

IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2021/CLE/gen/01462

B E T W E E N

IRINA VLADYKINA

Claimant

AND

DELTEC BANK & TRUST LIMITED

Defendant

Before: The Honourable Justice Simone I Fitzcharles
Appearances: Mr Sean N. Moree KC with Mrs Erin Hill for the Claimant
Mr Leif Farquharson KC with Mrs Christina Justin for the Defendant
Hearing Dates: 31 October 2023; 2 November 2023, 26 January 2024

JUDGMENT

FITZCHARLES, J

[1] This is a claim by a customer against a bank for damages for alleged breach of contract and negligence. The customer claims that she sustained loss of some GBP 3.5 million from her bank account when the bank, allegedly without her authorization and contrary to the mandate, made 2 transfers from her account to settle an investment subscription or purchase.

[2] The bank defends the claim, denies breach of its mandate and states that it was not negligent in the performance of its mandate from the customer. The bank contends that it acted on investment instructions given by an external asset manager appointed by the account holders.

[3] The Court regrets the delay in the delivery of this judgment and apologises to the parties. The delay resulted from the substantial volume of the evidential and written material, the complexity of the issues requiring determination and the pressure of the Court's calendar. The Court has endeavoured to give due and careful consideration to all matters material to its determination.

Relevant Background

[4] The parties agreed upon the facts set out below in this section.

[5] The Claimant, Irina Vladykina, and her mother, Mrs. Serafima Vakula ("**Mrs. Vakula**"), opened an investment account no. 303184 called SIKORA with the Defendant, Deltec Bank and Trust Limited (the "**Defendant**" or "**Deltec**" or the "**Bank**"), on or about 12 June 2014 (the "**Account**" or the "**Sikora Account**").

[6] The Defendant is a bank duly licensed and operating in the Commonwealth of The Bahamas.

[7] The Claimant and/or Mrs. Vakula executed the Defendant's various account opening documents on or about 12th June 2014. These documents (collectively the "**Account Documents**") included, amongst others:

- (i) an Account Opening Form and Agreement (the "**Account Opening Form**");
- (ii) the General Term and Conditions;
- (iii) the Account Profile for Investment Management Services Form;
- (iv) the Special Power of Attorney for Independent Managers Form in favour of Gabarit International Limited (the "**SPOA**");
- (v) the Waiver for Instructions Given by Telephone, Electronic Mail and/or Facsimile (the "**Waiver**"); and
- (vi) the Authorised Signatories Form.

[8] On 6 October 2021, Mrs Vakula died, leaving the Claimant as the sole accountholder.

[9] In Section E of the Account Opening Form, the Claimant and Mrs. Vakula stipulated that they were joint tenants of the Account and that the assets of the Account could be paid to either of them.

[10] The Account Opening Form designates that the Account is an Execution Account, meaning that “Deltec will execute transactions in accordance with instructions received from the client or an authorised agent by the client. Deltec will not have discretion with respect to trading or other investment-related activity.”

[11] The Waiver provision of the Account Opening Form authorised the Defendant to act on “any instructions which are received by the Bank by facsimile transmission, telephone, or by electronic mail and appear to the Bank to be signed (in the case of facsimile instructions) or given (in the case of telephone or electronic mail instructions) by the Client or an attorney authorised to act on behalf of the Client.”

[12] The Account Opening Form states in Section A, Article 5 that “each person who is authorised by the client to instruct Deltec with respect to the bank account MUST sign the Bank’s “Authorised Signatories” form, which by reference thereto forms a part of this Agreement”, and in Section A, Article 9 the Claimant authorised Deltec to accept written instructions from the client or an authorised representative sent by post, fax, email or orally via telephone.

[13] In section B, Article 5 of the Account Opening Form, the Claimant authorised the Defendant to contact Mr. Julian Radford (“**JR**” or “**Mr. Radford**”) if for any reason the Defendant was unable to reach her or her authorised representative over an extended period of time.

[14] The Authorised Signatory Form which was executed by the Claimant on 12th June, 2014 gave Mrs. Vakula the authority to individually give instructions to the Defendant and for the Claimant to give instructions jointly with Mrs. Vakula (the “**2014 Authorised Signatory Form**”.) Both individuals provided specimen signatures.

[15] The 2014 Authorised Signatory Form also states that “for instructions received by Electronic Mail (E-mail), please note that where instructions are to be given jointly both persons must be copied in the E-mail. Deltec will only act on instructions received from the Authorised E-mail address”. The authorised email address referred to in the Authorised Signatory Form was jr@gabaritinterntional.com.

[16] Pursuant to the SPOA, the Claimant and Mrs. Vakula appointed Gabarit International Ltd. (“**Gabarit**”) as attorney on their behalf with the following power:

“a SPECIAL POWER TO MANAGE AND ADMINISTER the Account in [the Claimant’s and/or Mrs. Vakula’s] name and on [the Claimants and/or Mrs. Vakula’s] behalf including, without limitation (i) to have complete discretion to invest the cash, securities and any other assets in the Account (“Assets”) in whatever investments (“Investments”) as [Gabarit] shall think fit...PROVIDED THAT [Gabarit] shall not have power to sell, withdraw, transfer or pledge the Assets save and except for (a) withdrawals from the Account to settle management fees payable by [me] to [Gabarit] and (b) undertakings by [Gabarit] to deliver investments and provide margins or other guarantees when necessary for executing forward transactions relating to the Assets, provided

that there is sufficient collateral for such transactions in the Account and that such transactions will not lead to an unauthorised overdraft on the Account”.

Prime Properties Investment Limited (“PPIL” or “Prime Properties”)

[17] On or about 13th January, 2015, Mr. Xavier Delattre (“XD” or “**Mr Delattre**”) emailed Aisha Johnson of Deltec (“AJ”) (copying Kenris Albury and Richard Beek both of Deltec at the time) from an email account xdelattre@gmail.com. By that email XD: (i) forwarded an email from an individual named Mikdam Alkadhi (mikdamalkhadi@hotmail.com) (“MA” or “**Mr Alkadhi**”) to JR dated 9th January, 2015 relating to the subscription form for Prime Properties; and (ii) informed AJ that “we want to invest in this Real Estate Fund”; and (iii) requested that AJ complete the subscription form for Prime Properties as soon as possible.

[18] The subscription form in Prime Properties dated 13th January 2015 was completed by Deltec. According to SIKORA GBP Transactions Report from 1 June 2014 through 23 November 2020, a transfer of GBP 2,011,000.00 was made on 30 January 2015 bearing a description “Migration SUBSCRIPTION FUNDS – 2,000,000 SUB IN PRIME PROP”.

[19] On 30 November 2015, Anthony Turner (“AT” or “**Anthony Turner**”) a partner in the British Law firm Farrer & Co. emailed Chandra Wallace-Whitfield of Deltec (“CWW”) and copied jr@aldrin.ch regarding a continued investment in Prime Properties.

[20] On 14 December 2015, Mr. Jean Pierre Ribes (“JPR” or “**Mr Ribes**”) emailed CWW from the email account jeanpierre@ribes.ch requesting a continued subscription of 1,500,000 shares in PPIL for GBP 1,500,000.

[21] According to SIKORA GBP Transactions Report from 1 June 2014 through 23 November 2020, a transfer of GBP 1,508,250.00 was made on 15 December 2015 bearing a description “Migration SUBSCRIPTION FUNDS – 1,500,000 SUB IN PRIME PROP”. The two transactions involving Prime Properties totaled GBP 3,500,000 (hereinafter referred to as the “**Transactions**” or the “**Transfers**”). This is confirmed in the Sikora financial statement appearing at page 575 of the Trial Bundle.

Pleadings

Claimant’s Claim

[22] The case for the Claimant is pleaded in her Writ of Summons filed on 10 December 2021, the Statement of Claim filed on 31 August 2022 and the Reply filed on 30 November 2022. In addition to the matters set out in the Relevant Background section above, the Claimant further pleads that the Transactions amount to both a breach of contract and/or negligence.

[23] In relation to the breach of contract claim, the Claimant avers that in breach of the express and implied terms emanating from the Account Opening Documents, the Bank authorised and completed the Transactions without the Claimant’s consent or authorization. More specifically, the Claimant pleads that not only did the Claimant not authorize the Transactions, but none of the

various emails with instructions to the Bank were sent from jr@gabaritinternational.com as mandated in the 2014 Authorised Signatory Form.

[24] In relation to the negligence claim the Claimant pleads that a bank owes its customer a duty to exercise reasonable care when providing banking services or products and the Bank's execution of the Transactions was a breach of its duty of reasonable care and skill owed to the Claimant. Further, as a customer's agent, a bank has a duty to adhere strictly to its customer's mandate. The instructions in relation to the Transfers did not come from the client or the authorised email account as outlined in the 2014 Authorised Signatory Form. Materially also, the Claimant pleads that one of the duties which a banker owes to its customers is to confirm and verify all payment instructions. It therefore breached its duty of reasonable care and skill when executing unauthorised transactions.

[25] The Claimant enumerates particulars of loss and damage and her claim as follows:

"26. Specifically, the [Claimant] has suffered loss in the sum of GBP 3,500,000.00 being the sum of the Transfers completed without her authorization.

"27. Additionally, the [Claimant] suffered a loss of opportunity and/or profit as she was deprived of the possibility to use or invest the GBP 3,500,000 as she saw fit.

"28. The losses set out above were within the scope of the Defendant's duty to the [Claimant] and reasonably foreseeable.

AND the [Claimant] claims:

- (1) Damages for breach of contract and/or negligence;
- (2) Further damages including but not limited to loss of profit and/or opportunity;
- (3) Interest;
- (4) Such further declarations or other relief as the Court shall deem fit;
- (5) Costs."

Defendant's Defence

[26] The Bank's Defence was filed on 07 October 2022. In it, amongst other averments, the Defendant avers that the email address of jr@gabaritinternational.com provided by the Claimant and Mrs Vakula (the account holders) on the 2014 Authorised Signatory Form "was intended to be used for the purposes of direct communications between the Bank and the account holders." Further, pursuant to the Account Opening Form of 12 June 2014, the Bank was also authorised to act on instructions received from an authorised agent designated by the account holders. In accordance with the SPOA, Gabarit was authorised and appointed to manage and administer the material account on behalf of the account holders, and to act on their behalf in relation to the investment of assets held in the account. Therefore, the Bank avers that by virtue of the SPOA, Gabarit was the authorised agent and/or attorney of the Claimant and Mrs Vakula.

[27] Deltec further avers that Xavier Delattre was a shareholder, principal contact person and authorised signatory of Gabarit. Mr Delattre was authorised to independently give instructions to the Bank on behalf of Gabarit, and Mr Delattre regularly used the email address xdelattre@gmail.com to communicate with the Bank regarding the material account and other matters.

[28] The Bank pleads that on or about January 2015, Mr Delattre of Gabarit provided the Memorandum and Articles of Association together with the Certificate of Incorporation for Prime Properties to the Bank from his email address, xdelattre@gmail.com. Subsequently, on or about 28 January 2015, Mr Delattre provided transfer details for the GBP 2,000,000 transaction to the Bank from his email address, xdelattre@gmail.com. Thereafter, on or about 25 March 2015, Mr Delattre sent an email to the Bank from his email address, xd@gabaritinternational.com, to which he attached a share certificate for Prime Properties certifying that the Bank was the registered holder of 2,000,000 fully paid shares of par value GBP 1.00.

