225] I agree with Mr. Turnquest that this letter does not suggest that the Account was opened in Hong Kong because, if this were the case, there would have been no need to refer to the Nassau Office. Further, the Account Number is not prefixed with "HK" to reflect a Hong Kong Account Number.

[226] On 1 December 1986, that is, after the Account was set up for Bettas, HSBC HK wrote, what Mr. Chau deemed a *"slightly odd"* letter, to HSBC Nassau seeking to introduce Sunder and Chandru as "*directors of a limited Company which has substantial sums deposited with the Group*."

[227] Then, on 28 December 1987, HSBC HK wrote a letter to Bettas which states:

> **"As you are aware, your deposit (s) under the above account is held off-shore and we, as a 'Post Office' convey your placement, renewal, withdrawal instructions by telex to our overseas office without levying any charges."**

[228] On 1 August 1995, HSBC HK wrote to HSBC Nassau inquiring whether Bettas and Chandru had any account relationship with it (HSBC Nassau). Mr. Saigal accepted that HSBC HK must have had some *prima facie* basis for believing that Chandru and Bettas had a banking relationship with HSBC Nassau otherwise it would not have written this letter.

[229] In my judgment, these contemporaneous documents clearly point to the fact that Bettas' Account was established in The Bahamas. If it were not, then all the contacts with The Bahamas over the years would have been pointless. HSBC HK's own evidence from its International Deposits Department confirmed that Bettas' Account was held "*off-shore*."

[230] While the Defendants have maintained that its Account statements were generated from Hong Kong and its Account had a HK prefix which, in their view, meant that the Account was a Hong Kong account, the Defendants failed to acknowledge HSBC HK's own correspondence expressly stated that Bettas' Account was to be administered in Hong Kong. For this to be done effectively, it was logical that HSBC

HK would establish an account in Hong Kong to be able to facilitate the movement of the Funds to its branches in various countries. A review of Bettas' statements shows that its Funds were moved around various countries including Bahrain, London and Singapore. Further, in some instances, there is no reference to the "HK" prefix included in correspondences issued by the Defendants.

[231] On a balance of probabilities, I find that Bettas Account was established in The Bahamas but administered in Hong Kong. The Defendants are unable to persuade this Court that HSBC Nassau "*merely acted as a middleman*". The contemporaneous documentary evidence demonstrates the contrary.

[232] In my judgment, Bettas have a banking relationship with HSBC Nassau and the Account is being administered.

Issue 3: Whether the Defendants, or either of them, are obliged to comply with instructions given by Adrian purportedly on behalf of Bettas in relation to the Account and, if so, which of the Defendants and on what basis?

[233] HSBC Nassau argued that, as it has not maintained or held any account or deposits for or on behalf of Bettas, it has owed and owes no contractual duties to Bettas obliging it to comply with instructions given by Adrian on its behalf. Given my finding, this argument is now moot.

[234] HSBC HK alleged that it is not obliged to comply with instructions given by Adrian on Bettas' behalf because Adrian is not Bettas' director and he is not an authorized signatory under the Mandate and no amending resolution has been delivered in conformity with the Mandate's terms.

[235] Under Liberian law, Sunder, as a duly appointed director of Bettas, was duly authorized to act on behalf of Bettas up to the time of his death having been appointed on 3 September 1986. Further, Sunder, as a duly appointed officer of Bettas, was authorized to act as an officer on behalf of Bettas up to the time of his resignation on 1 April 2011.

[236] It logically follows that Sunder had the authority to appoint Adrian as director and Vice President of Bettas on 12 March 2009. On 1 April 2011, Adrian was duly appointed president, secretary and treasurer. Consequently and preferring the expert evidence of Mrs. Blamo to that of Mr. Rutkowski, I also found that Adrian, as a duly appointed director and officer of Bettas, is duly to act on behalf of Bettas.

[237] Given the finding of this Court that, under Liberian law, Adrian was properly appointed the Sole Director, President, Secretary and Treasurer of Bettas, the Defendants are obligated to take instructions from him.

[238] It is true that the Defendants are obliged to govern themselves in accordance with the Mandate. This is ordinary banking practice. As Adrian testified:

> "Q: You did say earlier that you're a business executive running the family's business. You will be aware that the bank follows the instructions of an account mandate, correct?
>
> A: Yes, I'm aware of that."

[239] HSBC HK does not dispute that Bettas could change the Mandate. However, it submitted that unless HSBC HK waives the requirement, which it has not done, any amendment must comply with the conditions of Clause 9 of the Mandate, which provides:

> **"9. That these resolutions be communicated to the Bank and remain in force until an amending resolution shall have been passed by the Board of Directors and a copy thereof certified by the Chairman of the Meeting shall have been delivered to the Bank."**

[240] The Defendants say that Bettas has produced no evidence that any amending resolution has ever been passed by its Board of Directors authorizing Adrian to be an authorized signatory on the Account. They asserted that Adrian's answer to the point in cross-examination was to avoid it. They further asserted that while Bettas has purported to notify HSBC HK in writing that Adrian is now authorised to sign on the Account on its behalf, this does not obligate HSBC HK to act on Adrian's instructions.

