COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/CLE/gen/00969

BETWEEN

FIDGEN S.A.
(In the capacity of trustee of Piani 2020 3 Year Grat)

Claimant

AND

LYDDA CAPITAL LTD.

Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Tara Archer-Glasgow with Trevor Lightbourn and Audley Hanna Jr for the Claimant
Raynard Rigby KC with Asha Lewis for the Defendant

Hearing Date(s) 16 May 2024 and 13 January 2025

JUDGMENT

WINDER, CJ

This is a claim for breach of statutory and contractual obligations and/or negligence by the Claimant (Fidgen) arising from the transfer of Trustee funds in the amount of $1,500,000 belonging to Fidgen by the Defendant (Lydda).

[1.] The action was commenced by Writ of Summons dated 1 September 2021. Fidgen is a Swiss company and the Trustee for the 3 Year Grat Trust (the Trust).

[2.] Lydda is a Bahamian company which carried on business as a broker dealer/investment advisor based in Nassau, The Bahamas and is registered under the Securities Industries Act, 2011 (the "SIA") and is regulated by the Securities Commission of The Bahamas.

[3.] The Trust was established on 17 June 2020. The Trust document was executed by Carlos Piani but Alexandro Ferraresi (Ferraresi) was the Authorized Signatory of the Trust and Maria Fernanda Ferraresi the sole Investment Director of the Trust.

[4.] Fidgen which, had been an existing client of Lydda, opened a corporate account on behalf of the Trust on 17 June 2020 with an initial deposit of USD$3,700,000. The account number was 2.001040.00. The purpose of the Account was to hold the financial assets of the Trust.

[5.] Fidgen's complaint against Lydda, for breach of statutory and contractual obligations and/or negligence, are set out at paragraphs 18 – 28 of the Statement of Claim as follows:

> Particulars of Breach of Duty Owed by the Defendant to the Plaintiff
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> 18. On or about 8th July, 2020, Mrs. Piani, sent to the Plaintiff a letter of direction (the "First Letter of Direction") in relation to a bank transfer. The First Letter of Direction instructed the Plaintiff to debit the Account and to transfer the sum of US$1,500,000.00 to an American company, HPX Capital Partners LLC via Pershing LLC, a branch of the Bank of New York, to the following account:
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> > Bank Name: Bank of New York
> > Bank Address: 225 Liberty St. New York, Ny 10286
> > ABA Number: 021000018
> > SWIFT Address: IRVTUS3N
> > Beneficiary Account Name: Pershing LLC
> > Beneficiary Address: 1 Pershing Plz. Jersey City, NJ 07399
> > Beneficiary Account Number: 890-051238-5
> > FFC: HPX CAPITAL PARTNERS LLC/39K90606
>
> 19. Arising from the Letter of Directions, following the agreed procedure, the Plaintiff on or about 9th July, 2020, provided the Defendant with a letter signed by Mr. Ferraresi

in his capacity as authorized signatory (the "Letter of Instructions"), containing written instructions for the transfer the sum of US$1,500,000.00.

20. The Letter of Instructions expressly reminded and instructed the Defendant that:

> "A call back is necessary before proceeding with the transfer".

21. Shortly after issuing the Letter of Direction, the Plaintiff, on the same day, received email communication from Mr. Piani via his email address, "cpiani@icloud.com" (the "Hold Email") transfer request set out in the Letter of Instruction be put on hold. As a result of the Hold Email, the Plaintiff instructed the Defendant not to carry out the instructions set out in the Letter of Instructions until further notice. The Defendant duly complied with this request not to facilitate the transfer.

22. On or about 13th July, 2020, Mr. Piani sent, via his email "cpiani@icloud.com", new instructions and a new trust letter of direction executed by Mrs. Piani (the "Second Letter of Directions").

23. On or about 13th July, 2020, the Plaintiff issued the Defendant new instructions, inclusive of the Second Letter of Directions attached to an email, for a wire transfer (the "Second Letter of Instructions"). These new instructions directed the Defendant to transfer the sum of US$1,500,000.00 to the following account on or before 14th July, 2020:

> Santander Bank
> Bank Address: Prol Paseo De La Reforma 500, Col. Lomas De Santa Fe, Edifico
> SWIFT Address: BMSXMXMMXXX
> Beneficiary Account Name: Southgete Culhan SA DE CV
> Beneficiary Address: 1 Pershing Plz. Jersey City, NJ 07399
> Beneficiary Account Number: 014180655080628035
> FFC: HPX CAPITAL PARTNERS LLC

24. Following queries raised by the Defendant concerning the correct name, address and account number of the intended beneficiary of the wire transfer, the Plaintiff on or about 13th July, 2020, sent Mr. Piani an email (the "Clarification Email") seeking clarification.

25. Unbeknownst to the Plaintiff at the material time, the email communication was evidently being fraudulently monitored by a third party. The third party in turn seemingly created a bogus email address, namely "cpiani@admin- icloud.com" which was similar to Mr. Piani's actual email address, "cpiani@icloud.com".

26. In response to the queries raised by the Plaintiff in the Clarification Email, on 13th July, 2020 the unknown third party, purporting to be Mr. Piani wrote to both the Plaintiff and to the Defendant via the said bogus email address ("the "Bogus Email") and purported to address the queries and provided bogus instructions.

27. The Bogus Email also included a PDF attachment of a trust letter of direction with a false signature which purported to be the signature of Mrs. Piani (the "Bogus

Letter of Instructions") giving instructions to debit the Account and transfer the sum of US$1,500,000.00 (the "Bogus Instructions") to the following account:

Santander Bank
Bank Address: Prol Paseo De La Reforma 500, Co/. Lomas De Santa Fe, Edifico
SWIFT Address: BMSXMXMMXXX
Beneficiary Account Name: Southgete Culhan SA DE CV
Beneficiary Address: 95 State Route 17, Suite 204 Paramus, NJ 07652
Beneficiary Account Number: 014180655080628035
FFC: HPX CAPITAL PARTNERS LLC, 023838212

28. Thereafter, without reference to the Plaintiff, the Defendant, in breach of its statutory and contractual obligations to the Plaintiff, and/or negligently, proceeded to carry out the transfer as requested in the Bogus Letter of Instructions. By its actions and/or inactions the Defendant also breached its fiduciary duties to the Plaintiff.

Particulars of Negligence and Breach of section 75 of the SIA

i) At all material times, the Defendant owed a general duty of care to the Plaintiff and as an entity registered under the SIA, the Defendant owed, a statutory duty, pursuant to section 75 of the SIA, to the Plaintiff (its client) to act with due skill, care and diligence in the best interest of the Plaintiff (its client);
ii) One fundamental aspect of this general and statutory duty to act with due skill, care and diligence is to ensure that any instructions received by the Defendant concerning the outflow of money from the Account emanate from the Plaintiff (its client);
iii) Having regard to the fact that the Defendant received instructions to transfer money, particularly a large sum, out of the Account, the Defendant had a duty to verify that the instructions emanated from the proper and relevant entity/individual;
iv) In accepting and relying on the Bogus Email and Bogus Letter of Instructions as valid without verifying the true identity of the individual giving such instructions, the Defendant acted negligently, not with the care and skill of a reasonable broker and/or in breach of the statutory duty owed pursuant to section 75 of the SIA ;in that it failed to act with due skill, care and diligence in the best interest of the Plaintiff;
v) In carrying out the Bogus Letter of Instructions, the Defendant acted negligently, not with the care and skill of a reasonable broker dealer and/or in breach of the duties owed to the Plaintiff pursuant to section 75 of the SIA in that, as the Defendant and Mr. Piani had not previously engaged in direct communication, the Defendant failed to cross-reference and verify the Bogus Email with the email address listed in the Application for Mr. Piani, i.e. cpiani@icloud.com;
vi) The Defendant also acted negligently and not with the care and skill of a reasonable broker dealer in failing to seek out the Plaintiff's authorization before carrying out the bogus instructions; and

vii) The transfer of the sum of US$1,500,000.00 as requested in the Bogus Letter of Instructions was caused by the negligence of the Defendant and the lack of care and skill exercised of a reasonable broker dealer.