[29] With reference to the email from Anthony Turner of 30 November 2015 (referred to in para 19 above), the Bank avers that it contained a stipulation that the funds for the purposes of the further investment in Prime Properties would be transferred to Mikdam Alkadhi and held by Mr Alkadhi on trust for the Bank. This was followed by the request from Jean-Pierre Ribes to the Bank on 14 December 2015 (referred to in para 20 above), to effect a continued subscription of GBP 1,500,000 in Prime Properties. Subsequently, the Bank implemented a transaction involving GBP 1,508,250 on 15 December 2015 from the account of the Claimant and Mrs Vakula. The financial statements for the account reflects that this transfer related to an investment in Prime Properties.

[30] In its pleading, the Bank identifies Mr Ribes as a shareholder, principal contact person and authorised signatory of Gabarit. His email address is jr@aldrin.ch which he regularly used to communicate with the Bank. Further, it is averred that Mr Ribes was authorised to independently give instruction to the Bank on behalf of Gabarit. The Defendant further avers that a subscription form for Prime Properties and a Declaration of Trust were attached to the 14 December 2015 email of Mr Ribes to the Bank.

[31] The Bank denies that its actions relating to the Transactions amount to a breach of contract and/or negligence.

[32] In relation to the claim of a breach of contract, the Bank avers that pursuant to the 2014 Account Opening Form, the Bank was authorised to receive instructions from the client or an authorised agent. Pursuant to the SPOA, Gabarit was appointed the authorised attorney and agent of the Claimant and given full discretion to invest the cash and securities held on the SIKORA account. Therefore, the Defendant was not required to obtain the Claimant's prior consent or authorization before execution of the Transfers.

[33] The Defendant admits that the emails containing instructions to the Bank to execute the Transfers were not sent from the email address, jr@gabaritinternational.com. However, it is averred that in making the Transfers the Bank acted upon the instructions of Gabarit as authorised agent of the Claimant. Further, the Bank avers that it was authorised by the General Terms and

Conditions executed by the Claimant and Mrs Vakula on 12 June 2014 to rely and act on any instructions or other communications which were given, or purportedly given, by the Claimant or a person duly authorised to act on her behalf. Additionally, pursuant to the Waiver the Bank was authorised to act on any instructions received by email that appeared to the Bank to be given by the attorney authorised to act on the Claimant's behalf, and such instructions are deemed by the Waiver to be conclusively valid.

[34] On the issue of negligence, the Bank admits that a bank owes its customer a duty to exercise reasonable care in the provision of certain banking services and repeats averments made earlier in its Defence. Further or alternatively, the Bank relies upon the Waiver which provides that if the Defendant acts on instructions which are, or purport to be, given by the attorney authorised to act on behalf of the client, the instructions are deemed valid unless the Bank's actions amount to gross negligence or wilful misconduct. Further, save that it is admitted that a bank has a duty to adhere to its customer's mandate, insofar as any negligence or breach of duty or breach of mandate is alleged against the Bank, the Defendant denies the same and repeats earlier averments made in its Defence.

[35] No admission is made as to whether a bank owes its customer a duty to confirm and verify all payment instructions as alleged. Further, no admissions are made as to what, if any, loss and damage was suffered by the Claimant, and the Claimant is put to strict proof thereof. The Bank denies that the Transfers were completed without authorization and denies liability for any such loss and damage as alleged or at all.

Claimant's Reply

[36] Amongst other averments, the Claimant replies to the Defence, stating that while the email address provided on the Authorised Signatory Form (jr@gabaritinternational.com) was intended to be used for the purposes of direct communications between the Bank and account holders, it was not solely intended to be used for the purposes of direct communication between the Plaintiff and the Bank. It was also intended to be used to receive instructions from the account holders. Additionally, while the Account Opening Form does authorize the Bank to act on instructions received from an authorised agent, such authorised agent must also sign the Defendant's Authorised Signatories Form. The authorised email address provided for both the Plaintiff and Mrs Vakula was jr@gabaritinternational.com.

[37] The Gabarit SPOA gave Gabarit the power to, inter alia, invest the cash and securities and to make deposits, provided that it did not have the power to "sell, withdraw, transfer or pledge the Assets" save for minor exceptions. In this regard, the Claimant expressly denies that Gabarit was the authorised agent of the accountholder.

[38] The Claimant puts the Defendant to strict proof that Mr Delattre and Mr Ribes were:

- (1) at all material times shareholders, principal contact persons and authorised signatories of Gabarit;

- (2) that they were authorised to independently give instructions to the Bank on behalf of Gabarit; and
- (3) that the email address xdelattre@gamil.com was regularly used by Mr Delattre, and the email address jr@aldrin.ch was regularly used by Mr Ribes, to communicate with the Bank regarding the SIKORA account and other matters. Notwithstanding this, the Claimant denies that Mr Delattre of Gabarit and Mr Ribes of Gabarit were authorised agents of the account holder.

[39] The Claimant avers in Reply that Pursuant to the 2014 Authorised Signatory Form, neither Mr Delattre nor Mr Ribes were appointed the authorised signatories of the Account. In fact, the Claimant and Mrs Vakula were the only authorised signatories, with emails regarding their instructions to be received from jr@gabaritinternational.com. It is denied that by the terms of the SPOA the Bank was not required to obtain the Claimant's consent or authorization before execution of the Transfers. The SPOA gave Gabarit full discretion to invest the cash and securities of the Account provided that there were no withdrawals or transfers out of the Account (save for minor exceptions).

[40] As for the averments in the Defence in respect of the Waiver, the Claimant pleads that the instructions given were not in accordance with the Waiver and consequently, the instructions should not have been effected by the Defendant.

Issues

[41] The parties agreed upon the issues to be resolved by the Court. I distill the essential issues to the following:

- (1) whether Gabarit was validly appointed, and if so, the scope of its authority;
- (2) whether Xavier Delattre and Jean-Pierre Ribes were authorised to give the disputed instructions on Gabarit's behalf;
- (3) whether the instructions, properly characterized, were within Gabarit's authority and were within the Bank's mandate;
- (4) whether the Bank was entitled to rely on the Waiver and its dealings with Gabarit; and
- (5) whether the Bank failed to exercise reasonable care and skill in executing the instructions, and if so, whether the Claimant has proved loss caused by that breach.

Evidence

Account Opening Documents

The Account Opening Form

[42] The Account Opening Form completed by the Claimant and/or Mrs Vakula on 12 June 2014 set out, amongst others, the following material stipulations:

“ACCOUNT OPENING FORM AND AGREEMENT

“(For Individual Clients)

“I/we the undersigned (hereinafter the “Client”) hereby apply to Deltec Bank & Trust Limited (the “Bank” or “Deltec”) and authorize the Bank to establish and maintain an investment account (the “Account”) in the name of the Client with the cash, securities or other property to be deposited by the Client with the Bank for this purpose, in accordance with the terms and conditions set out in this Account Opening Form and Agreement (as amended from time to time, the “Agreement”) and agree to be bound, with respect to the Account, by this Agreement, the **Bank’s General Terms and Conditions**, and the **Bank’s Standard Fee Schedule** (unless otherwise agreed), as amended from time to time, which are incorporated herein by reference.

SECTION A – Account Profile

...

2. Type of Account

Execution (Deltec will execute transactions in accordance with instructions received from the client or an authorised agent designated by the client. Deltec will not have discretion with respect to trading or other investment-related activity.)

...

3. Purpose of Account

Investment management

5. Authorised Signatories

Each person who is authorised by the client to instruct Deltec with respect to the bank account MUST sign the Bank’s “Authorised Signatories” form, which by reference thereto forms a part of this Agreement.

...

9. Deltec is authorised to accept instructions from the client or authorised representative in the following form (please check all that apply:

Written instructions sent by post Fax E-mail Telephone

If any one or a combination of Fax, E-mail or Telephone instructions are selected, the client MUST sign Deltec’s “Waiver for Instructions Given by Telephone, Electronic Mail and/or Facsimile.” For the safety of the client, Deltec, in its sole discretion, may require a callback confirmation prior to executing an instruction.

SECTION B – Client Profile

...

5. Loss of Contact

If for any reason Deltec is unable to contact you, or your authorised representative over an extended period of time, please provide details of the person(s) we may contact with the sole aim of restoring contact with you or your legal assigns:

A.

Full legal name: JULIAN TIMOTHY RADFORD

Address: 48 AVENUE ...

Telephone contact ...

E-mail address ...

...

SECTION D – Certification & Signatures

BY SIGNING BELOW, the Client hereby agrees to and makes the following assurances to the Bank:

...

(iii) The Client hereby agrees to be bound by the provisions of this Agreement (including those of the Bank's General Terms and Conditions, the Bank's Investment Services Terms and Conditions, the Bank's Standard Fee Schedule (unless otherwise agreed), and if applicable, the Bank's Hold Mail Instructions Form and Waiver for Instructions Given by Telephone, Electronic Mail and/or Facsimile, all of which are incorporated herein by reference, receipt of which the Client acknowledges, and all of which the Client acknowledges having read and understood.

...

SECTION E – SUPPLEMENTARY INSTRUCTIONS FOR JOINT ACCOUNT WITH RIGHT OF SURVIVORSHIP

The undersigned Client hereby instructs the Bank that all of the Assets now or hereafter deposited with the Bank under the Agreement shall be held for the account of both of the undersigned and may be paid or delivered to either of the undersigned Clients or the survivor of them. Instructions from both of the undersigned Clients shall be full authority for any purpose and both of the undersigned Clients may withdraw all or any part of the Assets or pledge the same for his or her their individual indebtedness to the Bank and otherwise act without limitation whatsoever.

...”.

The Account Profile

[43] The Account Profile for Investment Management Services, also completed and signed by the Claimant and/or Mrs Vakula on 12 June 2014, indicated, among other information, that in relation to the Sikora Account, number 303184, liquidity needs were low and the objective of the account was “Growth”. There were no restrictions indicated on the type of investment, transactions or amount of any one or type of investment or asset which may be recommended and/or acquired for the Account. The Claimant and/or Mrs Vakula authorised that 99% of the Account could

constitute any one or type of investment or asset. A medium tolerance to volatility was selected in relation to risk tolerance and the Claimant was listed as having a moderate level of experience with investment products, such as having invested in bonds or bond funds or equities for 5 to 10 years. It was anticipated by the Claimant and/or Mrs Vakula that the investments would be kept in the Account for more than 5 years.

Authorised Signatories Form

[44] A part of the agreement between the parties was also comprised of the Authorised Signatories form, in which Mrs Vakula and the Claimant both specified that the authorised email address for each of them was jr@gabaritinternational.com. Supplying this information was specified “only for clients who wish for Deltec to act on E-mail instructions”. The Claimant and Mrs Vakula specified that on the Account, Mrs Vakula had authority to individually give instructions to the Bank and the Claimant had authority to give the Bank instructions jointly with Mrs Vakula. They both provided their specimen signatures. The terms of the Authorised Signatories form also included the following:

“1. To avoid delays in the execution of client instructions, each authorised signatory must sign this form EXACTLY as they will sign when providing Deltec with written instructions.

2. For instructions received by electronic Mail (E-mail), please note that where instructions are to be given jointly both persons must be copied in the E-mail. Deltec will only act on instructions received from the Authorised E-mail address.

...

NOTE: If any of the above-referenced Authorised Signatories is not the Client / Beneficial Owner of the assets held in the bank account with Deltec, the Bank’s “Power of Attorney” form must be completed...”.