[241] The Defendants referred to Clause 7 of the Mandate which provides that:

> **"…the Bank be supplied with a list of names and specimens of the signatures of the Directors and any other person or persons authorised to sign on behalf of the Company, and be from time to time informed by notice in writing under the hand of the chairman of the Company of any changes which may take place therein, and be entitled to act upon any such notice….".**

[242] The Defendants insisted that Clause 7 is of no assistance to Bettas: it protects HSBC HK from liability should it act on a notice in writing delivered pursuant to its terms (i.e. see "…*be entitled to act upon*…") but it does not impose additional obligations upon HSBC HK. The Defendants asserted that no amending resolution has ever been passed by Bettas' Board of Directors which authorized Adrian to be an authorized signatory on the Account or, at the very least, no certified copy of it has ever been delivered to HSBC HK.

[243] Thus, it is HSBC HK's position that the Mandate in its current form does not empower Bettas' directors to issue instructions to HSBC HK in relation to the Account. They said that even if Adrian is a validly appointed director and officer, HSBC HK is not obliged to comply with his instructions.

[244] HSBC Nassau argued that, since the 2009 instruction and the 2011 instruction were made to HSBC HK only, it is not obliged to comply with it.

[245] The Defendants further submit that the 2011 Repayment instruction was not a valid payment instruction because it was not signed by Sunder or Chandru.

[246] HSBC HK contended that while the Mandate has remained in force at all material times, Bettas has been put to proof as to Sunder's authorization to give instructions on its behalf at the time of the 2009 Sunder instruction due to the unusual circumstances of the case. HSBC HK further contended that with respect to the 2011 Adrian instruction and the 2011 Repayment Instruction, those instructions were not in accordance with the terms of the Mandate, not being signed by Sunder or Chandru and, consequently, HSBC was not obliged to comply with them.

[247] Once the Account was established with the Defendants, both parties owed each other certain duties. A fundamental aspect of the Account's operation was the provision of account statements by the Defendants to Bettas, when requested, so that it could monitor the Account. The Term Deposits had express terms and conditions regarding how they were to be treated. However, upon maturity, the Defendants were obligated to comply with Bettas' instructions on how to handle these Funds.

[248] In **Boltrun Investments Inc. v. Bank of Montreal,** [1998] O.J. No. 5526, the Court expressly recognised that a bank has a common law duty to render accounts to a customer periodically or on request. In this regard, the Court noted at page 11:

> **"52 There is a duty on the Bank to render accounts to a customer periodically. Usually this is done with monthly computerized statements and sometimes, with cancelled cheques."**

[249] With respect to the Term Deposits, Bettas referred to the treatise, **Ellinger's Modern Banking Law** where, at page 123, the learned authors state:

> **"In the case of a fixed deposit, maturing at a predetermined time, the amount involved becomes payable on the designated day without the need for any demand. <u>If the bank has not received any instructions with respect to the renewal or otherwise of the deposit once it has reached maturity, then it is acceptable banking practice to pay the amount to the credit of the customer's current account or alternatively to transfer the funds to a holding or suspense account. Where the bank instead retains the money on fixed deposit, it must pay interest as if the account holder had renewed the deposit. Principal and interest are then payable on demand</u>."** [Emphasis added]

[250] As Bettas correctly alluded to, HSBC HK has been generating account statements for the Term Deposits and holding them at its office in Hong Kong as per Sunder's instructions on 27 November 1989. HSBC HK acknowledged that Bettas operates a 'hold mail' account where its account statements are held. On 5 February 2009, Sunder made a specific request for copies of Bettas' Account statements. However, HSBC HK failed to provide the same to him. In 2011, Adrian likewise made a request to HSBC HK for a copy of statements relating to Bettas' Account

even going so far as to visit Hong Kong to meet with HSBC HK's representatives. This trip was in vain as HSBC HK's representatives failed to provide Adrian with any account statements.

[251] During his testimony, Adrian pointed out that Bettas initially had no desire to seek the repayment of the Funds in the Account at HSBC HK. However, given the Defendants conduct in failing to recognise his authority to give instructions, Bettas now demands repayment of the Funds held by the Defendants under the Term Deposits. To date, the Defendants have failed to repay the Term Deposit funds to Bettas.

[252] I therefore find that the Defendants are in breach of their Mandate to Bettas.