Particulars of Breach of Agreement and Regulation 70(1) of the Regulations

i.) The Defendant, as an entity registered under the SIA, contravened Regulation 70(1) of the Regulations by carrying out the Bogus Instructions in the absence of prior authorization from the Plaintiff (its client), in the manner agreed;

ii.) The Defendant breached the express and/or implied terms of the Agreement to conduct the affairs of the Account with due care, diligence and good faith by failing to obtain prior authorization in the manner agreed and solely relied upon the Bogus Email and the Bogus Letter of Instruction and without reference to the Plaintiff (its client);

iii.) The Defendant failed to comply with the twofold procedure in that it accepted instructions from an individual that was not the Plaintiff via Mr. Ferraresi, the authorized signatory; and

iv.) The Defendant failed to comply with the twofold procedure in that it did not undergo a call back procedure with the Plaintiff before carrying out the Bogus Instructions.

[6.] Lydda defended the claim in a Defence filed on 29 October 2021. At paragraph 3 of the Defence Lydda provides a summary of its defence as follows:

3. The Defence of the Defendant is in summary:

3.1. It is denied that the Plaintiff has any cause of action which it is entitled to prosecute in these proceedings against the Defendant.

3.2. The Defendant did not breach any such duties as alleged in the Claim or at all and the Plaintiff is put to strict proof thereof.

3.3. The Defendant had no reasonable basis to suspect or conclude that the First and Second Letter of Directions were not duly issued by either the Plaintiff and/or Mr. Piani and as the Plaintiff acted thereon the Defendant had no reason to consider that the same were not genuine.

3.4. At all material times the Defendant had no knowledge and no reasonable means to suspect that the Bogus Email and/or the Bogus Letter of Instructions (collectively "the Bogus Communications") were not genuine and reflected the authentic instructions of Mr. Piani and/or the Plaintiff.

3.5. In all of the prevailing circumstances the Plaintiff was negligent in safeguarding its communications network with Mr. Piani and thereby caused the Defendant to act on the Bogus Email and Bogus Letter of Instructions in circumstances where the Defendant was led to believe that the Bogus Communications were genuine and represented the true instructions of Mr. Piani.

3.6. Had the Plaintiff acted prudently as a trustee the Bogus Communications would have not been capable of being acted upon and thereby they would have been detected by the Plaintiff in the discharge of its duties as trustee.

3.7. By the Plaintiff's actions (and inactions) it misled the Defendant in believing that the Bogus Communications was genuine and in so doing it failed to exercise reasonable care and skill in the execution of its client's orders and instructions and their transmission to the Defendant.

3.8. The Plaintiff is estopped from asserting or contending that it did not convey or mislead the Defendant into a state of facts which at the material time the Plaintiff thought were genuine and for which the Defendant played no role in its fabrication or otherwise.

[7.] On 18th July, 2020 a second but unsuccessful effort was made to transfer USD$1,000,000 by the unauthorized third party using the fictitious email address. The fraud was reported to the authorities but efforts to recover the funds were unsuccessful.

[8.] On 11th February 2021 Lydda transferred to Fidgen $500,000. Fidgen claims in this action the balance of $1,000,000 which it says remain outstanding. Lydda contends that the payment of $500,000 was not an acknowledgement of any sums due and owing to Mr. Piani and/or to Fidgen but was an interrelated payment.

[9.] At trial Desiree Terrell (Terrell) gave evidence on behalf of Fidgen. Prescott Adderley (Adderley) gave evidence on behalf of Lydda.

[10.] Terrell's evidence was contained in her witness statement which was subject to cross examination. In her witness statement Terrell stated, in part:

1. I am currently the Managing Director of Fidgen Corporate & Fiduciary Services (Bahamas) Limited, a company incorporated under the laws of The Commonwealth of The Bahamas, which carries on business as a licensed financial services provider.
2. Fidgen Corporate & Fiduciary Services (Bahamas) Limited is a branch of the Claimant resident in The Bahamas.
3. The Claimant is a company duly incorporated, registered and validly existing in accordance with the laws of the Canton of Ticino, Switzerland, with registered office at Via Nassau, 60, 6900, Lugano, Ticino, Switzerland.
4. I have worked closely with the Claimant organization and its subsidiaries since June 2018, when I commenced employment as the Managing Director of Fidgen Trust Company (Bahamas) Limited.
5. My general duties include, among other things, providing the Claimant with guidance on fiduciary matters, including reviewing new business, trusts, and restructures for those trusts that are governed by Bahamian law, and acting as a client liaison for those clients who resided in proximity to The Bahamas given the time zone difference with Europe.
6. I have also worked closely with the Defendant when I commenced employment as the Managing Director of Fidgen Trust Company (Bahamas) Limited during July 2018. We established a number of bank accounts with the Defendant, of which I acted as one of the authorized signatories, and still act as an authorized signatory today on certain accounts. During the course of our banking relationship, the two-fold procedure was carried out for

all payment instructions which include all withdrawals from an account. We would always provide written instructions to the Defendant, which were forwarded electronically to the Defendant, who would thereafter perform callbacks with the authorized signatory (ies) in accordance with the signing authority on file.

7. On or about June 6th, 2020, I connected with Mr. Eric Dorsch ("Mr. Dorsh"), a U.S. attorney, who was assisting a client with estate planning. I came to know this client to be Mr. Carlos Piani ("Mr. Piani"). My communications with Mr. Dorsch resulted in formalising and implementing a trust structure for Mr. Piani which was to be funded with an interest in HPX Capital Partners LLC and approximately US$3,700,000 of cash.

8. Mr. Piani desired the structure to be in place quickly. In turn, I reached out to representatives of the Defendant.

9. The Defendant is a company incorporated and existing under the laws of the Commonwealth of The Bahamas and, at all material times, was a registrant under the Securities Industries Act, 2011, carrying on business as a broker-dealer/investment advisor based in The Bahamas.

10. The Claimant was at all material times an existing client of the Defendant who acted as its broker-dealer concerning the business referred to by the Claimant.

11. On this basis, on 17th June, 2020, I sent an email to Ms. Alicia Curry, the Client Relationship Manager of the Defendant, informing her that the Claimant needed to open an account by Friday, 19th June, 2020 to receive funding from Mr. Piani for the sum of US$3.7 million to give effect to the contemplated trust.