General Terms and Conditions

[45] The Claimant and Mrs Vakula entered into General Terms and Conditions with Deltec on 12 June 2014. Material terms, in part, are as follows:

“GENERAL TERMS AND CONDITIONS

“1. Purpose and Scope

“1.1 The purpose of the Terms (“Terms”) is to govern the relationship between **DELTEC BANK & TRUST LIMITED** (hereinafter referred to as the “Bank”, which term shall include its officers, directors, employees, agents, successors in title and assigns) and the undersigned persons (hereinafter collectively referred to as the “**Client**”). They shall apply to any account which the Client may open with the Bank at any time.

1.2 The General Terms & Conditions shall be without prejudice to any other agreements between the Bank and the Client, as well as, for purposes of executing any and all transactions, to the

regulations and practices of the relevant stock exchanges, markets and clearinghouses, and to the laws and regulations which apply in the countries where the transactions are carried out.

...

20. Notices, instructions and other communications

...

20.2 All instructions from the Client to the Bank shall be given in writing, orally, by telephone, electronic mail, facsimile or by such other medium agreed between the Client and the Bank in writing. If the Client wishes the Bank to act on telephone, electronic mail or facsimile instructions, the Client shall complete "Instructions Given by Telephone, Electronic Mail or Facsimile" form.

20.3 Where the Client wishes the Bank to act on the instructions of a third party, the Client agrees to execute an "Authorised Signatures and Power of Attorney" form appointing such person.

20.4 **Only the powers of attorney and specimen signatures provided to the Bank shall be considered to be valid unless and until it is notified in writing that they have been revoked or changed in any way.**

20.5 **The Client authorizes the Bank to rely and act on any instructions or other communications which purport to have been given (and which are reasonably accepted by the Bank) as being given by the Client or from any person duly authorised to act on behalf of the Client unless the Bank has received written notice to the contrary, whether or not the authority of such authorised representative shall have been terminated...**

25. Standard of Liability

25.1 Without prejudice to any other provision contained herein, the Bank will not be liable for any loss, damage or expense whatsoever however arising suffered by the Client or any other person arising directly or indirectly out of the performance of its duties hereunder unless arising from the gross negligence of the Bank...

The SPOA

[46] Given the nature of this dispute, one of the most important documents amongst the parties is the Special Power of Attorney for Independent Managers executed by the Claimant and Mrs Vakula on 12 June 2014. The material terms of the SPOA are in part set out below:

"Special Power of Attorney for Independent Managers

With Deltec Bank & Trust Limited

(hereinafter referred to as: "Deltec Bank")

Account Information

Account Name: SIKORA

Account No. 303184 (hereinafter referred to as the "Account")

By this Power of Attorney given on the date set out below, the undersigned (hereinafter referred to as the "Client") hereby appoints

Last / Corporate Name: GABARIT INTER LTD

...

As attorney (hereinafter referred to as the "Attorney")

to act on his/her behalf with a SPECIAL POWER TO MANAGE AND ADMINISTER the Account, in the Client's name and on the Client's behalf including without limitation (i) to have complete discretion to invest the cash, securities and any other assets in the Account (the "Assets") in whatever investments ("Investments") the Attorney may think fit, including the shares of mutual funds managed by Deltec Bank or any of its affiliates or by the Attorney, (ii) to purchase, retain, exchange or convert Investments belonging to the Client, (iii) to exercise or determine not to exercise rights in respect of the Investments, (iv) to make deposits, subscribe to issues and offers for sale of any Investments, advise on, execute and/or effect transactions on any markets, make all decisions and otherwise act as the Attorney in the Attorney's sole discretion determines to be appropriate in relation to the management of the Assets, (v) to negotiate, consider, settle, approve, sign, execute, deliver (under seal if required) or otherwise complete all agreements, documents and deeds and to do all acts and things which the Attorney considers necessary in connection with the foregoing, PROVIDED THAT the Attorney shall not have the power to sell, withdraw, transfer or pledge the Assets save and except for (a) withdrawals from the Account to settle management fees payable by the Client to the Attorney and (b) undertakings by the Attorney to deliver investments and provide margins or other guarantees when necessary for executing forward transactions relating to the Assets, provided that there is sufficient collateral for such transactions in the Account and that such transactions will not lead to an unauthorised overdraft on the Account.

...

Deltec Bank shall have no obligation whatsoever to supervise or monitor the transactions carried out by the Attorney, whatever their frequency, size or type (e.g. conventional or speculative Investments), and therefore shall not assume or be responsible for any of the liabilities that could arise as a result of the granting by the Client of this Power to the Attorney.

...

In addition, if the Attorney ever instructs Deltec Bank to use individuals or firms, other than Deltec Bank's usual correspondents for the custody of any and all funds, securities, cash or other assets, or for any purchases or sales of securities, or for any other services, the Client hereby irrevocably authorizes Deltec Bank to comply with such instructions and relieves it of any liability to the Client in this respect.

For all other matters, Deltec Bank's General Conditions shall apply, and this Power of Attorney should not diminish or modify the terms and conditions pertaining to the bank account existing in the name of the Client with Deltec Bank & Trust, particularly as regards applicable law and venue.

...".

The Waiver

[47] Finally, the Account Opening Documents included also the Waiver for Instructions Given by Telephone, Electronic Mail and/or Facsimile executed by the Claimant and Mrs Vakula on 12 June 2014 (previously defined as the ‘Waiver’). Relevant terms of the Waiver include the following:

“Waiver for Instructions Given by Telephone, Electronic Mail and / or Facsimile

...

1) The undersigned (hereinafter collectively referred to as the “Client”) hereby authorizes DELTEC BANK & TRUST LIMITED (hereinafter referred to as the “Bank”) to act on any instructions which are received by the Bank by facsimile transmission, telephone or by electronic mail and appear to the Bank to be signed (in the case of facsimile instructions) or given (in the case of telephone or electronic mail instructions) by the Client or an attorney authorised to act on behalf of the Client.

...

4) If the Bank acts on instructions which the Bank received that are, or purport to be, given under the authority to this authorization, those instructions will be conclusively deemed to be valid, even if they did not, in fact, come from the Client, or were not accurately transmitted or properly understood by the Bank. This does not, however, apply if the Bank is grossly negligent or if the Bank’s actions amount to willful misconduct.

...”.

External Asset Management Documents

[48] The Court notes that at Tab 34 (page 197) of the Trial Bundle the Bank produced a form entitled “Deltec Bank & Trust Limited External Asset Manager (“EAM”) / Business Referrer (“Referrer”) Approval Form” (the “EAM Form”). This form, filled out by hand, cites Gabarit International Ltd as the name of EAM / Referrer. Additionally, a ‘Principal contact person’ is listed as Xavier Delattre for whom an email contact is given of xd@gabaritinternational.com. For that person, the address of “xdelattr@gmail” is crossed out (deleted) by hand. Jean-Pierre Ribes is also listed as a Principal contact person, for whom an email contact is given as jpr@gabaritinternational.com. The form appears to have been prepared or filled out on January 20 2014, and at the bottom of the page there are signatures purportedly by or for CEO/CFO, Client Services Manager and Legal Compliance with an indication that the application was approved on August 7 2014.

[49] The Claimant indicates that the EAM Form came to the attention of the Claimant and her Counsel only at the discovery stage of this action, and not before. I accept that the EAM Form was an internal document held by the Bank and that, as such, it was not until discovery that the Claimant became aware of it. I regard similarly the External Independent Asset Manager Agreement dated 14 November 2013 between the Bank and Gabarit International Limited at pages 153 to 158 of the Trial Bundle, and the Authorised Signatories form, some of the hand-written parts of which are illegible at page 160 of the Trial Bundle and at Tab 1 of the Closing Submissions of the Defendant (albeit the latter is a slightly more legible copy). The Authorised signatories listed appear to be

Xavier Delattre and Jean Pierre Ribes for whom email addresses given (as to what can be deciphered) end with '@gabaritinternational.com'. This form specifies that "Deltec will only act on instructions received from the Authorised E-mail address". I accept that the account holders were not aware of this Authorised Signatories form (at page 160 of the Trial Bundle) before the discovery stage of this action.

Witnesses

[50] At the trial of this matter, the Court heard the oral testimony of three witnesses, who also provided witness statements which were entered as their respective evidence-in-chief. For the Claimant, Irina Vladykina herself gave evidence and previously furnished a witness statement filed on 18 August 2023. For the Defendant, Chandra Wallace-Whitfield gave evidence and provided her witness statement filed on 24 August 2023. Also for the Bank, Aisha Russell gave evidence, having earlier furnished her witness statement filed on 30 August 2023.

The Claimant

[51] The witness statement of Irina Vladykina contained all the agreed facts set out in the Relevant Background above. Additionally, the Claimant explained that the Bank authorised transactions which did not emanate from the email addresses listed on the 2014 Authorised Signatory Form nor did the authorizations contain her signature or that of Mrs Vakula. The email addresses of xdelattre@gmail.com and mikdamalkadhi@hotmail.com were not those which were written on the 2014 Authorised Signatory Form.

[52] The Claimant stated that she has no relationship with Mr Delattre or Mr Alkadhi and does not know them at all.

[53] The Claimant testified that the EAM Form did not come to her attention before this litigation. It was produced in discovery by the Bank. The EAM Form states that Mr Delattre and Mr Ribes are principal contact persons of Gabarit. Notwithstanding, the email addresses on the EAM Form are not those which Mrs Vakula and the Claimant denoted on the 2014 Authorised Signatory Form.

[54] In her view, the sum of GBP 2,000,000 was debited from the Sikora Account and transferred to an undisclosed third party. The Claimant stated that she had no information on where or to whom the funds from the Account were in fact sent. Further, a continued investment in Prime Properties was sought in late 2015. However, the Claimant highlighted in her evidence that on 29 October 2015, Chandra Wallace-Whitfield (then an Assistant Manager in the External Asset Management section of the Bank) emailed Jean-Pierre Ribes and stated that she could:

"confirm the subscription documents have been completed [and are] ready for submission for said subscription, however the payment has not been remitted as yet. Our COO has reviewed and has several concerns with transferring the funds of said subscription to an individual account. This is highly unusual and unorthodox, is there a prospectus that can shed more light on this matter?"

[55] The Claimant noted that the email query from Chandra Wallace-Whitfield was forwarded multiple times: (1) from Mr Ribes to bpa@pl-associes.com, and from an individual named Boris Pavlovic at bpa@pl-associes.com ("BP") to jr@aldrin.ch. However, despite Chandra Wallace-Whitfield's query, neither she nor any person at the Bank contacted the Claimant or Mrs Vakula regarding the purported instructions. The Claimant felt that there were obvious red flags with the instructions.

[56] The Claimant gave evidence that Julian Radford then emailed BP on 30 October 2015 stating that he "sent last Wednesday a copy of the prospectus, the Memorandum and Articles of Association of the company as well as a Declaration of Trust linking Mr Alkadhi to Prime Properties which was drawn up by Messrs Farrer & Co. Deltec executed a similar instruction to subscribe the equivalent of GBP 2,000,000 last January for the account SIKORA. Can they please make the transfer for the subscription." It appears that this email was forwarded from BP to Mr Ribes and back to Chandra Wallace-Whitfield.