Issue 4: Have the Defendants acted reasonably after allegedly "being put on inquiry"?

[253] HSBC HK alleged that it has been "put on inquiry" about Sunder and then Adrian's authority to act on Bettas' behalf and that, after being put on inquiry, it acted reasonably in the conduct of this matter.

[254] In support of their position, HSBC HK relied on the principle, that if it is put on notice that there may be some irregularity in the customer's payment instructions, it is at liberty to refuse to execute the same. HSBC HK alleged that it had and has reasonable grounds not to comply with the instruction or instructions by virtue of the Quincecare duty, the Sierratel principle and the criminal liability principle.

The Sierratel principle

[255] The Defendants relied on the Sierratel principle which originates from the case of **Sierra Leone Telecommunications Co Ltd v Barclays Bank plc** [1998] 2 All ER 821. The principle establishes that, where a bank receives instructions and has **serious** grounds for doubting the authority of those operating the account on behalf of the customer, the bank **may** refuse to act until the authority of the persons giving the instructions has been established. In **Sierratel**, Cresswell J found (at page 826):

> **"Mr. de Lacy on behalf of the bank submitted as follows. A bank's obligation to its current account customer is generally to honour its customer's orders in the ordinary course of business with reasonable skill and care, subject to the availability of funds or credit. Where the bank has reasonable grounds (falling short of proof) for believing that a payment order has been made without authority, although it is regular and in accordance with the mandate, it is justified in refusing to honour the order: *Barclays Bank plc v Quincecare Ltd* (1988) [1992] 4 All ER 363 at 375–376 per Steyn J and *Lipkin Gorman* (*a firm*) *v Karpnale Ltd* (1989) [1992] 4 All ER 409 at 421, [1989] 1 WLR 1340 at 1356 per May LJ and [1992] 4 All ER 409 at 439, 441, [1989] 1 WLR 1340 at 1376, 1378 (particularly the reference to 'serious or real possibility albeit not amounting to a probability') per Parker LJ. A case where a bank has reasonable grounds for believing that there is a possibility that the existing mandate has been revoked is a case a fortiori to the case of a regular order complying with a mandate but in fact unauthorised by the customer (e g because of the customer's agent's fraud).**
>
> **Where the issue is as sensitive and important as the question of the continued authority of a foreign government, the bank was entitled to take the stand which it did, and effectively freeze the account. …"**

[256] **Sierratel** raises issues as to international recognition and international banking. It reflects the problems faced by an international bank when it holds an account of a company wholly owned by a foreign government and there is a military coup in the country in question.

[257] In my opinion, the facts in **Sierratel** are totally distinguishable from the facts of the present case. Thus, this case is unhelpful.

The Criminal liability principle

[258] The Defendants next relied on the criminal liability principle in its refusal to honour the 2009 Sunder instruction and the 2011 Adrian Instruction.

[259] This principle was recognized by the English Court of Appeal in **K Ltd v National Westminster Bank Plc** [2006] 4 All ER 907 where the English Court of Appeal held that it could not be a breach of contract for a bank to refuse to honour its customer's mandate if it would thereby be committing a criminal offence under section 328 of the English Proceeds of Crime Act 2002.

[260] In this case, the bank had declined to act upon a customer's instructions, reporting its suspicions of criminal activity to the police.

[261] This principle is also unhelpful as there is not an iota of evidence of money laundering in this case. This Account was opened in 1986 and there is no evidence that HSBC Nassau did not do its due diligence when $26 million was deposited at its bank. In fact, the reasonable inference to be drawn is that adequate due diligence was done because the Account was established.

The Quincecare duty

[262] Lastly, the Defendants relied on the Quincecare duty, established from the case of **Barclays Bank plc v Quincecare Ltd and another** [1992] 4 All ER 363. It is a duty of care that banks owe to their customers in circumstances where the banks have reasonable grounds to believe that instructions provided by customers are an attempt to misappropriate funds. The case centred around whether Barclays Bank had breached its duty of care to a customer, Mr. Quincecare, by failing to prevent payments from being made from his account when there were reasonable grounds to believe that the payments were fraudulent. The Court found that Barclays Bank had breached its duty of care and was liable for the losses suffered by Mr. Quincecare as a result. At page 375, Steyn J explained the nature and scope of the Quincecare duty as follows:

> **"Primarily, the relationship between a banker and customer is that of debtor and creditor. But quoad the drawing and payment of the customer's cheques as against the money of the customer's in the banker's hands the relationship is that of principal and agent: see *Westminster Bank Ltd v Hilton* (1926) 43 TLR 124, 126, per Lord Atkinson … Prima facie every agent for reward is also bound to exercise reasonable care and skill in carrying out the instructions of his principal: *Bowstead on Agency*, 15th ed (1985), p 144. There is no logical or sensible reason for holding that bankers are immune from such an elementary obligation. 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 …**
>
> **"Given that the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to transfer money, it is**