12. The Defendant had a variety of forms requiring completion and submission, namely an Account Application for a Corporate Account, which Mr. Alexandro Ferraresi, the Managing Director of the Claimant executed on behalf of Mr. Piani. Page 7 of the Defendant's Account Application for a Corporate Account confirmed that the only authorized signatory was Mr. Ferraresi and that the Defendant was only authorized to accept instructions, requests, and other instruments and endorsements from Mr. Ferraresi.

13. The said forms provided by the Defendant were standard forms issued by them to prospective clients, and were not exhaustive. Thus, to better govern the broker-dealer relationship between the Claimant and the Defendant concerning the outflow of money from accounts, the Claimant and the Defendant had a policy and practice which corresponded with the general banking practices, namely that authorization for all transactions would be conducted via a twofold procedure.

14. The two-fold procedure for when the outflow of money via a wire transfer first involved the Claimant sending signed written instructions signed by the authorized signatory to the Defendant. After that, the Defendant was obligated to undergo a call back procedure with the Claimant. At all times, to the best of my knowledge during the time that I interacted with the Defendant, in the capacity as an authorized signatory on certain custody accounts, all instructions issued to the Defendant, were provided in writing, signed by the respective authorized signatory (ies). The Defendant, and its representatives would customarily perform callbacks on all payment instructions of the accounts in which I acted, and still act as an authorized signatory thereof.

15. The twofold procedure was an essential security control that ensured the proper verification of the legitimacy of instructions before money was transferred from accounts.

16. Additionally, undergoing the twofold procedure was a safety system to help reduce the occurrence of general human error, particularly with incorrectly citing bank account details.

17. On or about 17th June, 2020, a trust was created by virtue of a trust document, namely Piani 2020 3 Year Grat Trust (the "Trust"). The Trust document was executed by: Mr. Carlos Piani of Chicago, Illinois, United States of America as Creator of the Trust; Mr. Alexandro Ferraresi ("Mr. Ferraresi"), the Managing Director of the Claimant; and Mrs. Maria Fernanda Martino Piani, the Investment Director of the Trust.

18. To the best of my knowledge, information and belief, at all material times, the actual email address of Mr. Carlos Piani was "cpiani@icloud.com".

19. The Claimant was named in the Trust as the initial Trustee.

20. Shortly after that, the Claimant received a letter dated 23rd June, 2020 from Prescott Adderley, a Client Relationship Officer, who confirmed that the Piani 2020 3 Year Grat Trust had been approved, and its account number was 2.001040.00.

21. In an email dated 7th July, 2020, Ms. Curry informed us that the said account had been funded. To this end, she enclosed the bank statement, which reflected the funding in the amount of US$3,699,990.00.

22. On 7th July, 2020, I received an email from Mr. Piani advising that he needed to wire funds to HPX Capital Partners LLC.

23. On July 8th, 2020, I confirmed with Ms. Curry that I would prepare the Letter of Direction for signature for the wire. Thereafter, I sought confirmation of the quantum of the transfer and the wire details. By email of the same date, Mr. Piani responded that the amount was US$1,500,000.00 and provided the wire instructions to Fidgen.

24. Pursuant to the two-fold procedure, on 9th July, 2020, a representative of the Claimant, sent an email to Ms. Alicia Curry enclosing a Letter of Instruction signed by Mr. Ferraresi on behalf of the Claimant. The Letter of Instructions expressly reminded and instructed the Defendant that:

> "A call back it's (sic) necessary before proceeding with the transfer".

25. The need for a call back was again emphasized in the said email, where Ms. Brunner indicated that,

> "For the call back please dial the number +41 91 911 95 03 and speak with Caroline".

26. Shortly after the said 9th July, 2020 email, I received an email from Mr. Piani requesting I hold the wire so that he can change the accounts.

27. On July 13th, 2020, I received an email from Mr. Piani, which provided a new Letter of Directions for the sum of US$1,500,000.00 with the updated banking information. I then forwarded Ms. Curry the said Letter of Directions along with an email again referencing the twofold procedure.

28. Unbeknownst to me at the material time, the email communication was being fraudulently monitored by a third party. The third party seemingly created a bogus email address, namely "cpiani@admin-icloud.com" which was similar to Mr. Piani's actual email address, "cpiani@icloud.com".

29. In response to the queries raised by me on behalf of the Defendant in an email, on 13th July, 2020 the unknown third party, purporting to be Mr. Piani wrote to both the Claimant and to the Defendant via the said bogus email address and purported to address the queries and provided bogus instructions, namely enclosing a Letter of Direction.

30. Uncertain as to the impact the responses had on the issues raised by the Defendant's queries, on 13th July, 2020 at 4:13 pm, I sought Ms. Curry's guidance as to whether the information provided was sufficient for processing.

31. On this occasion, the Claimant did not provide Ms Curry with a transfer signed by Mr. Ferraresi on behalf of the Claimant, nor did she provide a telephone number to the Defendant for it to fulfil its obligations to conduct a call back verification.

32. Ms. Curry advised, via email, that the Defendant already sent the amended instructions to the bank that day.

33. This was done by the Defendant without reference to the Claimant and in breach of its statutory, contractual and fiduciary duty to the Claimant.

34. The following day on 14th July, 2020, after the fact, Ms. Curry sent another email with additional inquiries concerning Sothget Culhan Sa de CV. The email address cpiani@admin-icloud.com provided a response and instructions to provide SWIFT Copy today.

35. Acting on the said instructions of cpiani@admin-icloud.com, on 14th July, 2020 at 4:52 pm, Ms. Curry complied with the request and provided the SWIFT to cpiani@admin-icloud.com.

36. On or about 18th July, 2020, the Claimant received an additional email from the bogus email address "cpiani@admin-icloud.com" with further wire transfer instructions that requested the Claimant to execute the instructions in a manner that USD$1,000,000.00 was to be received by HPX Capital on Tuesday, 21st July, 2020.

37. However, on or about 21st July, 2020, following our investigatory procedures, we were able to ascertain that the email account cpiani@admin-icloud.com was not being operated by Mr. Piani. And upon analyzing all of our transactions and found that the initial transfer of USD$1,500,000.00 was fraudulent.

38. Shortly thereafter, we alerted the Swiss Authorities of this fraud, and a report was prepared.

39. The Claimant made repeated oral demands to the Defendant for the return of the USD$1,500,000.00 to the said account. The oral demands were reduced to writing on 9th February, 2021, when the Claimant issued a demand letter after receiving no satisfactory response to its previous demands

40. Thus Fidgen, as the Claimant to this action commences this action in the capacity of Trustee of a Piani 2020 3 Year Grat Trust Account Number 2.001040.00.

41. However, the sum of USD$1,500,000.00 remains due and outstanding.

[11.] Under cross examination, Terrell stated that:

(1) She is the managing director of Fidgen Corporate and Fiduciary Services Bahamas Limited and does not have a position in Fidgen.

(2) She received the account documentation from Lydda and forwarded them to Fidgen for their completion thereof on behalf of the account. She played no role in the completion of the account opening documents.

(3) She coordinated the documentation but played no role in the discussions between Lydda and Fidgen on the terms of that account opening.

(4) The reference in paragraph 6 of the witness statement was not a reference to Fidgen but to the dealings with the Bahamian company and its multiple accounts to which at the time she acted as an authorized signatory.

(5) She had no knowledge of whether Lydda and Fidgen agreed to a two-fold procedure.

(6) She has never spoken with Mr. Piani.