[57] Ms Vladykina further gave evidence that on 3 November 2015, Anthony Turner, a partner in the British law firm, Farrer & Co., emailed Chandra Wallace-Whitfield and copied jr@aldrin.ch regarding the continued investment in Prime Properties. The Nov 2015 email stated that:

"[T]he funds cannot be placed in the account of Prime Properties as it does not yet have a bank account and, within the current time-frames, it is not possible for it to open an account...Accordingly, the following structure has been put in place to address the fact that Prime Properties does not have a bank account:

1. The funds are transferred to the bank account of Mikdam Alkadhi (MA), for whom I act. MA is already appointed as a consultant to Prime Properties in relation to the acquisition of property on behalf of Prime Properties.
2. These funds are held by MA under the terms of a Declaration of Trust under which MA hold the funds for Deltec Bank (until the subscription for shares has taken place) and then for Prime Properties (when the share subscription has taken place).
3. Deltec Bank subscribes for additional shares (it is already a shareholder) in Prime Properties. The subscription is on the terms of a Subscription Agreement, which I believe you have seen.
4. On completion of the subscription, Deltec Bank holds additional shares and the funds belong to Prime Properties. At this point, MA holds the funds on behalf of Prime Properties instead of Deltec Bank under the terms of the Declaration of Trust.
5. Prime Properties (acting through its director) then instructs MA how to deal with these funds, on its behalf. It is clear that MA cannot use these funds without the direction of Prime Properties."

[58] The Claimant stated that despite this complex and unorthodox approach to this investment, the Bank did not contact her or Mrs Vakula regarding the same. She emphasized in her evidence that Mr Ribes, Mr Delattre and Mr Alkadhi were strangers to her and the instructions purportedly given to the Bank by them were plainly contrary to the 2014 Signatory Form.

[59] On 14 December 2015, jeanpierre@ribes.ch emailed Chandra Wallace-Whitfield requesting a continued subscription of 1,500,000 shares in Prime Properties for GBP 1,500,000. The Bank debited the account in the sum of GBP 1,508,250 and transferred it to a third party.

[60] The Claimant then gave evidence of having been approached by Mr Radford previously with the offer to invest in Prime Properties, which she declined. She recounted that on or about 28 March 2009, Mr Radford email her with reference to a potential investment of GBP1,000,000.00 in Prime Properties. Amongst other things, Mr Radford told the Claimant that “as it is not a fund on the bank’s recommended list, I need you and your mother’s specific approval to allow me to subscribe on your behalf. If you would like me to proceed, can I ask you to send me by email a confirmation letter from you and your mother.” The Claimant responded to Mr Radford on or about 9 June 2009 stating that “1M pounds is too much to be invested in one place.” The Claimant testified that she never provided Mr Radford with any authorization to invest in Prime Properties on her and her mother’s behalf.

[61] To the Claimant, the bank mandate is clear as to who can give instructions on her behalf and on behalf of Mrs Vakula. The 2014 Authorised Signatory Form clearly outlines the email address for instructions and provides specimen signatures. The Claimant stated that there can be no ambiguity on who is authorised to give instructions. Further, when considering the SPOA, she stated that her consent (or that of Mrs Vakula) would be necessary.

[62] The Claimant also testified that having reviewed the documents disclosed by the Bank, it appears that the instructions for several transactions emanated from email addresses purportedly belonging to Mr Delattre or Mr Ribes and not from the email address denoted on the 2014 Authorised Signatory Form (jr@gabaritinternational.com). The Claimant states that she did not authorize for any transaction to be acted upon unless it complied with the instructions outlined in the 2014 Authorised Signatory Form and the SPOA. The Claimant reiterates that she did not consent to or authorize the Transfers of GBP 2,000,000 and GBP 1,500,000, which she states the Bank carried out without any regard for her consent or authorization.

[63] The Claimant stated that as a result of the above matters she has suffered loss in the sum of GBP 3,500,000 being the sum of the Transfers completed without her authorization and also a loss of opportunity and/or profit as she was deprived of the possibility to use or invest the GBP 3,500,000 as she saw fit.

[64] On cross-examination, the Claimant was, inter alia, questioned about a recorded conversation which she had on 19 January 2022 with personnel from the Bank (one Ms Simmons), after she commenced this action. In the recording Ms Vladykina could be heard stating that she was “shocked at the loss”, “the value was astronomical”, “five years later that investment amounts to zero”, and that the “property company does not exist”. The Claimant also stated, “That’s very very unfortunate because the investment was done without consulting, without letting us know and it was only by pure chance that the knowledge of something like that taking place became mailed to us two years ago.” After indicating that she wanted to keep an account with Deltec with the minimum sum on it of \$50,000, the Claimant also stated, “This prime property matter is a separate thing and it is very unfortunate as I didn’t know how to call it now. It is a very unfortunate action

on part of our assets manager. Definitely our assets manager would have to somehow be kept responsible for it because things like that are not done.”

[65] The Claimant stated that her reference in the call to “our asset manager” was a reference to Julian Radford and accepted that she acknowledged her investment manager was responsible for managing her assets. She accepted that she said during the call that it was a very unfortunate action taken by the Asset Manager with reference to the loss of funds in Prime Properties investment. The Claimant accepted that her conversation during the call included that the Asset Manager would be held responsible.

[66] The Claimant also identified her authorised email address (jr@gabaritinternational.com) as that of Julian Radford. It was confirmed that no investment instructions came from this email address, and further that the SPOA gave the asset manager limited powers to make investments. By contrast, the account holder had unlimited powers to give instructions (i.e. for investment and non-investment-related instructions). She also accepted that in 2009 when she declined Mr Radford’s proposal that she invest in a real estate investment, she was not yet a client of the Bank.

[67] She accepted that she and Mrs Vakula had appointed Gabarit as their asset manager and had executed a Special Power of Attorney in favour of Gabarit. Additionally, the Claimant accepted that, by selecting an execution account, the account holders authorised the Bank to act on instructions from an authorised agent, including instructions given by email or telephone. When asked whether the instructions received by the Bank relative to Prime Properties appeared to be given by Mr Ribes of Gabarit, the Claimant responded that it appears to be so.

[68] The Claimant confirmed in re-examination that the EAM Approval Form produced by the Bank did not make up a part of the Account Opening Documents and appeared to pre-date her and her mother’s entry into the Account Opening Documents with the Bank. She confirmed she never met and does not know Mr Delattre and Mr Ribes.

[69] In cross-examination, the Claimant was asked about documents which purported that one Wayne Ross held the shares in Prime Properties on trust for her and her mother. (See Nominee Agreement at Tab 19 of the Trial Bundle and Share Certificates at Tabs 20 and 21). On re-examination the witness stated she does not know who Wayne Ross is and has never met him. Additionally, she had never seen the Nominee Agreement and Share Certificates prior to discovery in this action. The Claimant also testified that she thought Julian Radford, whose services she and her mother previously used, was Gabarit. She did not know Mr Ribes or Mr Delattre.

The Bank

[70] For the Bank, Chandra Wallace Whitfield (“CWW”) stated that she had been employed with the Bank from 2010. She worked in Operations, Private Client Services and, from the latter part of 2016, as an Assistant Manager in External Asset Management (“EAM”) services. She was familiar with the Account Opening Documents of the Bank which included those enumerated above in the Relevant Background. CWW noted that these account opening documents taken together comprised the customer’s entire mandate. She recounted that from 2015 to early 2016 she was assigned to Gabarit and was the primary contact person for Gabarit at the Bank for the purpose

of receiving their instructions. As such, CWW stated she was familiar with the account opening documents for the account opened by the Claimant and her mother – the Sikora Account.

[71] CWW in her evidence cited clauses from the Account Opening Form and Agreement and the SPOA which have been set out in full above. As she understood the SPOA, it did not restrict or limit the types of investments that Gabarit was authorised to place for the Sikora Account. She understood that the external asset manager (or “EAM”) was authorised to instruct the Bank to execute a wide variety of investment transactions, from subscriptions to funds and private placements, to buy and sell orders for securities on behalf of the client. The external asset manager could also provide instructions for non-investment-related transactions; however, the signature or approval of the underlying client was required.

[72] CWW testified that Section 8 of the Account Opening Agreement governed the means by which instructions would be communicated to the Bank, that is, the Bank was authorised to accept instructions via email, telephone, fax or post from Gabarit (the authorised representative in the SPOA). According to CWW, the Gabarit agents known to the Bank at the time were Xavier Delattre and Jean Pierre Ribes, who were authorised to communicate on behalf of Gabarit and were principal contacts. These individuals would generally use email to contact the Bank, sending investment instructions to either CWW or Aisha Johnson (another employee of the Bank in EAM services, who became Aisha Russell before the trial).

[73] According to CWW, the Bank would regularly communicate with Mr Delattre who used the email addresses xdelattre@gmail.com and xd@gabaritinternational.com. The witness further stated that Mr Ribes regularly used the email address jeanpierre@ribes.ch to communicate with CWW over the Sikora account.

[74] In relation to placing a call back to the customer to confirm investment instructions, CWW’s evidence is that the account opening documents did not require this. The callback was left to the discretion of the Bank. CWW stated that “at the time, the usual practice was to confirm instructions for withdrawals (such as for the payment of invoices or non-investment related purchases) by placing a call back to the sender of the instructions. However, it was not common practice to conduct a callback for investment instructions received from the external asset manager.”

[75] CWW stated that the purpose of the Authorised Signatories Form was to obtain specimen signatures and email addresses for the individual authorised signatories. She stated, “if an authorised signatory was sending an instruction to Deltec via email, Deltec could only execute the instruction from the email address listed on the form. However, this form did not govern the relationship between the account holder, the external asset manager and Deltec. The relevant document for this relationship was” the SPOA.

[76] Mr Delattre used the email address xdelattre@gmail.com to confirm the instructions to the Bank for the subscription in Prime Properties including to advise when and how much to invest and to provide transfer details. He used xd@gabaritinternational.com to send copies of the share certificates for the investment of GBP 2,000,000.

[77] In relation to the query as to sending funds from Sikora to the personal bank account of a third party, CWW stated that on 29 October 2015, she received a forwarded email from jeanpierre@ribes.ch regarding a further investment in Prime Properties. CWW stated that she was advised that “there was an issue with the funds...being sent to a personal account.” On the same date, she responded to Mr Ribes advising that the payment had not yet been made as the Chief Operations Officer of the Bank queried the reason for the funds being transferred to the personal bank account of Mikdam Alkadhi. On 3rd November 2015, CWW received an email from Anthony Turner of Farrer & Co who advised that he was the attorney for Mr Alkadhi MA and explained the Prime Properties account had not yet been opened and detailed a proposed structure for Mr Alkadhi to hold the funds on trust for the Bank until such time as this had been done. The Bank executed the instructions on 15 December 2015 transferring GBP 1,500,000 from Sikora to the personal account of Mr Alkadhi to subscribe for shares in Prime Properties.

[78] CWW gave evidence that because of the SPOA, Gabarit was an authorised representative of the Claimant and Mrs Vakula. Therefore, the agents and employees of Gabarit were authorised to instruct the Bank to execute investment instructions and the Bank was authorised to act on them. The witness opines that the Prime Properties transactions were within the parameters of the SPOA and the Bank complied with its mandate.

[79] On cross-examination, CWW accepted that the Account Opening Form, General Terms and Conditions, Waiver, Authorised Signatories Form and the SPOA comprised the overall mandate given by the Claimant and Mrs Vakula to the Bank. She accepted that they were the Bank’s template documents and were not modified for the clients.

[80] CWW testified that the SPOA was granted to a company, Gabarit. The witness indicated that Bank staff regularly communicated with Mr Delattre and Mr Ribes. When she was asked what corporate documentation the Bank had obtained to identify who could act for Gabarit under that SPOA, she could not say or recall.