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

"Having stated what appears to me to be the governing principle, it may be useful to consider briefly how one should approach the problem. Everything will no doubt depend on the particular facts of each case. Factors such as the standing of the corporate customer, the bank's knowledge of the signatory, the amount involved, the need for a prompt transfer, the presence of unusual features, and the scope and means for making reasonable inquiries may be relevant. But there is one particular factor which will often be decisive. That is the consideration that, in the absence of telling indications to the contrary, a banker will usually approach a suggestion that a director of a corporate customer is trying to defraud the company with an initial reaction of instinctive disbelief … it is right to say that trust, not distrust, is … the basis of a bank's dealings with its customers. And full weight must be given to this consideration before one is entitled, in a given case, to conclude that the banker had reasonable grounds

for thinking that the order was part of a fraudulent scheme to defraud the company." [Emphasis added]

[263] The Quincecare duty was further discussed in **Lipkin Gorman (a firm) v Karpnale Ltd** [1992] 4 All ER 331. In this case Alliott J considered what a bank's relevant 'contractual duties' are towards a customer facing a questionable instruction request. Alliott J stated at 349, that:

> **"(1)The bank is entitled to treat the customer's mandate at its face value save in extreme cases. (2)The bank is not obliged to question any transaction which is in accordance with the mandate, unless a reasonable banker would have grounds for believing that the authorised signatories are misusing their authority for the purpose of defrauding their principal or otherwise defeating his true intention. (3) It follows that if a bank does not have reasonable grounds for believing that there is fraud, it must pay. (4) Mere suspicion or unease do not constitute reasonable grounds and are not enough to justify a bank in failing to act in accordance with a mandate. (5) A bank is not required to act as an amateur detective."**

[264] In **Federal Republic of Nigeria v JPMorgan Chase Bank NA** [2022] EWHC 1447 (Comm) Mr. Justice Cockerill, after extensively reviewing the Quincecare duty summarized the same as follows at para 158:

> **"158. Against this background - and perhaps particularly if at the same time the applicability of the duty is to extend beyond the original paradigm of internal fraud - it becomes of particular importance to focus on what is the content of the obligation. Here it seems to me that JPMC must be right to say that:**
>
> **i) The duty arises in relation to the payment instruction;**
>
> **ii) There needs to be a clear focus on the issue of what it is of which the bank in question must be on notice;**
>
> **iii) Unless the bank is on notice that the instruction in question may be vitiated by fraud - that the payment instruction is an attempt to misappropriate the customer's funds - the duty does not arise;**

It follows that the focus has to be on notice of the matter that has vitiated the instruction and not any different or wider potential concern."

[265] The Defendants argued that, on the basis of the facts and banking practices at the time, a reasonable and honest banker in the position of HSBC HK would have considered that there was a serious or real possibility albeit, not amounting to a probability, that Bettas might have been being defrauded.

[266] HSBC HK contended that the following facts and matters from before receipt of the instructions are important relevant background/context that a reasonable bank would have taken into account in assessing whether to act on the instructions:

1. The Account had been subject to an indefinite hold mail notification issued by Sunder on 27 November 1989 with an instruction that all term deposits should automatically roll over every 120 days. This was and is unusual. An indefinite hold mail notification is "*strange*" as a matter of banking practice according to Mr. Saigal's evidence; such instructions are usually temporary and are given where a customer wishes to reduce the amount of communications it receives from the bank. This must *a fortiori* be the case where the instruction is combined with an instruction to automatically roll over fixed deposits indefinitely. That HSBC HK permitted and acted upon these instructions does not make them any less unusual.

2. No further instructions were given on Bettas' behalf in relation to the Account from 27 November 1989 until possibly 1995 and thereafter the Account remained dormant (in the sense that no active instructions were received in relation to it) until 2009. It was and is unusual for a customer to be out of contact with its bank to the same extent as Bettas in this case, especially given the sums involved and the fact that interest rates were low. At trial, even Adrian thought it would be surprising if Sunder or Chandru would not have made contact with HSBC HK within 2 or 3 years since 27 November 1989 and Adrian challenged the Defendants' counsel when it

was put to him that they had not made contact for about 14 years. Adrian tried to explain Bettas' inactivity/long silence by saying that he and his family had no need for the money in the Account but, the Defendants insisted that, given the sums involved, that is hardly credible and there is no evidence that corroborates Adrian's bare assertion.

3. In 2002, HSBC HK had been unable to trace the directors or beneficial owners of the Account during a remedial customer verification exercise and the Account had been marked "dormant". It is well-known that dormant accounts are more susceptible to fraud than active accounts and therefore generally attract enhanced monitoring and supervision by banks.