(7) She has never had any discussions with Mr. Ferraresi pertaining to the account.

(8) She was the client liaison for the structure. Owing to the time difference in Switzerland she was involved from a client management perspective and was copied in respect of emails concerning Mr. Piani's account.

(9) She was unaware if whether investment services was intended to be provided to Mr. Piani.

(10) Terrell confirmed that she was aware of the procedures for payment instructions, which included a two-fold procedure involving written instructions and callbacks with authorized signatories. However, she clarified that her knowledge of this procedure was based on her experience with Fidgen Trust Company Bahamas, not Fidgen S.A. She also stated that she had no direct discussions with Mr. Carlos Piani, the client, or Mr. Alexandro Ferraresi, the Managing Director of Fidgen S.A., regarding the account.

(11) She knows that Fidgen calls back on all instructions, because they write it into the instructions making a call back is necessary. She was unable to say whether anyone from Fidgen called Mr. Piani.

(12) She stated that if Lydda received any instructions from the authorized signatories on the account they are duty bound to comply with those instructions unless there is gross negligence.

(13) She said that it was not until 18 July 2020 that she realized that the emails were hacked. She realized that there was something funny going on as they were trying to get another million immediately after. So it was queried and discussed with Alex Ferraresi that same day. Mr Ferraresi did not indicate that he had a call back or WhatsApp messages with Lydda at that time.

(14) She is unaware of any procedures that Fidgen have in place with respect to communications with their clients or any mandates or account opening forms that may exist between Piani and Fidgen outside of the trust account.

[12.] When re-examined, Terrell stated:

(1) Her role with Fidgen was as a client liaison and fiduciary. She was a resource on matters for their trust from time to time and they call on her to assist them. She has 35 year experience in the Trust business.

(2) There is a commonality of shareholders between Fidgen and her company and Fidgen Corporate and Fiduciary Services Bahamas Limited.

(3) Lydda received the letter requesting the transfer of $1,500,000 on 9 July 2020. After setting out the banking instructions, the email stated that: "a call back is necessary before

proceeding with the transfer. Many thanks and regards." She was copied in that e-mail. The letter went to Lydda from Sacha Brunner at Fidgen.

(4) When the letter says that a call back is necessary before proceeding with a transfer, it means that a call back must be performed for the instructions to be considered valid.

(5) In relation to the indemnity, in her experience, three things are always embedded in the indemnity, which are exceptions for gross negligence, actual fraud and willful misconduct. She didn't see these evident in this indemnity.

[13.] Adderley's evidence was contained in his witness statement which was subject to cross examination. In his witness statement Adderley stated, in part:

> 1. I am the Compliance Officer at Lydda Capital Ltd., the Defendant, (hereinafter "LCL") in this action. In my capacity as the compliance officer, it is my duty to ensure that the organization complies with all pertinent regulations, laws, and internal policies. Assembling, executing, and overseeing compliance programs in order to mitigate the risks associated with legal and regulatory obligations is my responsibility. This entails maintaining current knowledge of legislative and regulatory developments, performing routine audits and evaluations, and offering counsel to personnel regarding matters of compliance. In addition, I serve as an intermediary between the institution and regulatory agencies, ensuring that any issues are promptly addressed and facilitating communication. In addition, I hold the direct responsibility for overseeing client activity within said accounts and approving client accounts, as well as assigning risk ratings to said accounts.
>
> 2. LCL is a registered broker dealer licensed by the Securities Commission of The Bahamas.
>
> 3. I was intimately involved in the onboarding of the Plaintiff as a new client of LCL. The onboarding process entailed as the primary objective to gather extensive information from the client through our account opening application in order to evaluate their risk profile. The application includes information verifying the client's identity, source of funds, business activities, potential to be a politically exposed person (PEP) or High Profile Figure (HPF), their tax residency status and jurisdiction where they live. After the requisite information is acquired, it is subjected to a stringent examination in order to verify adherence to regulations pertaining to know your customer (KYC) and anti-money laundering (AML). This involves performing background checks, authenticating documents that are provided, and employing specialized software to enhance due diligence, particularly in the case of high-risk customers or transactions. Effective communication is consistently maintained with the client to resolve any uncertainties and clarify requirements, thereby guaranteeing a seamless and compliant onboarding experience. After the evaluation is finished, a risk rating is produced in order to indicate the degree of risk exposure that the client may present to the organization. The suitability of the prospect for onboarding is determined by the risk rating status (high risk versus low risk). Assessing the client's compliance with regulatory obligations and potential risks against the institution's risk

appetite requires the assignment of a score based on various criteria, including jurisdiction, employment type, source of funds, PEP status, and more. Client approval or rejection is contingent upon the Risk Rating score.

4. The Plaintiff secured the signature to LCL's standard Account Application Agreement as well as its client background memo, tax residency self certification, Antimony laundering program checklist, W-8IMY and general account application which includes an agreement to open the account, waiver of confidentiality, electronic communication indemnity and general indemnity on or about 17 June 2020. These various agreements must be read together as they form the terms of the relationship between the parties.

5. The Plaintiff's account at LCL was credited with the sum of $3.7million. The agreed terms between the parties meant that LCL would invest those funds per the direction of the Plaintiff, via instruction communicated electronically.

6. At all times, and as far as I am aware, LCL was authorized to take instructions from Carlos Piani or Martino Piani, as the beneficial owners as well as the CEO of the Plaintiff. LCL also took instructions from Desiree Terrell and Sacha Brunner, who are (or were) employees of the Plaintiff.

7. When the complaint was made in July 2020 in respect of the sum of $1.5 million transferred to HPX Capital Partners, LCL acted on the instructions received from the Plaintiff and also performed a call back to confirm the authorization.

8. The responsibility of LCL is not to question the instructions that it receives either from the Plaintiff or the authorized signatory on the account. Its mandate is to comply with the instructions once they meet the usual mandate on the account.

9. What transpired is in fact a fraud that was perpetrated on the Plaintiff when it received a bogus email allegedly from Mr. Piani. LCL had no reasonable basis to suspect or conclude that any of the letters of directions that it received on 13 July 2020 were not issued by either the Plaintiff and/or Mr. Piani. In fact, it appears that the Plaintiff itself acted on what it perceived was genuine instructions from Mr. Piani.

10. LCL was authorized to act on instructions via email in accordance with the terms of its agreement.

11. In the circumstances, LCL performed its obligations under the account opening agreements. At no time did LCL agree or covenant to protect the Plaintiff's account from fraud. LCL's obligation was to manage the funds in a prudent fashion.

12. I would also think that the Plaintiff had a duty to its client and to LCL to ensure that the instructions or directions it received and likely act on were legitimate.

[14.] Under cross-examination, Adderley stated:

(1) He is a compliance officer and not a customer relations officer. He did not engage with clients on a day-to-day basis, as he was back office.

(2) He confirmed that his responsibilities included overseeing client activity, approving client accounts, and ensuring compliance with relevant regulations and internal policies.

(3) He was involved in reviewing the application package for the account which was signed by the ultimate beneficial owner, Mr. Ferraresi.

(4) In the letter of instruction Fidgen was advising that Lydda should send 1.5 million from their account and they're telling them where to send it, the currency, the location, who's going to be the recipient, the beneficiary account and the address and when they're signing it. The letter also said that a call back is necessary before proceeding with the transfer.