[81] It was accepted by CWW that the Bank had the account holders telephone and email contacts. She testified that where an EAM had given investment instructions, the practice was to conduct any callback with the EAM rather than the account holders, and that the clients would never be called. Further, CWW accepted that the January 2015 instruction came from an address that was not on record or client sanctioned. CWW’s asserted basis for accepting the instruction from that address was familiarity acquired through communications with “Xavier”, including verbal communications. However, she accepted that this was not the general practice of the Bank. She also accepted that jeanpierre@ribes.ch used for the later transaction of GBP 1,500,000 was not found in the Account Documents.

[82] CWW accepted that the January 2015 wire instructions for GBP 2,000,000 directed payment to Mikdam Alkadhi at Baltic International Bank and did not refer to Prime Properties. She understood that the funds were being sent to an individual’s account. She conceded that the payment to an individual was not typical but maintained that it could occur in private placement transactions. She could not recall any KYC or due diligence in relation to Mr Alkadhi and accepted that the first written record connecting him with Prime Properties only came later, in October 2015.

She testified that there were likely phone communications over this issue. These were not supported by an identified note or record. CWW further, could not recall whether calls or concerns were recorded in a memorandum to file.

[83] During cross-examination, CWW also agreed that the GBP 2 million payment was made on 30 January 2015 for Prime Properties shares, but the share certificate was dated 48 days later on 18 March 2015. Specifically, the share certificate post-dated the payment. She characterized this as standard. She also accepted the contemporaneous description (in relation to the proposed payment of GBP 1.5 million) as “highly unusual and unorthodox”. She accepted that the payment was submitted for the approval of the COO of the Bank, that he had questions and that a prospectus for Prime Properties was requested. The witness further accepted that such payment to an individual was not a day-to-day occurrence and could not explain why the concerns arising on the second transaction were not documented or addressed similarly in respect of the first transaction.

[84] Additionally, CWW accepted that the Bank did not ask for anything on the first GBP 2 million transaction, and that the questions asked in relation to the later GBP 1.5 million subscription prompted the later production of a Declaration of Trust.

[85] Aisha Russell, (“AR”, who was formerly “AJ”) also gave evidence for the Bank. She was Head of EAM and Client Services from 2014 to 2018 with responsibility for the management and operations of EAM services. AR performed the duties of, inter alia, familiarizing herself with the Bank’s account opening documents, overseeing the operation of the EAM services desk, ensuring that team members were executing instructions received from external asset managers and placing orders with Operations correctly, and providing support for team members as needed.

[86] Many of the facts contained in the witness statement of AR were set out in the agreed facts amongst the parties, and I do not here repeat them.

[87] AR explained that in the arrangement with the Claimant and Mrs Vakula, the Bank did not provide investment management services to the account holders. The Bank had no discretion or control over the type, frequency or size of the transactions made with respect to the Sikora Account. AR’s understanding was that by the Account Opening Form and the SPOA, Gabarit was selected by the account holders to give investment instructions and Deltec had no responsibility to monitor or supervise the type of investment being carried out but rather were authorised to accept and comply with the investment instructions from Gabarit. In relation to the Authorised Signatories Form, the witness stated that the email addresses provided thereon were the authorised addresses “to be used by the authorised signatories when and if they sent email instructions to Deltec directly. However, this did not mean that all emails were required to be sent only from that individual’s email address, particularly where an external asset manager was engaged. This was certainly not the case in practice.”

[88] AR testified that the EAM services desk was the main point of contact for all external asset managers managing client accounts. Each external asset manager was assigned to an EAM services team member who was their direct point of contact. Through frequent contact, EAM employees were familiar with the employees and agents of the external asset managers providing investment instructions to the Bank on behalf of their clients. Where an external asset manager was appointed

under the SPOA to manage assets, it was usually the case that all instructions would be sent via the authorised external asset manager. Generally, the account holder would not come in contact with the EAM services team. Instead, the usual point of contact for account holders was the Bank's Private Client Services desk.

[89] AR stated that she also knew that Gabarit's agents were Xavier Delattre and Jean-Pierre Ribes. The EAM team members were familiar with Gabarit's agents, so "it was not customary for callbacks to be conducted for the investment instructions received from Mr Delattre or Mr Ribes.

[90] AR testified as to receiving instructions from xdelattre@gmail.com on 13 January 2015 concerning an investment in a "real estate fund". She completed the subscription form for Prime Properties for GBP 2,000,000 in exchange for 2,000,000 shares. On 20 January 2015, xdelattre@gmail.com provided her with copies of a Certificate of Incorporation, Memorandum and Articles of Association for Prime Properties. On 25 March 2015 xd@gabaritinternational.com sent the Bank a share certificate for the investment.

[91] AR stated that it became apparent, from a chain of emails received on 29 October 2015 from jeanpierre@ribes.ch to CWW concerning a further investment in Prime Properties, that "the investment was a private placement, as opposed to a fund, which meant that the investment was for the purchasing of shares in a private entity, as opposed to a public entity listed on an open market or exchange."

[92] The witness rehearsed provisions from the Account Opening Form, the SPOA and the Waiver which also appear in the agreed facts set out in the Relevant Background above. She stated that she believes that the investment instructions executed by the Bank were authorised by the account holders, as they fell within the parameters of the SPOA and followed the mandate of the Account Opening Form.

[93] On cross-examination, AR was directed to consider the clause in the Account Opening Form at page 162 of the Trial Bundle, which reads: "Each person who is authorised by the client to instruct Deltec with respect to the bank account must sign the Bank's Authorised Signatories form, which by reference thereto forms a part of this Agreement." She was asked whether this meant that unless somebody signs the Authorised Signatory Form, they cannot instruct the Bank. She answered that this is in reference to a client who is just an individual account holder and is not giving any other party authority to act on that account. She stated that it is a form for beneficial owners and does not require that "all of those others" whom the beneficial owners have given access sign the Authorised Signatories form. She admitted however that those words (that is, her interpretation of the clause) are not included in the Account Opening Form.

[94] The witness also stated that the Bank would never make a call back to a client in relation to an investment if an EAM gave the instructions.

[95] The witness was taken to the Authorised Signatories Form (page 172 of the Trial Bundle). Reference was made to the instructions that "Deltec will only act on instructions received from the authorised email address." When asked whether she accepted that the only email address on the form is jr@gabaritinternational.com, AR agreed. When asked whether Deltec would only act on

instructions received from the authorised email address, AR responded that this would be so if there were no other powers granted to any other party. She indicated all documents had to be read together. She stated that the instructions were only speaking to the individual account holders listed on the Authorised Signatories Form. Counsel asked whether the document expressed that qualification. The document did not state that Deltec will only act on instructions received from the account holders from the authorised email address.

[96] AR was asked, given the limitation in the SPOA on selling, withdrawing, transferring or pledging the assets, why the Bank thought that Gabarit had the power to instruct Deltec to purchase the investments in Prime Properties. AR answered that Gabarit was asking the Bank “to purchase something”. She stated that the EAM instructed the Bank to purchase the particular security and in order to execute the purchase of that security, a wire was needed, which is not unusual. When asked whether she thought the wire involved withdrawal or transfer of the assets, she responded, that the EAM could not have instructed her to wire money to anybody as that would be a transfer of assets and a withdrawal. In AR’s view, the SPOA gives the EAM “full authority to invest, to subscribe, to do whatever is needed to execute that.” She indicated that inherent in investing is buying or selling. The proviso limits what the EAM can do outside of investments. However, the witness agreed that there were no definitions of terms such as “transfer” in the SPOA. The witness agreed that when one invests in a private placement, it necessitates transferring money from the Deltec account to a third party.

[97] The Bank accepted instructions from EAMs from email addresses not listed on their EAM Approval Form. The question whether they had a concern with corresponding with email addresses from gmail or any worldwide domain servers was not answered by AR who stated that when one works with an EAM one becomes familiar with the addresses from which they send instructions. She also stated that she appreciates that there are risks with not properly documenting what email address is associated with which EAM. She also admitted that while Gabarit was referred to in the Account Opening Documents, the names of Mr Delattre and Mr Ribes were not.

[98] AR admitted that xdelattre@gmail.com was not on the EAM Approval Form. Counsel pointed out that the Bank was given a subscription form for a particular investment for Prime Properties and, subsequent to that, the Bank was asked to transfer money to a personal account and the Bank had nothing by way of due diligence or KYC to connect the recipient of the funds to the investment. The Bank wired 2,000,000 pounds in relation to this investment and almost a year later there were lots of red flags raised when there was another request to make a further investment of GBP 1.5 million. When asked why the questions were not raised in relation to the initial investment of GBP 2 million, the witness stated she did not have the answer. The COO would have to answer that question.

[99] Having observed and heard the witnesses at the trial, the Court formed impressions of each of them. All (the Claimant, CWW and AR) were observed, on a small number of occasions, to exhibit a natural tendency to cling to or repeat their stories, as opposed to following and directly responding to the specific questions asked of them. However, I did not find any of the witnesses to be dishonest or untrustworthy.

Submissions in Summary

For the Claimant

[100] Counsel for the Claimant, Mr Sean Moree KC with Mrs Erin Hill, submit on behalf of the Claimant that Deltec breached the contractual mandate and acted negligently by debiting the Sikora Account to fund the two Prime Properties transactions without valid authority. The submissions supported by authorities are encapsulated in the Opening Submissions, Closing Submissions and Reply Submissions of the Claimant. These have been fully considered by the Court.

[101] It is accepted that Gabarit was appointed as an external asset manager under the SPOA and had authority to manage the account and make investment decisions. However, Counsel argues that Gabarit's authority was expressly limited: it could not sell, withdraw, transfer or pledge account assets, except for the stated exceptions concerning management fees and forward transactions. On that construction, the payments from the Account to fund Prime Properties were prohibited withdrawals or transfers, not acts within an unrestricted investment mandate.

[102] Counsel further submits that the Account Opening Form and the Authorised Signatories Form must be read together with the SPOA. The Account Opening Form required every person authorised to instruct Deltec to sign the Authorised Signatories Form, while the client-specific form stated that the Bank would only act on email instructions from the authorised address jr@gabaritinternational.com. Neither Mr Delattre nor Mr Ribes was named in the Account Documents, and the instruction emails for the two impugned transfers came from other email addresses.

[103] Counsel contends that the Bank cannot establish that Mr Delattre and Mr Ribes had authority to bind Gabarit or the account holders. The EAM Form is said to be an internal Deltec document, not part of the Account Documents, and not disclosed to the Claimant at any material time or prior to these proceedings. It is submitted that a course of informal communications from unrecorded email addresses is not proof of actual or implied authority, especially in the absence of evidence identifying the holder of the addresses or their corporate authority.

[104] In relation to the Transactions, Mr Moree KC emphasizes that the first GBP 2 million payment was made to Mr Alkadhi's personal account and that the payment instructions themselves did not name Prime Properties. The second proposed payment likewise prompted the Bank's COO to describe payment to an individual as "highly unusual and unorthodox". Therefore, it is submitted that the use of unrecorded email addresses, a newly formed fund, payment to an individual rather than the fund, and the lack of sufficient documentary verification should have caused Deltec to make further inquiry, including by contacting the account holders.

[105] Counsel further submits that the Waiver does not assist the Bank unless the Bank first proves that the instructions appeared to be given by a person authorised to act as attorney. For the Claimant, it is contended that threshold is not met.

[106] The Claimant therefore seeks the principal sum of GBP 3,500,000, damages for loss of opportunity or profit, interest and costs.

For the Defendant

[107] Counsel for the Bank, Mr Leif Farquharson KC and Mrs Christina Davis-Justin submit that Gabarit was validly appointed under the SPOA as the account holders' external asset manager, with authority to manage and administer the Account and broad discretion to invest its assets. The Account was expressly designated as 'execution only': Deltec was to execute investment instructions received from the client or an authorised agent and was not to exercise investment discretion of its own.