4. Sunder only contacted HSBC HK after it sought to contact him regarding the Account as part of its continued efforts to regularize the Account. The documentary record reflects that HSBC HK contacted Ann Mary Pak of Nala which in turn contacted Sunder. Sunder then contacted HSBC HK.

5. HSBC HK was concerned to adhere to regulatory requirements and to ascertain the identity of the true beneficial owner of the funds in the Account.

[267] The Defendants argued that when HSBC HK was contacted by Sunder in 2009, it had no up-to-date information about Sunder due to the lack of an active relationship with him. The genuineness and validity of the 2009 Sunder instruction (and the requests made subsequently by D&T on Sunder's behalf) could not simply be assumed. For this reason, HSBC HK prudently set about trying to verify the same.

[268] The Defendants further stated that HSBC HK did not get much assistance from this exercise. Rather than personally and urgently attend HSBC HK to regularize the Account, Sunder chose instead to correspond with HSBC HK (in Hong Kong) through D&T and the responses provided by Sunder's representatives served to only exacerbate matters due to their failure to provide satisfactory or sufficient

documentation, their failure to cooperate and their repeated attempts to insist the matter was urgent (after such a long period of inactivity) without explanation.

[269] The Defendants argued that D&T failed to directly answer HSBC HK's request in its letter of 24 March 2009 to be advised of whom D&T was representing, their interest in Bettas and their legal rights to the requested information and (ii) although, on Bettas' case, Adrian was by this time appointed a director of Bettas and Sunder and/or Adrian have, in these proceedings, been able to produce them, the Register of Officers and Directors which was provided by D&T was not accompanied by the underlying minutes/resolutions. In any event, such a Register is not conclusive.

[270] The Defendants contended that Mr. Steve Smith reviewed the 24 April 2009 Letter and found that "*[o]verall, we do not believe the documents which have been faxed to you provide the bank with anything like the evidence we would need to move forward*." and identified various irregularities with that letter and its enclosures (including those mentioned above).

[271] HSBC HK then requested (i) a copy of Sunder's passport; (ii) a fresh copy of the Register of Members and Register of Directors and Officers stating the date of certification or a letter from K.K. Young certifying the date on which the previous copies were certified and providing K.K. Young's contact details; (iii) the identity of the Executor of Chandru's Estate, a copy of the latest Will executed by Chandru, a copy of the passport of the Executor and a copy of Chandru's death certificate; (iv) a copy of Adrian's passport; (v) an explanation as to why Share Certificate No. 4 was issued to a deceased person almost 14 years after his death and the legal basis for this; (vi) an explanation as to why the Register of Members stated Share Certificate No.4 was issued on 25 March 2008 whereas the (uncertified) copy of the Share Certificate itself stated it was issued on 25 March 2009; (vii) all information that Sunder had about the type of accounts, the account numbers and the balances standing in the accounts of the Plaintiff and copies of any account

statements in Sunder's possession; and (viii) an explanation as to why Probate had not been applied for earlier given Chandru died in 1995.

[272] HSBC HK opined that these queries were all significant matters and concerns to the bank.

[273] By letter dated 19 May 2009, D&T confirmed that it represented Sunder (i.e. not Bettas) and that Sunder was requesting the information regarding the Account in his capacity as one of Bettas' directors and president and as the sole signatory on the Account and enclosed the various documents recited at paragraph 38 of the Saigal Statement, including a "corrected" copy of the Register of Members. In the concluding passages of 19 May 2009 Letter, D&T addressed the most critical parts of HSBC HK's request for information in the following manner:

> **"6. Regarding our client providing you with information and documentation relating to our inquiry, we call attention to our client's letter to you dated February 5, 2009 with attached copy letter of instructions dated November 27, 1989 from the Company addressed to your Bank, requesting that all statements, deposit renewal confirmations and other correspondence concerning the subject account be held at your International Deposits Department until further notice. We wonder, however, whether the Account No. HK-567264957 allocated to Bettas Limited by you has any connection to any bank accounts in this name.**
>
> **7. As to why our client is only now making inquiries into this matter, we advise that as the sole Executor and sole Beneficiary of Mr. Chandru Kundanmal's estate, Mr. Sunder Kundanmal and his appointees may exercise their discretion as to when these matters were to be resolved. Our client is therefore exercising his rights as an officer, director and sole signatory of Bettas Limited, which is further endorsed by his position as the sole beneficiary and sole executor of the Will of the late Chandru Kundanmal.**
>
> **We point out that efforts to obtain information on updated account(s) from your bank began several months ago. We trust that you will now have more than sufficient information in hand to demonstrate our client's provenance for the said accounts. Continued delay is not acceptable."**

[274] HSBC HK stated that this letter only served to enhance the issues which it needed to be addressed. Shortly put, HSBC HK was not satisfied with what was provided

including Sunder and Adrian's authority to give instructions on behalf of Bettas and the ultimate beneficial owner of the funds in the Account. It requested that Adrian should obtain a UK court order. Both Adrian and HSBC HK then instructed external counsel.