(5) He explained that the contractual relationship with Fidgen involved acting on instructions provided by authorized signatories, specifically mentioning that instructions were to be signed by the authorized signatory, Alexandro Ferraresi.

(6) He was unable to identify a document which said that he could take instructions from Fidgen's employees.

(7) The email address of the beneficial owner is cpiani@icloud.com. The e-mail that Ms. Alicia Curry responded to when she was responding to Terrell also included a cpiani@admin-icloud.com, which e-mail is different from the e-mail that's on the beneficial owner form.

(8) When asked if he could point to any direct communication between Ms. Curry and Mr. Ferraresi where she e-mailed him and he responded, Adderley pointed to what he called the WhatsApp approval for the transfer.

(9) The WhatsApp confirmation is confirmation that she received the transfer.

(10) He was copied on an email where $500,000 was transferred to Fidgen.

(11) He agreed with the suggestion that Lydda had a duty to comply only with the instructions authorized signatory but disagreed with the suggestion that the transfer of the $1,500,000 from the trust account by Lydda was a result of Lydda not following that account mandate that had Mr. Ferraresi as the authorized signatory.

(12) He also discussed the process of verifying instructions, noting that a call back was performed to confirm the instructions for a transfer of 1.5 million dollars, and that WhatsApp messages were used to confirm the go-ahead for the transaction. Adderley mentioned that Lydda Capital maintained logs of communications, including call logs and WhatsApp messages, which were stored in a document management system called Viewpoint.

(13) He disagreed with the suggestion that Ms. Curry should have picked up on the email address she was responding to and seeking instructions from that it was not the e-mail address that was stated on the contract.

(14) He disagreed that Lydda was responsible for the loss and that this was why they made the $500,000 payment.

[15.] When re-examined, Adderley stated that:

(1) There was no indication in the email as to the purpose of the payment.

(2) Alicia made the call back. Lydda keeps a record of any communications with clients so they would have had a copy of her call history and we would have had the WhatsApp exchanges that she sent to the client. The WhatsApp call log is in a document management system called Viewpoint which he has access to as a result of his position in compliance.

(3) The call back was with Mr. Ferraresi and the WhatsApp message was with Mr. Ferraresi.

(4) That the call log showed an incoming call, which was not a call back.

Fidgen's case

[16.] Fidgen asserts that Lydda's actions resulted in an unauthorized transfer of $1.5 million, and seeks full indemnification for the loss, arguing that the letter of indemnity is inapplicable or should be interpreted against Lydda.

[17.] Fidgen emphasizes that a call back was necessary as per the agreement between the parties, and Lydda's failure to perform it constitutes a breach. Fidgen challenges Lydda's assertion that a call back was made to verify a transfer instruction, arguing that no such call back occurred. Fidgen further argues that Lydda had the means to identify a fraudulent email address but failed to do so, which amounts to negligence.

[18.] Additionally, Fidgen contends that the letter of indemnity cited by Lydda does not absolve it from liability, as the fraud involved a third party pretending to be someone not covered by the indemnity. Fidgen also invokes the "Contra proferentem" principle, suggesting that any ambiguity in the indemnity should be interpreted against Lydda, who drafted it.

[19.] Fidgen seeks to recover a sum of $1,000,000, arguing that a previous payment of $500,000 by the defendant was an admission of liability.

Lydda's case

[20.] Lydda denies the allegation that it breached the contract and its fiduciary duty by executing an unauthorized transfer of $1.5 million. Lydda says:

1. It did not breach the contract by not following a twofold procedure for authorizing transactions, which included written instructions and a callback verification. Lydda argues that no such procedure was part of the agreement and that Fidgen failed to prove its existence or necessity. It performed a callback to verify the instructions, which was confirmed by evidence presented during the trial.
2. It was not negligent by not ensuring the authenticity of the instructions. Lydda contends that it acted in accordance with the terms of the Client Account Application and that Fidgen did not provide evidence of negligence.
3. It did not breach its statutory duty under Section 75 of the Securities Industry Act (SIA), which requires acting with due skill, care, and diligence. Lydda argues that it fulfilled its obligations and that Fidgen did not prove otherwise. Additionally, it was not in breach of Regulation 70(1) for executing instructions without prior authorization.

Lydda maintains that it acted within the scope of the agreement and that Fidgen failed to demonstrate a breach.

4. Lydda claims that the Letter of Indemnity protects it from liability, as it waives all claims arising from instructions sent via electronic means, provided it acted in good faith.

[21.] Finally, Lydda contends that Fidgen failed to discharge the burden of proof and that the evidence supports Lydda's position.

Issues

[22.] The issues for determination are the following:

(1) Whether the transfer was authorized by Fidgen.

(2) If the transfer was not authorized by Fidgen, whether there was a breach of the account operating agreement by executing the transfer or whether Lydda owed a duty to Fidgen in respect of the transfer instruction.

(3) Whether Lydda's Indemnity Letter absolves it from liability for the transaction.

(4) Whether the claim has been compromised by a part payment of $500,000.

(5) Whether Fidgen was wholly or partially liable for the fraudulent transfer.

Analysis and Disposition

[23.] A brief timeline of the salient events enables us to properly orient the context of the dispute:

July 7 Mr. Piani advised the need to wire funds to HPX Capital Partners LLC.

July 8 Confirmation with Ms. Curry to prepare the Letter of Direction for the wire transfer.

July 9 A Letter of Instruction was sent, emphasizing the need for a call back before proceeding.

July 9 Mr. Piani requested to hold the wire to change accounts.

July 13 A new Letter of Directions was provided with updated banking information.

July 13 Fraudulent email from a third party purporting to be Mr. Piani was sent.

July 14 Ms. Curry sent amended instructions to the bank without reference to the Claimant.

July 14 Further fraudulent instructions were followed, leading to the provision of a SWIFT copy.

July 18 Additional fraudulent wire transfer instructions were received.

Jul 21 It was discovered that the email account was not operated by Mr. Piani, confirming the fraud.

Whether the transfer was authorized by Fidgen

[24.] On the evidence which I accept, the new Letter of Directions dated July 13, 2020, was sent from an unknown third party using a bogus email address similar to Mr. Piani's. This I accept was not a mandate issued by Fidgen. This third party sent fraudulent instructions, which led to Lydda sending amended instructions to the bank. Irrespective of who Lydda was authorized to take instructions from, it was not authorized to act on instructions from the author of the bogus email.

If the transfer was not authorized by the Fidgen, whether there was a breach of the account operating agreement by executing the transfer or whether Lydda owed a duty to Fidgen in respect of the transfer instruction.