[108] It is submitted that Mr Delattre and Mr Ribes were authorised representatives of Gabarit. The Bank relies on the EAM Agreement, the Bank's signatory records for Gabarit, the EAM / Business Referrer Form, and the communications between Gabarit personnel and the Bank. It is averred that the use of the Gmail address for Mr Delattre and the ribes.ch email for Mr Ribes was known to the Bank through its ongoing dealings with the EAM.

[109] Counsel contends that the Authorised Signatories Form governs instructions of account holders or persons with full authority over the Account, whereas the SPOA governs the EAM's narrower investment authority. It is contended that on its construction, the authorised client email address did not prevent Deltec from receiving investment instructions from Gabarit.

[110] The central submission for Deltec on the SPOA is that a payment or wire necessary to settle an authorised investment is not a prohibited "withdrawal" or "transfer". The prohibition, it contends, restricts Gabarit from directing non-investment disbursements or using Account assets for the attorney's own benefit or another non-investment purpose. A subscription for shares requires a payment; to construe the provision otherwise would deprive the investment power of practical effect.

[111] It is submitted that the Prime Properties payments were genuine investment subscriptions. Reliance is placed on the subscription forms, the later share certificates, the asserted nominee / trust structure by which the Bank held 3.5 million shares in Prime Properties for the account holders. It is submitted that payment to Mr Alkadhi was explained by Prime Properties' lack of an operational bank account and by the declaration of trust arrangement.

[112] On negligence, Counsel for Deltec asserts that the pleaded case is confined to breach of mandate and alleged failure to verify instructions. The Claimant did not plead fraud, misappropriation or a Quincecare-style case based on suspicious circumstances. Counsel contends that because the Account was 'execution only' and Gabarit was the authorised investment manager, the Bank was not required to assess the commercial merits of Prime Properties, or to investigate the rationale of the investment, or to contact the account holders before acting on Gabarit's investment instructions.

[113] Finally, Counsel states that the Bank relies on the Waiver and General Terms and Conditions. It submits that the Waiver permitted the Bank to act on instructions that appear to be given by an authorised attorney. The instructions are deemed conclusively valid unless the Bank acted with gross negligence or wilful misconduct. It is further submitted that neither gross negligence nor wilful misconduct was adequately pleaded or proven.

[114] Counsel therefore contends that the Bank acted within its contractual mandate and did not breach any duty owed to the Claimant. As such, the claim should be dismissed. Reliance is placed on submissions and authorities set out in the Opening Submissions and the Closing Submissions of the Defendant, which have been fully considered by the Court.

Discussion

The Banker-Customer Relationship

[115] The basis of the banker's relationship with the customer is based on contract, and pursuant to it certain duties are owed to the customer. Succinctly stated by the authors of Paget's *Law of Banking* 16th ed at 109-110 and 719, the relationship and concomitant duties are described as follows:

"4.1 The essential relationship between a bank and its customer is contractual. It is not a fiduciary relationship. The banking relationship comprises a general contract, which is basic to all transactions, together with any special contracts which arise only as they are brought into being in relation to specific transactions or banking services. The bank's fundamental obligations under the general contract are to open and operate its customer's accounts, honour its customer's instructions in accordance with its mandate and to repay on demand monies deposited in an account. Other obligations come into existence by virtue of specific agreements...

23.1 The primary duty of a paying bank is to honour its customer's instructions and make payments as instructed in accordance with its mandate. That duty is a fundamental aspect of the contractual relationship between the bank and its customer. The bank's payment obligation only arises if the instructions comply with the mandate...

23.2 ...The mandate embodies an agreement which authorizes and obliges the bank to pay if it is given instructions in accordance with its terms...

A bank which acts in accordance with its mandate is duly authorised and will be entitled to debit the customer's account in the amount of the payment. But it does not follow that a bank which acts contrary to the mandate is bound to be unauthorised. The bank will not be liable to the customer if the customer did in fact authorize the payment (notwithstanding that the payment instruction did not comply with the mandate)."

Pleaded Issues and Approach

[116] The pleaded case of the Claimant is that the Bank breached the Account documents and/or failed to exercise reasonable care and skill by acting on unauthorised instructions and failing to

confirm or verify them. In this case, the contractual arrangement between the parties is the foundation of the banker and customer relationship. The authority of Deltec to debit the Sikora Account was governed by the Account Opening Form, the General Terms and Conditions, the Waiver, the Authorised Signatories Form and the SPOA. The Court must construe these documents together. The SPOA specifies that it does not diminish or modify the account terms and that the Bank's General Terms and Conditions apply in all other matters.

[117] In the circumstances, the Court must construe the documents to find the objective meaning of the language used, taking into consideration the language of the documents, the relevant facts and the commercial setting. Guidance as to such an approach is described by *Lord Hodge* in **Wood v Capita Insurance Services Ltd** [2017] 2 WLR 1095 as follows:

“[10] The court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning....

“[11] ...Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (*Rainy Sky* para 26 citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No. 2)* [2001] 2 All ER (Comm) 299...); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77)....

“[12] This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: *Arnold* para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571 para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.”

(Emphasis added).

[118] I consider that the Court must give effect to the agreed words as a whole, giving both general powers and specific limitations due effect and workability.

[119] It is clear that the Bank was obliged to act within the Account mandate. An execution-only account does not require the Bank to assess the commercial viability of an investment, properly authorised. However, such an account does require the Bank to execute only instructions that are authorised and to exercise reasonable care and skill in doing so.

[120] The Defendant argues that the present action is fundamentally a contractual dispute. Deltec submits that the Claimant is now seeking to advance a case far beyond the pleadings, but parties are bound by their pleadings. On this issue, the Court was referred to **Bahamas Ferries Limited**

v Charlene Rahming SCCivApp & CAIS No 122 of 2018. In that judgment of the Court of Appeal, *Crane-Scott JA* observed:

“38. In **Nada Fadil Al Medenni v Mars UK Limited** [2005] EWCA Civ 1041 Dyson LJ giving the decision of the English Court of Appeal said:

‘It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by each other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.

“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 v Times Newspapers Ltd.* [1999] 3 All ER 775 Lord Woolf MR observed: 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. [Emphasis added]”.

[121] It is contended that one of the ways in which the Claimant seemingly seeks to expand its case is through the assertion of a ‘Quincecare duty’ based on **Barclays Bank plc v Quincecare Ltd and another** [1992] 4 All ER 363. The Bank states that the Claimant ought to be prevented from asserting any liability arising from the Quincecare duty because: (1) there is no plea of fraud or misappropriation or similar wrongdoing by any person, (2) there is no allegation of negligence beyond the averment of breach of reasonable care and skill and breach of the alleged duty to confirm payment instructions, (3) there is no pleading that the Bank was put on inquiry.

[122] The Bank contends that in relation to the alleged breach of reasonable care and skill, there are no specific allegations related to the alleged failure to exercise care and skill, so the Court cannot rely on the evidence at trial regarding unusual features of the Prime Properties transactions or purported red flags.

[123] The Claimant responds, in part, that the Quincecare duty forms a part of the Bank’s wider duty to act on its customer’s instructions and in accordance with the customer’s mandate. It may be summarized as a bank’s duty to make inquiries where it had reasonable grounds for doing so. It is not essential to plead dishonesty and only the general duty of care and skill need be pleaded in the Statement of Claim.

[124] I observe that the Claimant expressly pleaded:

- (1) a general duty to exercise reasonable care and skill;
- (2) a duty to adhere strictly to the customer’s mandate;
- (3) that the instructions did not come from the client or the authorised email account; and
- (4) a duty to confirm and verify all payment instructions.

[125] The Statement of Claim also alleges that the Account was debited, and the funds transferred to an undisclosed third party with the Claimant having no information as to the recipient. In my view, the pleaded allegation that the Bank failed to confirm and verify the payment instructions raises the question whether, in the circumstances known to the Bank, reasonable verification necessitated some further enquiry before the payments were made. On the pleading, the Court is not called upon to find that any person was dishonest, that any payment was in fact misappropriated, that Prime Properties was a sham or that the Bank had actual knowledge of fraud. The enquiry is really whether, on the information available to the Bank, considered as a whole, it could not treat the instructions as sufficiently verified without further steps.

[126] I accept that there is no pleading of fraud or misappropriation to be found in the Claimant's pleadings. But it is not necessary to plead or prove fraud or misappropriation as an established fact in order for a Quincecare-type duty of inquiry to arise. The relevant issue is the bank's knowledge and the information available at the time, not proof at trial that in fact a fraud occurred. Asserting a Quincecare duty is not a stand-alone tort. It is a particular application of a bank's contractual and parallel tortious duty of reasonable skill and care when carrying out an instruction that appears to be authorised. This is consistent with **Phillip v Barclays Bank UK plc** [2023] UKSC 25, [97] where the Supreme Court explained that, where a bank has reasonable grounds for believing that a payment instruction given by an agent may be an attempt to defraud a customer, reasonable care may require the bank to refrain from executing it until inquiries have verified that it was actually authorised.

[127] In **Barclays Bank plc v Quincecare Ltd** [1992] 4 All ER 363, as summarized and applied by the Privy Council, the duty is to refrain from executing an order where the bank is 'put on inquiry', meaning that it has reasonable grounds, judged by the ordinary prudent banker standard, to believe that the order is an attempt to defraud the customer. In that case, the underlying claim failed because the banker was not put on inquiry. I note it did not fail due to a lack of proving actual fraud.

[128] I also accept that for the advancement of a Quincecare argument, it is not enough to plead negligence in wholly general terms and then seek to base liability on alleged warning signs which are not particularized. The facts said to put a bank on inquiry must be sufficiently pleaded. This is illustrated in **Royal Bank of Scotland International Ltd v JP SPC 4** [2022] UKPC 18, where the Privy Council made a distinction between, on the one hand, the facts said to establish that a duty was owed, from, on the other hand, suspicious circumstances that bear on what a pre-existing duty required a bank to do. The Board did not state that a claimant must plead and prove completed fraud before a Quincecare duty arises. Rather, it stressed that the pleaded case must accurately identify the duty and the factual circumstances relied upon.

[129] In my view, the pleaded case on the duty to verify instructions may be informed by the Quincecare line of authority. I do not think this case involves an allegation that the Bank negligently failed to prevent a completed fraud. As I understand it, the Claimant's pleaded case is that Deltec acted in breach of its mandate and failed to exercise reasonable care and skill by executing payment instructions, without adequately confirming and verifying their authority.

[130] The Claimant's pleading alleged that the instructions did not come from the client or the stipulated authorised email address. She further pleaded circumstances of the payments from the Account to an unidentified third party. These pleaded allegations, in my opinion, fairly raise the question of whether the Bank ought reasonably to have made further inquiry before carrying out the instructions. The evidence concerning the mode of instruction, payment destination, supporting documents and the Bank's internal concerns is relevant to that pleaded question. I do not accept that I am precluded from considering proven features of the transactions. I will consider those features as evidence of whether Deltec reasonably verified the instructions and complied with the mandate.

[131] Based on the parties' submissions, the Court must also treat with the scope of Deltec's pleaded case on 'authority'. The Claimant submits that Deltec's reliance on actual or implied authority was not pleaded and should not be considered. I do not accept that submission in its entirety. Deltec's Defence expressly pleaded: (1) Gabarit was appointed as attorney under the SPOA, (2) that Mr Delattre and Mr Ribes were authorised representatives of Gabarit, and (3) that they were authorised to give instructions to the Bank. Those allegations placed the authority of Gabarit and its alleged representatives squarely in issue. Further, the Claimant addressed them in her Reply, pleading that neither Mr Delattre nor Mr Ribes was an authorised signatory. The Claimant's evidence, cross-examination at trial and her Closing Submissions also engaged the issue of Gabarit's authority and that of its alleged representatives.