[275] The impasse which ensued between instructing Counsel did not assist much and led to the institution of the present action. HSBC HK submitted that it was put on inquiry regarding Sunder's continuing authority to give instructions on behalf of Bettas in relation to the Account and Adrian's authority to give instructions on Bettas' behalf and it has, at all material times, acted honestly, reasonably and prudently, in accordance with its obligations. In the face of an unusual situation, it sought to take a prudent position to protect the interests of its customer and the material put before it to justify the instructions, was not satisfactory. HSBC HK asserted that, no reasonable modern bank in the position that it was in, would have felt comfortable concluding that there was not a serious or real possibility Sunder and Adrian may have lacked authority to act on Bettas' behalf or may have been pursuing their own purposes. Nor would a reasonable modern bank have felt comfortable resolving the matter without a court order from **a court of competent jurisdiction**.

[276] Before I venture any further into this matter, it is an opportune moment to revisit the Defendants' pleadings and the applicable law on pleadings.

[277] Time and again, this Court has reminded parties about proper pleadings. In **Glendon Rolle**, this Court stated at paras 39 to 42:

> **[39] In Bahamas Ferries Limited v Charlene Rahming SCCivApp & CAIS No. 122 of 2018, our Court of Appeal held that the starting point must always be the pleadings. At paras. 29-33 and 37-39 of the judgment, Sir Michael Barnett JA (as he then was) stated:**
>
> > **"29. The real difficulty in the judgement of the court below is that the finding of negligence was not one that was pleaded by the respondent. This is ground 10 of the appellant's grounds of appeal.**

30. The trial judge rejected the particulars of negligence pleaded and founded liability on a ground not pleaded in the statement of claim.

31. In our judgment this is not proper and manifestly unfair to the appellant.

32. ….

39. The starting point must always be the pleadings. In Loveridge and Loveridge v Healey [2004] EWCA Civ. 173, Lord Phillips MR said at paragraph 23:

> **"In *Mcphilemy vs Times Newspapers Ltd. [1999] 3 ALL ER 775* Lord Woolf MR observed at 792-793:**
>
> **'Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.'" [Emphasis added]**

[40] At paragraph 40 of the Judgment, Sir Michael went on to state:

> **"It is on the basis of pleadings that the party's decide what evidence they will need to place before the court and what preparations are necessary for trial."**

[41] In Montague Investments Limited v Westminster College Ltd & Another [2015/CLE/gen/00845] – Judgment delivered on 31 March 2020 (Reported on BahamasJudiciary.com Website), this Court applied the principles emanating from Bahamas Ferries Limited and emphasized the necessity for proper pleadings. Pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader and the court is obligated to look at the witness statements to see what the issues between the parties are.

[42] Shortly put, parties are bound by their pleadings and a party cannot generally seek to advance a case that is not expressly raised in his (her) pleadings."

[278] At paragraph 7 of the Defence, the Defendants averred:

> **"<u>the Defendants do not deny that Sunder Kundanmal is a former director of the Plaintiff or that Chandru Kundanmal is a former shareholder of the Plaintiff.</u> However, the Defendants put the Plaintiff to strict proof with respect to when Sunder Kundanmal ceased to be a director of the Plaintiff; the date that Chandru Kundanmal passed away and/or ceased to be a shareholder of the Plaintiff; by whom and the date when Adrian Kundanmal was appointed a director of the Plaintiff; and/or how and when Adrian Kundanmal became the sole shareholder of the Plaintiff."** [Emphasis supplied]

[279] Then, at paragraph 20 of the Defence, they further averred:

> **"the Second Defendant does not deny that it was obligated to comply with the instructions of Sunder Kundanmal when he was duly vested with the authority to issue instructions on behalf of the Plaintiff. <u>In this regard, the Second Defendant avers that it duly complied with all such instructions of Sunder Kundanmal at the material times</u>."** [Emphasis supplied]

[280] However, at paragraph 21, the Defendants averred, without any explanation, as Bettas alluded to, that:

> **"In particular it is not admitted that Sunder Kundanmal was vested with the authority at that time [i.e. 5 February 2009] to issue such instructions on behalf of the Plaintiff and the Plaintiff is put to strict proof."**

[281] Mr. Turnquest correctly submitted that, nowhere in the Defence do the Defendants set out or allege how, if as they accept, Sunder was a properly appointed director when he set up the Account in 1986 on Bettas' behalf, it was that he suddenly ceased to be vested with authority in 2009.