[25.] It is useful to set out the email chain which led to the fraudulent transfer:

From Desiree Terrell < dterrell@fidgen.com
Sent Tuesday, July 14, 2020 4:10 PM
To Alicia Curry; cpiani@admin-icloud.com; Alicia Curry
Cc Alexandro Ferraresi; Trading
Subject RE: Funding of 2020 3 YR GRAT

Dear Alicia,
Have you heard from the Bank?
Regards
Desiree

- - - - - - - - - - - - -

From Alicia Curry [mailto: Acurry@lyddacap.com
Sent Tuesday, July 14, 2020 2:56 PM
To Desiree Terrell < dterrell@fidgen.com; cpiani@admin-icloud.com; Alicia Curry < acurry@cfal.com
Cc Alexandro Ferraresi < aferraresi@fidgen.com; Trading
Subject RE: Funding of 2020 3 YR GRAT

Hi,

We have not yet received from the bank. We will send as soon as received.
Best,
AC

- ------------

From Desiree Terrell < dterrell@fidgen.com
Sent Tuesday, July 14, 2020 1:57 PM
To cpiani@admin-icloud.com; Alicia Curry < acurry@cfal.com
Cc Alexandro Ferraresi < aferraresi@fidgen.com; Trading < trading@lyddacap.com
Subject RE: Funding of 2020 3 YR GRAT

Hi Alicia,
Do you have the SWIFT information?
Regards
Desiree

- ------------

From Desiree Terrell < dterrell@fidgen.com
Sent Tuesday, July 14, 2020 11:11 AM
To cpiani@admin-icloud.com; Alicia Curry < acurry@cfal.com
Cc Alexandro Ferraresi < aferraresi@fidgen.com; Trading < trading@lyddacap.com
Subject RE: Funding of 2020 3 YR GRAT

Hi Carlos,
Alicia will provide to you shortly.
We trust that the funds have arrived as per your instructions.
Kind regards,
Desiree

- -------------

From cpiani@admin-icloud.com [mailto:cpiani
Sent Tuesday, July 14, 2020 11:05 AM
To Desiree Terrell < dterrell@fidgen.com; Alicia Curry < acurry@cfal.com
Cc Alexandro Ferraresi < aferraresi@fidgen.com; Trading
Subject RE: Funding of 2020 3 YR GRAT

Desiree
Can you please send a copy of the SWIFT confirmation?
I hope it was executed in a manner that funds are received by HPX Capital today July 14 2020.
I await your response.
Kind regards,
Carlos Piani

On 2020-07-13 23:37, Alicia Curry wrote:

Yes, we've sent amended instructions to the bank today.
Best,
AC

From Desiree Terrell [mailto:dterrell@fidgen.com]
Sent Monday , July 13, 2020 4:37 PM
To cpiani@admin-icloud.com;
Cc Sacha Brunner<sbrunner@fidgen.com; Alicia Curry < acurry@cfal.com Alexandro Ferraresi < aferraresi@fidgen.com

Subject RE: Funding of 2020 3 YR GRAT

Thank you Carlos. Alicia, is this sufficient for processing? Best regards

----

From cpiani@admin-icloud.com [mailto:cpiani
Sent Monday, July 13, 2020 3:04 AM
To Desiree Terrell < dterrell@fidgen.com
Cc Sacha Brunner<sbrunner@fidgen.com; Alicia Curry < acurry@cfal.com Alexandro Ferraresi < aferraresi@fidgen.com
Subject RE: Funding of 2020 3 YR GRAT

Desiree
Yes, the correct beneficiary is Southgate Culhan.
The relationship between HPX and Southgate is Southgate is an intermediary.
The correct beneficiary address is included in the attached instructions.
I have attached the corrected instructions.
Kind regards,
Carlos Piani

- -----------

On 2020-07-13 20:18, Diedre Terrell wrote:

Hi Carlos,
Lydda Capital has sent us the below message, Can you please advise.

- The correct name of the beneficiary Southgate Culhane and not Southgate culhan
- As Southgate is not a bank can you please confirm the relationship between Southgate and HPX
- Please provide the correct beneficiary address (address provided is for Pershing)
- Can you confirm that there is no account number for HPX (noting listed in FFC)

Regards
Desiree

- ----------

From Desiree Terrell
Sent Monday, July 13, 2020 12:30 PM
To cpiani@admin-icloud.com;
Cc Sacha Brunner<sbrunner@fidgen.com
Subject RE: Funding of 2020 3 YR GRAT

Good afternoon Carlos:
We will provide our revised instructions to Lydda Capital Ltd today.
With kind regards,
Desiree

- -------------

From cpiani@icloud.com [mailto:cpiani
Sent Monday, July 13, 2020 11:18 AM
To Desiree Terrell < dterrell@fidgen.com
Cc Sacha Brunner<sbrunner@fidgen.com
Subject RE: Funding of 2020 3 YR GRAT

Desiree,

Please find attached the updated wire transfer for signed. Please execute in a manner that funds are received by HPX Capital on or before July 14th.
Kind regards
Carlos Piani

From Desiree Terrell [mailto:dterrell@fidgen.com]
Sent Monday , July 13, 2020 11:10 PM
To cpiani@icloud.com; Erice Dorasch < edorasch@hozlaw.com
Cc Alexandro Ferraresi < aferraresi@fidgen.com; Sacha Brunner<sbrunner@fidgen.com; Nuno Stuer nstuer@pegas.law; Fabio Pegas < fpegas@pegal.law
Subject RE: Funding of 2020 3 YR GRAT

Good morning Carlos. Alicia,
Hope all is well.
Just following up on this matter. We await your further advices.
With kind regards
Desiree

From cpiani@icloud.com [mailto:cpiani@icloud.com]
Sent Thursday, July 9, 2020 4:16 PM
To Desiree Terrell [mailto:dterrell@fidgen.com; Erice Dorasch < edorasch@hozlaw.com
Cc Alexandro Ferraresi < aferraresi@fidgen.com; Sacha Brunner<sbrunner@fidgen.com; Nuno Stuer nstuer@pegas.law; Fabio Pegas < fpegas@pegal.law
Subject RE: Funding of 2020 3 YR GRAT

Desiree,
Please hold the wire. I'll need to change the accounts.
Sorry, Please let me know if it's possible.
Thanks
Carlos

From Desiree Terrell [mailto:dterrell@fidgen.com]
Sent Thursday, July 9, 2020 11:05 AM
To cpiani@icloud.com; Erice Dorasch < edorasch@hozlaw.com
Cc Alexandro Ferraresi < aferraresi@fidgen.com; Sacha Brunner<sbrunner@fidgen.com; Nuno Stuer nstuer@pegas.law; Fabio Pegas < fpegas@pegal.law
Subject RE: Funding of 2020 3 YR GRAT

Good afternoon Carlos,
Hope all is well.
Please be advised that we have issued our instructions to Lydda Capital Ltd.
We will follow up with them for the SWIFT confirmation and will provide same to you once received.
The funds should be received by July 14th, 2020.
Best regards,
Desiree

[26.] Fidgen argues firstly, that Lydda acted upon the instructions of Carlos Piani rather that the authorized signatory on the account Alexandro Ferraresi. Secondly, Fidgen complains that Lydda

failed to adhere to its duty, as banker, by not verifying the authenticity of the instructions received. This raises issues both in contract and the tortious act of negligence and centers around whether there was this two-fold procedure in place.

[27.] The parties seem to agree that the legal principles, relative to the duty of the Lydda, in considering to act on instructions relative to Fidgen's account begins with a consideration of the *Quincecare* duty. This duty was first postulated by Lord Steyn in the High Court case of **Barclays Bank Plc v Quincecare Ltd.** [1992] 4 All E.R. 363. In **Barclays Bank Plc v Quincecare Ltd.**, Barclays Bank provided a loan of £400,000 to Quincecare, a company formed to purchase four chemist shops. The chairman of Quincecare instructed the bank to transfer approximately £340,000 to a firm of solicitors who subsequently transferred the funds to the chairman's personal account in the USA, constituting fraud against the company. When Barclays sued Quincecare for repayment of the loan, the company counterclaimed, alleging that the bank had breached its duty of care by executing the payment instructions despite grounds for suspicion. Lord Steyn identified a legal principle that imposes an obligation on banks to exercise reasonable skill and care when executing customers' payment instructions. The duty requires a bank to refrain from executing an order if it has reasonable grounds to believe the order may be an attempt to misappropriate the customer's funds.