[132] The Bank was also entitled to argue that, by the true meaning of the SPOA, Gabarit and/or its representatives could exercise any authority necessarily connected with Gabarit's express power to invest and subscribe for investments. That is not a separate unpleaded defence. It is rather a legal consequence said to follow from the pleaded appointment and written terms. I do not, however, treat Deltec as having pleaded or established any distinct defence of contractual variation, waiver, estoppel or course of dealing which could supersede the express email safeguards set out in the Account Documents. Evidence of prior communication between the Bank and Gabarit may be considered as relevant to whether the disputed emails came from Gabarit's representatives, and to the Bank's reliance on the Waiver. But it does not, without more, vary the Claimant's mandate.

Appointment and Limits of Authority of Gabarit

[133] I find that Gabarit was validly appointed as the account holders' attorney and external asset manager. The Claimant accepted that she and Mrs Vakula had appointed Gabarit, and that the execution account arrangement permitted Deltec to receive instructions from an authorised agent by email or telephone. (See pages 4 and 9 of the Trial Transcript, Day 1).

[134] The appointment, however, did not confer unrestricted authority on Gabarit. The SPOA authorised Gabarit to manage and administer the Account. It could: (1) invest the cash, securities and other Account assets, (2) purchase, retain, exchange or convert investments, (3) subscribe for investments, (4) effect transactions, and (5) take acts necessary in connection with these powers.

[135] Materially, the same sentence then imposed an express restriction: Gabarit had no power to sell, withdraw, transfer or pledge assets in the Account, save for management fee withdrawals and limited commitments in connection with forward transactions.

[136] In my judgment, the interpretation of the scope of Gabarit's authority must reconcile both the grant of the general power and its express restriction. Gabarit had no general power to instruct a free-standing payment, withdrawal or transfer from the Account, whether for its own benefit, the customer's personal purposes or for an unrelated third party. But the express authority of Gabarit to subscribe for investments and effect investment transactions necessarily included the limited authority to instruct a payment genuinely needed to settle an investment subscription or purchase. In the Court's opinion, this is the better construction. A conclusion to the contrary would substantially strip the express investment powers of practical effect.

[137] This construction is reinforced by the provision in the SPOA which authorizes the Bank to comply where Gabarit instructs it to use an individual or firm other than Deltec's usual correspondent for the custody of assets, purchases or sales of securities, or other services.

[138] That authority, however, was conditional upon the transaction being a genuine act of investment management within the SPOA. It did not authorize the Bank to treat a payment to any person identified by an alleged agent as an investment payment simply because the nomenclature of 'investment' was used.

[139] The Claimant relies on her 2009 conversation with Mr Radford in which she refused a proposed investment in Prime Properties. I attach limited weight to that correspondence. It predated the opening of the Sikora Account, execution of the SPOA and the grant of Gabarit's express investment authority. Moreover, Deltec was not involved. It may show that the Claimant in 2009 considered an investment of GBP 1 million in one vehicle to be excessive. However, it did not constitute a continuing restriction or any restriction on the Sikora mandate. I do not consider that it had the effect of revoking or qualifying the authority granted to Gabarit in 2014 either.

Proof of Authority of Delattre and Ribes

[140] The Bank is required to establish that the persons from whom it received the challenged instructions were authorised to act for the corporate attorney, Gabarit. The SPOA was granted by the Claimant and Mrs Vakula to Gabarit, not to Mr Delattre, Mr Ribes, Mr Radford, or any other natural person.

[141] The Claimant's knowledge of, and dealings with, Mr Radford are relevant. His correspondence with persons involved in the asserted Prime Properties arrangements supports an inference that he was involved in, or at least aware of, the proposed investment. It does not, without more, establish that Mr Delattre or Mr Ribes had authority from Gabarit to bind the Claimant or Mrs Vakula, or that the email accounts used by them were authorised channels of instruction. Mr Delattre and Mr Ribes were not at all referenced in the Account Documents of which the customers were aware. This was accepted by the Bank's witness, AR. (See Trial Transcript, page 69, Day 1).

[142] Deltec relied on the EAM Agreement and the EAM Form to establish Gabarit's business relationship with the Bank and the alleged identity of its representatives. In my view, those documents may be considered as evidence of Deltec's internal information and its asserted understanding of Gabarit's organization. They were not, however, a part of the Sikora Account Documents, were not shown to the Claimant, and appeared to have been created before the Claimant and Mrs Vakula became customers of the Bank. (See Trial Transcript, page 65, line 12 et seq, Day 1). In my view, they cannot expand the authority granted under the SPOA or vary the Claimant's mandate.

[143] There is a further problem. The EAM Form identified different Gabarit email addresses, namely, xd@gabaritinternational.com and jpr@gabaritinternational.com. The January 2015 instruction came from xdelattre@gmail.com. AR accepted in her testimony that this email address was not on the EAM Form and she could not recall a document from Gabarit authorizing its use. (See Trial Transcript, page 70, Day 1).

[144] Additionally, the December 2015 instruction came from jeanpierre@ribes.ch. CWW, Deltec's witness, accepted that this email address did not appear in the Account Documents. (See Trial Transcript, page 29, Day 2). CWW also accepted that Mr Delattre's Gmail address was not an email on record and said that acting through that channel was not the Bank's practice. (See Trial Transcript, pages 18 and 19, Day 2).

[145] The evidence that Deltec personnel "knew" the alleged senders through prior dealings and the evidence of actual authority is incomplete. Deltec did not produce any corroboration by a contemporaneous call record, written authority, corporate resolution, or authenticated update to Gabarit's instruction details. Neither did the Bank call Mr Delattre and/or Mr Ribes as witnesses. These omissions diminish the weight of the Bank's proof that each sender had actual authority and that the disputed addresses were authorised channels.

[146] The Court does not, however, regard the absence of such proof as conclusive against the Bank. Deltec bears the burden of establishing the contractual authority on which it seeks to rely. I consider that the agreed documents identified Mr Delattre and Mr Ribes as principals and contact persons and the communications mentioned their names. Further, the Claimant accepted that the emails appeared to come from them. I note also that the communications were linked to Mr Radford (a person whom the Claimant had known for many years and had identified in the Account Documentation). Considered collectively, those matters were capable of giving Deltec a basis to regard the emails as purporting to come from Gabarit's representatives. (See Trial Transcript, page 37, Day 1).

[147] I therefore make no finding that Mr Delattre or Mr Ribes lacked actual authority. I find that Deltec's evidence of actual authority was incomplete. It fell short of the documentary verification standards set by its own instruction safeguards. These are evidential deficiencies, but there is also the Waiver to consider. The Waiver does not depend solely on proof of actual authority, but on the Bank's reasonable understanding. In other words, reliance on the Waiver will depend on whether the emails (and their context) reasonably 'appeared' to Deltec to come from authorised Gabarit representatives. I address this issue below.

Prime Properties Payments and Proof of Subscription

[148] The Bank submits that both payments were genuine settlement payments for Prime Properties subscriptions. It relies on the subscription documents, later share certificates, the asserted declaration of trust arrangement, the Account statements and correspondence involving Mr Radford and a Farrer & Co partner. These materials are capable of supporting the inference that an investment structure existed and that Deltec acquired Prime Properties shares. But in my view, the weight to be given to them differs between the two payments.

[149] The first transaction is the more troubling. The January 2015 wire instruction for GBP 2 million, did not identify Prime Properties and directed payment to the personal account of Mikdam Alkadhi at Baltic International Bank. CWW accepted each feature. (See Trial Transcript, pages 23 and 24, Day 2).

[150] Payment to an individual was not typical. No contemporaneous Declaration of Trust relating to the GBP 2 million payment was produced, though Deltec's April 2015 letter referred to a declaration said to be dated 27 January 2015.

[151] Those deficiencies, however, do not require the Court to find that no subscription occurred. I note in particular the following:

- (1) the contemporaneous January 2015 communications referred to a Prime Properties subscription;
- (2) the account records described the payment as subscription funds; and
- (3) Deltec later received a share certificate recording the Bank as holder of 2 million Prime Properties shares.

[152] I find that while these documents do not make a compelling case, they at least permit an inference that the January payment was intended and applied as subscription consideration.

[153] The December 2015 transaction is supported by a materially fuller paper trail. The Bank was told that Prime Properties lacked a bank account, that Mr Alkadhi would hold the funds pending completion of the subscription, and that a Declaration of Trust supported the arrangement. The Declaration of Trust was undated and did not prove every aspect of the payment path. But it gives the December 2015 transaction stronger evidential support than the January 2015 transaction.

[154] Deltec did not call as witnesses Mr Delattre, Mr Ribes, Mr Alkadhi, Mr Radford, a Prime Properties officer or the author of the Farrer & Co correspondence. Those persons could have supplied direct evidence of the authority of the purported senders and the payment arrangements. The absence of their evidence limits the weight which can be placed on disputed propositions. But in the circumstances, it does not justify an adverse inference against Deltec because none of those third-party witnesses was shown to be within Deltec's control. I observe also that the Claimant did not call Mr Radford either.

[155] A short note concerning the Trial Bundle documents is appropriate. At the case management phase of this matter, one of the directions in my Case Management Order filed on 17 April 2023 was that the Bundle of Documents must comprise 3 schedules which specify: (i) Authentic documents the truth of their contents agreed; (ii) Authentic documents the truth of their contents in dispute; and (iii) Documents in dispute as to their authenticity. It appears from the Trial Bundle that all documents included were placed by the parties in “**Schedule 1: Authentic Documents the Truth of Their Contents Agreed.**” The parties’ agreement as to truth of contents means that I accept the factual statements made in the documents, subject to their proper construction and any qualification within the documents themselves. It does not eliminate questions of the legal effect of the documents. Further, it does not necessarily support every further inference for which a party contends, for example, that a particular payment was applied as subscription consideration or that shares were beneficially held for Sikora.

[156] I do not treat the documentary trail in this case as conclusive proof of how the transferred funds were ultimately applied. At the same time, the Court does not disregard the substantial support those documents lend to the Bank’s case.

[157] Weighing these matters, I do not find on the material before the Court, that the payments were sham or unrelated payments. The evidence supports that they were presented to Deltec as Prime Properties subscription payments. It also allows for an inference that Prime Properties shares were acquired. These findings, however, do not determine the ultimate destination, value or beneficial ownership of the payments or shares.

Breach of Mandate

[158] The Authorised Signatories Form states that Deltec will act only on instructions received from the authorised email address. The Sikora form identified jr@gabaritinternational.com.

[159] The interpretation of this provision by the Bank is that it regulated instructions given by account holders and persons with full account authority. The Defendant further contrasts this with Gabarit’s separate and limited authority established by the SPOA. On the other hand, the Claimant argues that the provision regulated all email instructions, including those given by Gabarit’s representatives. The words “Deltec will only act” are broad and provide real support for the Claimant’s submission.

[160] In considering which construction I prefer, I take into account that the SPOA was the specific, contemporaneous instrument by which the Claimant and Mrs Vakula appointed Gabarit as an independent manager for investment purposes. The Account Documents distinguish between the full authority of an authorised signatory and the restricted investment authority of an independent manager. The SPOA makes detailed provision for Gabarit to instruct Deltec in relation to investments. To my mind, it would be incoherent to treat Gabarit as required to acquire the full account authority associated with the Authorised Signatories Form before it could perform the limited investment function which the SPOA separately grants. On this basis, I prefer the construction offered by the Bank.