[282] At paragraph 29.1, the Defendants acknowledge that:

> **"From August, 1986, the sole shareholder of the Plaintiff was Chandru Kundanmal."**

[283] Given all of the above, Mr. Turnquest correctly stated that, in their pleaded case, the Defendants acknowledged and accepted that Chandru was Bettas' shareholder, and *Sunder was its director*. Notwithstanding their unequivocal

admissions, their expert, Mr. Rutkowski, has now sought to resile from this position.

[284] The Defendants then proceeded to take issue with Adrian's appointment as Bettas' director and shareholder. The Court has affirmatively found that Adrian is a properly appointed director of Bettas.

[285] I return to the Quincecare duty and its applicability to the facts of the present case. In my opinion, the Quincecare duty does not strictly arise as it has never been suggested or alleged that Sunder or Adrian were seeking to fraudulently misappropriate Bettas' assets. Adrian, in his testimony, strongly refuted such a suggestion as being absurd. Moreover, when the question was put to Adrian as to who the Funds would be transferred to if ordered by the Court, he stated, in no uncertain terms, that the Funds would remain with Bettas for its benefit.

[286] I agree with Mr. Turnquest that there can be no suggestion that Adrian is seeking to misappropriate Bettas' funds for his own benefit. However, the Defendants have raised the issue of Adrian's authority to act and Chandru's status as Bettas' shareholder without having any real basis for doing so.

[287] Bettas opined that the Defendants have acted unreasonably in not complying with the 2009 Sunder Instruction and the 2011 Adrian Instruction. Bettas contended that, prior to opening the Account, HSBC Nassau was provided with a reference from CIBC on 16 September 1986 which confirmed that Sunder and Chandru were reputable businessmen, with "substantial deposits", who operated their accounts in a "satisfactory manner." HSBC HK itself gave Sunder and Chandru an introductory letter to HSBC Nassau on 1 December 1986. HSBC Canada also issued a reference letter dated 16 May 1996, noting that Sunder was "a valued client" since 1983. As already alluded to, before the Defendants opened the Account, they must or ought to have carried out due diligence on Chandru and Sunder to be satisfied that they were legitimately wealthy businessmen. There is nothing in the record to suggest otherwise. Thus, the abrupt change of tone in the Defendants' attitude to Bettas in 1995 is completely unwarranted.

[288] Bettas, in its submission, addressed the specific points raised by the Defendants and contended that:

1. There is nothing unusual or “strange” about Bettas using the ‘hold mail’ service offered by HSBC HK. In fact, Mr. Saigal admitted during cross-examination that there is no time limit on how long a client can use its hold mail service and that HSBC HK never had a concern with Bettas doing so.

2. There is nothing wrong with Bettas issuing instructions to HSBC HK to roll over its Term Deposits. The Defendants have produced no evidence nor have they suggested that there was some policy against this or that it even raised this issue with Bettas as a concern. Adrian’s evidence is that his family is independently wealthy and had no need for the Funds. Thus, Sunder and Chandru were content not to actively manage the Funds constituting the Term Deposits and to allow them to roll over and during the 1980’s and 1990’s, Bettas was to obtain approximately 6% interest on the Term Deposits, which is a substantial return.

3. The suggestion that the Defendants could not trace Bettas’ directors since 2002, again does not reflect the complete picture. The evidence from the Defendants own internal correspondence in 2008 is that no one took any real steps to locate Bettas’ directors until 2007. Further, there is no evidence that the Defendants ever wrote to Bettas to request any information about the Account. Moreover, as pointed out by Adrian in his cross-examination, the Defendants attempts to contact Sunder were lackluster at best. Sunder’s contact information did not change and there is no suggestion that he was attempting to evade the Defendants. The Defendants also did not attempt to contact Sunder through HSBC Canada, despite being aware that he was a customer of theirs. When Sunder was finally contacted in 2009 by Nala who functions as its registered office in Hong Kong, he immediately commenced communicating with HSBC HK.

4. The fact that there was no substantive communication from 1989 to 2009 is immaterial. HSBC HK had standing instructions on how to manage the Term Deposits. Further, the Defendants did not send Bettas any substantive communication that it needed to respond to.

5. In 2009 when HSBC HK contacted Sunder, Sunder remained Bettas' sole director.

6. Adrian noted in his cross-examination that Sunder and himself issued instructions to Bettas' lawyers to provide all information that the Defendants required. However, notwithstanding Bettas' Bahamian lawyers providing the Defendants with all information they requested from 30 July 2009, HSBC HK adopted the position that it would only provide Sunder with any Account information after he *"obtained a formal order from a Court in the UK."*

7. The Defendants attempt to twist Bettas' English and United States lawyers' words does not advance their case.

8. The suggestion that HSBC HK is managing or holding deposits that are potentially owned by unknown third parties is without merit. The expert evidence is that Chandru's estate remains the beneficial owner of the Bettas' shares. In addition, it is significant to rehash that from 1986, when the Account was established, no third party has come forward to claim any beneficial interest in Bettas or the Funds. This is further proof that there is no other party who has any claim to the Funds. In addition, the Defendants have produced no evidence that Adrian had indicated an intention to misappropriate the Funds.