[28.] Lady Rose in the UK Supreme Court case of **Sanford International Bank Ltd v HSBC Plc** [2022] UKSC 34, provides a succinct statement of the duty as "a duty on the bank to refuse to comply with a payment instruction given by the person mandated by the customer to give such an instruction when the bank is on notice that the instruction may be part of a fraud on the customer, unless and until the bank's inquiries satisfy it that the instruction is validly authorised by the customer." In **The Federal Republic of Nigeria v JP Morgan Chase Bank, N.A.** [2019] EWHC 347 (Comm), it is described as "a duty on a bank to refrain from executing a customer's order if, and for so long as, the bank is 'put on inquiry' in the sense that the bank has reasonable grounds for believing – assessed according to the standards of an ordinary prudent banker – that the order is an attempt to defraud the customer."

[29.] **Fiona Lorraine Philipp v Barclays Bank UK Plc** [2021] EWHC 10 (Comm) provides further insight into Steyn J's reasoning, noting that the judge sought to strike a balance between competing 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."

[30.] I am satisfied that there was a two-fold procedure. The first being the production of a properly signed instruction by the authorized signature. The second aspect of the approval required the verification of the instruction by the provision of a call back.

[31.] Lydda was not presented with a properly signed instruction by the authorized signatory, Mr Ferraresi. The instructions were purportedly signed by Mr Piani, who although an agent of Fidgen, was not an authorized signatory. Lydda submitted that it could have received instructions from Mr. Ferraresi, the beneficiaries of the Trust or anyone at Fidgen. They say that based on the course of dealings (as proven through email correspondence). Lydda received instructions from various authorized agents of Fidgen. More importantly, they admit that these instructions (other than from Mr. Ferraresi) <u>once they were authorized by Mr. Ferraresi</u> could be actioned by the Defendant.

[32.] I am satisfied however that the email was bogus and sent by fraudulent means and not by Fidgen. The instruction was not purported to be signed by the authorized signatory Ferraresi but purported to be signed by Mr. Piani. I therefore could not find that the instruction was authorized by Mr. Ferraresi.

[33.] Lydda submits that there existed no express or verbal agreement between the parties and no clause in any of the account opening agreements that a two-step callback procedure was to be followed to verify instructions before a transaction can be carried out. I am satisfied that there was an obligation to conduct a verification of the instruction by the provision of a call back.

[34.] Firstly, the obligation arose from the specific request of Mr. Ferraresi that it be done. The Letter to Lydda dated 9th July, 2020 of Alexandro Ferraresi the Authorized Signatory initially instructed Lydda to transfer US$1,500,000 from the Account. The letter expressly stated:

> "A call back is necessary before proceeding with the transfer."

The Authorized Signatories page of the Account Application Corporate Account provides that:

> "**<u>Lydda is authorized to accept instructions</u>**, notices, **<u>requests</u>**, cheques, bills, notes and other instruments and endorsements **<u>from the persons named above, in relation to the account</u>**. The execution of any Asset Management Authority agreement with Lydda by the persons named above is valid and may be accepted by Lydda."

It was the therefore the authorized signatory's express and unequivocal instructions and/or request that Lydda conduct a call back before proceeding a transfer.

[35.] Secondly, Lydda was obliged to conduct the call back not as a result of any contractual obligation, but as a result of the course of dealings of the parties and the requirement of the financial services industry. The evidence of Terrell, a 30-year veteran in the industry, was that a call back was the industry standard. According to Terrell:

> "Just based on my experience having worked with the parties over the years, that was what I was aware of because Lydda Capital would call me to perform callbacks on all

instructions that I would send to them. So it's very common and in my experience in the fiduciary business, a callback is always required on withdrawals of $10,000.00 or more, so that's standard practice."

I accepted this evidence which is somewhat supported by Lydda's evidence which purported to suggest that a call back was performed, albeit over Whatsapp text messaging. I also accept that the dealings as between the parties contemplated a call back as expressed in the proper original (and legitimate) letter of instruction of 9 July 2020.

[36.] Finally, even if there was no requirement or obligation to conduct a call back, the *Quincecare* duty would certainly demand such an action by Lydda. I therefore accept the submission of Fidgen that there was sufficient information to put [Lydda] on inquiry, namely that:

(1) the only authorised signatory was Mr. Ferraresi;

(2) the Bogus Instructions did not originate from Mr Ferraresi, or even purport to, but from Mr. Piani directly; and

(3) [Lydda] ought to have been able to ascertain that the Bogus Instructions came from an incorrect email address as the Bogus Email Address was different from the one on [Lydda]'s file (being the opening documents for the account).

The question to consider in determining whether the Lydda ought to have been put on inquiry is:

"*whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility, albeit not amounting to a probability, that its customer might be being defrauded ...*" (**Lipkin Gorman v Karpnale Ltd** [1989] 1 WLR 1340 at p 1377)

Lydda ought not to have executed the transaction as they ought to have been put on inquiry that something was untoward with the transaction and not conclude it until satisfied that it was legitimate.

[37.] Lydda contends that "*although it did not have a contractual obligation to perform a call back, after receipt of the new instructions on 13 July, 2020 for the transfer of the sum of $1,500,000, [Lydda] confirmed the same via a call back to Mr. Ferraresi, and was given authorization to complete the transaction*". On the evidence, which I accepted, I could not find, on balance that there was a call back conducted by Lydda as asserted by Lydda. The only witness on Lydda's case was Adderley, who did not conduct a call back. Alecia Curry, who Adderley says conducted the call back, was not called as a witness in Lydda's case. There is no intimation in the papers or the email exchanges where she indicates that she secured a call back. I was not persuaded by Adderley's evidence that the purported WhatsApp call log in Lydda's document management system amounted to a call back with Mr. Ferraresi. That the call log showed an incoming call, which was not a call back. When question about the purported call back, Adderley's evidence was as follows:

"Q. And on the page over, the call log, I imagine it's supposed to represent the call, that's the second from the bottom that's on page 447?

A. Yes.
Q. Okay and that's a incoming call?
A. That's an incoming call.
Q. And **it's not a call made from the cell phone, it's an incoming call to that cell phone?**
A. That's an incoming call.
Q. So it would not be a call back, correct?
A. An incoming call, is not a call back, you're correct.

Further, and more importantly, the WhatsApp messaging produced in evidence by Lydda related to 9 July 2020 not to 13 or 14 July 2020 when the fraudulent email required verification.

[38.] I find that Lydda was obligated to conduct a call back and did not do so.

Whether Lydda's Indemnity provision absolves it from liability for the transaction?