[161] Nevertheless, the safeguard of only acting on instructions from the authorised email address cannot be ignored. Read with the SPOA it provides an important measure of control and makes the Bank's reliance on unrecorded email addresses a matter which requires careful scrutiny. The Bank was required to act reasonably in satisfying itself that an instruction was in fact from, or appeared to be from, Gabarit acting within the SPOA. But the mere fact that the emails were not sent from jr@gabaritinternational.com did not, of itself, constitute a breach of the mandate.

[162] The Bank bears the burden of establishing the authority on which it acted. The Claimant was not required to prove the negative propositions that the emails were not sent by Mr Delattre or Mr Ribes, that they lacked authority, or that no shares were acquired. The question is whether Deltec's evidence, assessed with the relevant documentary context, established a sufficient objective basis for the Bank reasonably to treat the emails as purporting to be from Gabarit's representatives. The evidence permits the findings that the instructions appeared to have been sent by persons associated with Gabarit and that they related to Prime Properties subscription transactions. In the whole context, for reasons which follow, it is the Court's opinion that Deltec established a sufficient basis for its primary case that it acted upon instructions which objectively appeared to be from Gabarit in the performance of its investment management role.

[163] Accordingly, I do not find that Deltec breached the Account mandate.

Negligence and the Duty to Verify

[164] Deltec owed the Claimant a duty to exercise reasonable care and skill in carrying out its mandate. The duty did not require the Bank to guarantee the quality, prudence or success of an investment selected by an EAM. Nor did it impose a general obligation to undertake due diligence into Prime Properties in this execution-only relationship. It did require reasonable care in deciding whether the instructions and their payment mechanics were properly capable of execution under the mandate.

[165] I accept the Claimant's submission that the suspicious features are relevant to that issue. The Claimant pleaded that Deltec failed to confirm and verify payment instructions. This pleading fairly raises the question whether the circumstances called for inquiry. The Court must consider the non-recorded email addresses, the payment to Mr Alkadhi, the documentation, and the later internal concerns (raised by the COO). A finding that any person committed fraud or misappropriated funds would, in my view, not be necessary or appropriate.

[166] The January 2015 payment presented genuine cause for concern. It was a large payment, the instruction email was not on the EAM Form, the wire details did not identify Prime Properties, and payment was to an individual. Deltec did not establish a contemporaneous trust instrument or other direct documentary link between Mr Alkadhi and Prime Properties. (See Trial Transcript, page 24, Day 2).

[167] The December 2015 payment also presented unusual features. But it was escalated by the COO, who raised questions and requested further material, including a prospectus. (See Trial Transcript, page 29 and 30, Day 2).

[168] The Bank did not call the COO as a trial witness. The absence of the evidence from the COO means that the Court cannot determine precisely what concerns he had or whether he considered they were satisfactorily answered. The subsequent documents provide some support for the Bank's case that an explanation was received and considered. But they do not demonstrate the reasoning by which the concerns were resolved. The Claimant nevertheless bears the burden of proving that the steps actually taken were unreasonable.

[169] The evidence that Bank staff would not place a call to the account holders where an EAM had issued investment instructions is capable of criticism. (See Trial Transcript, page 51, Day 1). Nevertheless, the absence of a direct callback does not itself establish negligence. I call to mind that the Account was deliberately structured by the Claimant and Mrs Vakula with an independent manager holding investment authority. The relevant question is whether a reasonable bank was obliged, in the circumstances, to bypass that arrangement and seek confirmation directly from the clients.

[170] The Claimant relies on **Zampa Overseas Ltd v CBH (Bahamas) Ltd**, Claim No. 2015/CLE/gen/01961, in which *Winder J* (as he then was) emphasized the primacy of the account opening agreement and stated that banks were not mere automatons. The case was put forward by the Claimant as authority that a callback may be an appropriate verification step. There, the Court stated:

“[60] Banks are expected to be more than mere automatons. The evidence of Zampa's expert witness emphasized that in providing service to customers, particularly in the digital age, requires banks to rise beyond the strict execution of payment instructions without pause for inquiry. The bank must, as a rule, interrogate the instructions given by clients. The rapid succession in which the payment requests came, in some cases 2 or 3 times in one day, ought to have created a cause for some concern.”

[171] The general proposition is sound. Whether a callback is required, however, remains dependent upon the context of the matter under consideration. That case was decided on its own account mandate and facts. Here, the Claimant and Mrs Vakula had appointed an EAM (Gabarit) for investment instructions, and the contractual materials contemplated that Deltec would act on Gabarit's instructions.

[172] The January transaction is the Bank's weaker case. The unrecorded Gmail address, the absence of a reference to Prime Properties from the wire details, the payment to an individual and the absence of a contemporaneous trust instrument were matters which a prudent bank should not have overlooked. Against them, however, were the January subscription materials, the contemporaneous description of the transaction as an investment in a real estate fund, and the subsequent share certificate in Deltec's name. Further, the SPOA allowed the use of individuals or firms other than the Bank's usual correspondents for investment-related services. Even if the Waiver did not provide a complete contractual answer, I would not find ordinary negligence established on the evidence. The Claimant identified a specific further step: that a callback should have been made to her or Mrs Vakula before the January payment was made. Had such call been made it may well have proved that they had not personally approved the payment. The question, however, is not whether a callback would have been prudent with hindsight. Rather, it is whether

reasonable care required Deltec to bypass the investment management arrangement which the Claimant and Mrs Vakula had put in place by appointing Gabarit under the SPOA.

[173] While the January payment gave cause for concern, the Bank had before it an apparent investment instruction from the appointed EAM, accompanying subscription material, and an account structure which contemplated that the Bank would execute investment instructions received from that manager. On the evidence, the Claimant has not established that reasonable care required a direct callback to her or Mrs Vakula, rather than further inquiry through the EAM. Further, the Claimant has not established that Deltec's decision not to make such a callback fell below the applicable standard of reasonable care and skill.

[174] The December transaction presents a materially stronger case for the Bank. It was escalated and the COO's questions prompted the production of further explanatory material. Further, the Bank was provided with a prospectus, corporate material and the asserted Declaration of Trust. The Claimant correctly submits that the explanation remained unorthodox and that the direct clients were not called. But the evidence does not establish that the inquiry undertaken before the December payment was unreasonable or insufficient.

[175] I therefore find that the evidence does not establish, on the balance of probabilities, that Deltec breached its duty of reasonable care and skill. The Bank had grounds for concern, especially in January, and its record-keeping and verification procedures were imperfect. But the documentary sequence, the apparent involvement of Gabarit personnel and Mr Radford, the subscription documentation, the later share certificate and the further information obtained before the December transaction prevent the Court from concluding that Deltec acted unreasonably in executing either instruction.

The Waiver

[176] The Waiver authorised the Bank to act on email instructions that appeared to the Bank to be given by the client or an attorney authorised to act for the client. It provided that instructions received or purporting to be given under the authority of that authorization were conclusively deemed to be valid, save where Deltec was grossly negligent or engaged in wilful misconduct.

[177] The words "appear to the Bank" and "purport" are not satisfied by purely subjective belief or an unsupported familiarity with an email address. They must be assessed objectively, by reference to the circumstances then known to Deltec. The formal email records are therefore material, and the use of unrecorded emails weakens the Bank's position. Certain features of the evidence are particularly material. The Claimant admitted to her appointment of Gabarit. Further, the EAM material identified Mr Delattre and Mr Ribes, and the Claimant acknowledged that the communications appeared to be from them. Mr Radford was involved or aware of the Prime Properties transactions. Additionally, the Court considers the accompanying investment documents for the transactions. In my view, these factors provided a sufficient objective basis for the Bank to regard the emails as purporting to be from Gabarit representatives.

[178] The Waiver is consequently engaged. The Claimant's submission that actual authority had to be proved before the Waiver could apply does not give adequate effect to the words "appear" and "purport" as used in that document.

[179] The Waiver does not permit Deltec to disregard the limits of the mandate or its own relevant records. Its protection depends upon the Bank having a reasonable basis, assessed objectively in the circumstances known at the time, for treating the communication as one given under the authority of the client or an authorised attorney. For the reasons already given, that threshold is met. Gabarit was admittedly appointed; the emails bore the names of persons identified in the EAM documentation as Gabarit contacts; the communications were linked to Mr Radford; and they were accompanied by documents consistent with investment subscriptions.

[180] In my opinion, the Claimant was not required to use the phrase "gross negligence" if the substance of her pleading revealed facts which clearly advanced negligence to that degree. But the Statement of Claim pleaded breach of mandate, ordinary negligence, and failure to confirm and verify instructions. It did not identify the particular payment features and internal concerns now said to establish gross negligence. Deltec objected to the expansion of the negligence case. Applying the pleading principles relied on by the Bank including **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No 122 of 2018 and **Al-Medenni v Mars UK Ltd** [2005] EWCA Civ 1041, the Court's view is that it should not determine the Claimant's case as one of gross negligence.

[181] In any event, the evidence does not establish gross negligence or wilful misconduct. Gross negligence is a fundamental want of care, different from ordinary negligence, and usually involves serious disregard of an obvious risk. In **Red Sea Tankers Ltd v Papachristidis (The Ardent)** 1997 LLR 2 548, *Mance J* provided a definition on English principles of construction as to what gross negligence encompasses as follows:

"Gross negligence here appears to me to embrace serious negligence amounting to reckless disregard, without any necessary implication of consciousness of the high degree of risk or the likely consequences of the conduct on the part of the person acting or omitting to act.

...If the matter is viewed according to purely English principles of construction...Gross negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence...[A]s a matter of ordinary language and general impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk...".

[182] In my judgment, while Deltec's procedures were open to criticism, it had an EAM instruction, a contemporaneous documentary investment trail, and for December, a management escalation and further explanatory material. The high threshold required to establish gross negligence is not met. Deltec may therefore rely on the Waiver, which provides a further and independent answer to the claim.

Causation and Loss

[183] In light of my findings on mandate, negligence and the Waiver, it is unnecessary to determine quantum. I nevertheless record that the Claimant proved the debit entries on the Sikora Account, but not necessarily the net loss equal to their gross amount. The account records identify debits of GBP 2,011,000.00 and GBP 1,508,250.00.

[184] The Claimant advanced no valuation evidence as to the asserted Prime Properties shares, any beneficial interest held through Deltec, or any rights of recovery against Prime Properties or Mr Alkadhi. The Claimant also did not prove a distinct lost investment opportunity or its value. Those evidential gaps would have in any event hindered an award of the full debit amounts and the additional loss of opportunity / profit claim without further proof.

Disposition

[185] The Claimant has not established that Deltec breached the contractual mandate or its duty to exercise reasonable care and skill. In any event, the Waiver applies and the Claimant has not established gross negligence or wilful misconduct to displace it.

[186] In the circumstances, the claim is dismissed.

[187] The parties shall file and serve written submissions on costs, not exceeding 10 pages, within 21 days from delivery of this judgment. In those submissions, they shall address whether, notwithstanding the dismissal of the claim, the circumstances of the January and December 2015 transactions, Deltec's instruction-verification records, and the disclosure of the EAM documentation justify a departure from the ordinary costs order. The Court shall also hear the parties on the form of Order, if necessary.

Dated 9 September 2026



Simone I Fitzcharles

Justice