9. Bettas opined that if the Court makes an order directing the Defendants to transfer the funds pursuant to Adrian's instructions and a third person miraculously later appears claiming to be the beneficial owner of Bettas, the

Defendants would, in any event, be fully protected against such a claim by the Court order.

10. Despite the Defendants claim that they are in the position of an interpleader, this is simply not correct as there is no third party claiming these funds and as such interpleader rules do not apply.

[289] On a preponderance of the evidence, I accept the submissions advanced by Bettas and find that HSBC HK had no reason to be put on inquiry. As Adrian stated, his family are wealthy and there is no law to say that you cannot be wealthy and leave your money in an account to grow. In addition, both Chandru and Sunder have passed away and Adrian, now of age, appears the one to continue the legacy of this family.

[290] The Defendants have sought to make an issue out of the fact that it has not received an amending resolution in accordance with Clause 9 of the Mandate and that Adrian is not an "authorised signatory" on the Account. As such, the Defendants claim that they are not obligated to comply with Adrian's instructions. I agree with Mr. Turnquest that this position is unsustainable.

[291] Sunder was an "authorised signatory" on the Account and HSBC HK refused to follow his instructions. Sunder appointed Adrian as a director and officer of Bettas. Since Sunder's death, Adrian, as the sole director, is authorised to manage Bettas' assets. In view of that, Adrian as a duly appointed director of Bettas is empowered to change the signatories on the Account to add his name to the Account since the two other authorised signatories have died. However, since the Defendants have refused to recognise Adrian's authority as a director, this change cannot be made. Thus, the Defendants' claim that it has not received an amending resolution or proper instructions from an authorised signatory is disingenuous at best. I agree.

[292] The Defendants further claim that the Writ filed in this action is not capable of giving rise to a repayment obligation on behalf of HSBC HK, as it is not made by an "authorised person" since it was signed by Lennox Paton. This position is

untenable since LP is acting as Bettas' agent in filing the Writ. Mr. Turnquest argued that this position flies in the face of authority which clearly states otherwise. In **N. Joachimson v Swiss Bank Corporation** Bankes LJ noted, at page 115, that *"even if a demand is necessary to complete the cause of action, a writ is a sufficient demand."* This is what has happened in this case.

[293] In my opinion, the Defendants were wrong not to provide the instructions to Sunder (when he was alive in 2009) and to Adrian who is now Bettas' Sole Director, President, Secretary and Treasurer. The fact that large amounts of money was held by the Defendants in a banker-customer relationship with some silence for some years do not constitute reasonable grounds for putting HSBC HK on inquiry and refusing to honour the terms of the Mandate. In my considered opinion, HSBC HK acted as an amateur detective.

[294] The witnesses for HSBC HK were unable to disclose the exact amount standing in Bettas' Account although it has never denied that it does not hold or manage the deposits in the Account. This is remarkable.

Conclusion

[295] On a balance of probabilities, Bettas has established that:

1. It opened an account with HSBC Nassau in September 1986 which was administered by HSBC Hong Kong;

2. Adrian is a properly appointed director of Bettas and he entitled to give instructions to the Defendants in relation to the Account.

3. The Defendants are in breach of its Mandate in not complying with Sunder and later, Adrian's instructions, to produce account statements and to transfer the Funds in the Account.

4. There is no reasonable basis for the Defendants to claim that they have been "put on inquiry" over Bettas' Account and they have acted unreasonably by refusing to follow Sunder and Adrian's instructions.

[296] Based on the foregoing findings, the Court makes the following orders namely:

1. A declaration that Adrian is a properly appointed director of Bettas and he is entitled to give instructions to the Defendants;

2. The Defendants are ordered to transfer the Funds in Bettas' Account in accordance with Adrian's instructions;

3. The Defendants are ordered to provide Bettas with an account of all the Funds held to its order from the inception of the Account not later than 5 May 2023;

4. Bettas is awarded its interest on the funds held by the Defendants from the commencement of the proceedings to the date of the Judgment; such interest to be heard by a Judge in Chambers if not agreed;

5. Interest at the statutory rate of 6.25% per annum from the date of Judgment to the date of payment and;

6. Bettas, being the successful party in these proceedings, is entitled to its costs certified fit for two counsel, to be taxed if not agreed.

Dated this 5th day of April, 2023

Indra H. Charles
Senior Justice