[39.] Lydda submits that the letter of indemnity applies in the instant as an alternative defence to avoid liability. They submit that the letter of indemnity is quite clear, and wholly protects them against any claim Fidgen attempts to mount against it. Fidgen challenges the applicability of the indemnity clause, arguing that it does not cover instances of negligence or fraud, and that the defendant has not established clear wording to exclude liability. The Indemnity provides:

> "I/We understand, acknowledge and confirm by/our awareness of the numerous risks inherent and associated in conveying my/our instructions to you via the telephone, facsimile, email, untested telexes, telegraph, cable or any other electronic channels to be produced in the future (including but not limited to damages incurred as a result of interception of any email, failure of any encryption of any attachment to any email, viruses within the machine/terminal used by the Client or by Lydda, lack of clarity in the instructions and any risks associated with Lydda processing a forged/tampered instruction in good faith) and hereby confirm my/our acceptance of all risks and unconditionally agree that all risks shall be fully borne by me/us and Lydda will not be liable for any losses or damages arising as a consequence of you acting (without being obliged to) on any instructions by me/us or the future purporting to be from me/us received by you via the telephone, facsimile, email, untested telexes, telegraph, cable or any other electronic means or through any electronic channels to be produced in the future, provided you have acted in good faith.

[40.] Fidgen contends that the fraud did not involve of an individual pretending to be Mr. Ferraresi or a representative of Fidgen (as contemplated by the Indemnity Letter) but rather the fraudulent transfer was carried out by a fraudster pretending to be Mr. Piani, who was a stranger to the contract. Fidgen says that the indemnity is irrelevant as the bogus email was not the

instructions of Fidgen, as the client but of a third party, therefore the letter of indemnity cannot absolve Lydda of liability.

[41.] There is considerable merit in the submission as the indemnity clearly provides that "*Lydda will not be liable for any losses or damages arising as a consequence of you acting (without being obliged to) on any instructions by me/us or porting to be from me/us received by you via the telephone, facsimile, email…*" Lydda acted on a fraudulent instruction, which was not from Mr. Ferraresi or even from someone purporting to be Mr. Ferraresi.

[42.] In the event that I am wrong in my view that the language of the Indemnity clearly excludes the circumstances which arise in this case, and Lydda's interpretation is also a viable one, I would apply the contra proferentem rule. The contra proferentem rule would favor Fidgen's interpretation as Lydda is the maker of the document. Lydda argues that the Indemnity ought to be interpreted to apply to every loss or damage incurred by Lydda. Where a contractual obligation is one sided and seeks to dramatically curtail Fidgen's rights of redress, such as the Indemnity, the contra proferentem rule would be invoked. As Lord Justice Moore-Bick of the English Court of Appeal stated in the case of **Transocean Drilling U.K. Ltd. v Providence Resources Plc** [2016] EWCA Civ 372, the contra proferentem rule:

> "is an approach to construction to which resort may properly be had when the language chosen by the parties is one-sided and genuinely ambiguous, that is, equally capable of bearing two distinct meanings. In such cases the application of the principle may enable the court to choose the meaning that is less favourable to the party who introduced the clause or in whose favour it operates."

Where there is an ambiguity as to the interpretation, I would have to invoke the contra preferentem rule and accept Fidgen's interpretation.

Whether the claim has been compromised by a part payment of $500,000

[43.] Fidgen argues the claim has been compromised by Lydda's part payment of $500,000, which it views as an admission of liability and that Lydda breached its contractual and statutory duties. Lydda denies that there was an admission or part payment but its pleaded case was that:

> "[A]t all material times it pleaded its innocence of the matter and relied on its indemnity. [Lydda] further contends that the payment of US $500,000 was not an acknowledgement of any sums due and owing to Mr. Piani and/or to the Plaintiff but was an interrelated payment."

[44.] The witness statement of Terrell, the only witness for Fidgen, does not speak to this issue at all or to the averments in the Defence. In fact, Terrell's evidence, in her witness statement is that

the complete sum of $1,500,000 remains due and owing. This is notwithstanding the pleaded case that a sum of $500,000 was repaid.

[45.] I accept that there are some documents which suggests that there was some discussions about the compromise of the action but this is not supported by any viva voce evidence on either side. While Lydda merely puts the correspondence in its bundle, no witness gave evidence to explain what the correspondence meant. Fidgen does not plead that the discussions resulted in an enforceable agreement. Adderley denies that there was a compromise; however, he, like Terrell, were not parties to the correspondence. Adderley does not provide any details of the alleged "unrelated payment owing to Piani". In the circumstances I was not satisfied that Fidgen has met its burden in proving that there was an agreement or actionable admission by Lydda, to the entirety of the claim of Fidgen.

Whether Fidgen was wholly or partially liable for the transfer?

[46.] Lydda asserts that Fidgen is wholly or partially liable for any loss which it may have sustained. Paragraph 28 of the Defence provides:

> 28. [Lydda] denies paragraph 31 of the Claim as it relates to any responsibility for the loss and damages. [Lydda] contends that if any loss was suffered it was the loss of Mr. Piani and not [Fidgen]; and that the loss was wholly or partially caused by [Fidgen]'s negligence and breach of fiduciary duty.
>
> Particulars of Breach
>
> i) The Plaintiff knew or ought to have known that its communications system (emails) could be compromised;
> ii) The Plaintiff ought to have acted prudently in issuing instructions to the Defendant by first ascertaining from its clients that it was genuine and authorized;
> iii) The Plaintiff as a trustee and holding assets from its clients had a duty to ensure that it acted on authorized instructions and thereby failed to safeguard its processes;
> iv) The Plaintiff knew or ought to have known that its email communication system was susceptible to hacking and thereby ought to have placed certain industry standards and protocols in place to safeguard its communications with its clients and other service providers;
> v) The Plaintiff had a duty and obligation to ensure that its instructions to third party providers like the Defendant emanated from and was authorized by its clients;
> vi) The Plaintiff ought to have taken steps to confirm from its client that the instructions were authorized prior to its onward transmission to the Defendant; and
> vii) In all of the circumstances, failing to act as a prudent and responsible trustee and taking all reasonable steps to safeguard its client's accounts and assets and in its dealings with third parties.

[47.] I accept that Fidgen is not blameless as, with vigilance, it too could have uncovered the fraud. Additionally, the actions of Fidgen's agent lent credibility to the fraudulent correspondence. It appears that it was in correspondence with Terrell that the bogus email (cpiani@admin-icloud.com) first emerges on 13 July 2020, when Terrell forwards questions from Lydda to it (instead of to cpiani@icloud.com). Fidgen also does not seek to confirm the validity of the new transfer instructions attached to the bogus email. While Mr. Piani may not have been a party to the email, other agents of Fidgen, including Mr *Ferraresi* were copied on the email, ought also to have been alerted that it was fraudulent, and therefore could have avoided the loss ultimately sustained.

[48.] I am satisfied therefore that there is some contributory negligence on the part of Fidgen, albeit it has to be minimal in comparison to Lydda's. I assess this at 15%.

Conclusion

[49.] In all the circumstances I give judgment to Fidgen for the sum claimed of $1,000,000 less 15%. Fidgen is therefore awarded a sum of $850,000. The said sum shall bear interest at the rate of 3% from the date of the filing of the Statement of Claim to the date of judgment and thereafter at the statutory rate.

[50.] I shall hear the parties by written submissions within the next 21 days as to the appropriate order for costs.

Dated the 25th day of April 2025

Sir Ian R. Winder
Chief Justice