

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMERCIAL DIVISION
2018/COM/com/00075

BETWEEN

ZALTIC SOLUTIONS INC.

Plaintiff

AND

XL PARTNERS LTD.

First Defendant

AND

DELTEC BANK AND TRUST LIMITED

Second Defendant

Before: The Hon. Madam Justice G. Diane Stewart

Appearances: Mr. Jason Maynard and Mr. Colin Jupp for the Plaintiff
Mr. E. Terry North, Ms. Wynsome Carey and Mr. Darzhon JR Rolle for the First Defendant
Mr. Leif G. Farquharson K.C. and Mrs. Christina D. Justin for the Second Defendant

Hearing Dates: 28th, 29th and 30th June 2022, 20th, 21st, 22nd, 23rd 26th and 27th September 2022, 5th October 2022 and 28th November 2022

Judgment Date: 28th April 2023

REASONS

Fraud – Pleadings – Litigants bound by their Pleadings - Disputed Emails – Authorization Letters – Evidence – Silence of Material Witness - Adverse Inferences - Professional Negligence - Gross Negligence - Breach of Contract – Implied Terms – Agency – Apparent Authority – Implied Authority

1. By a decision given on the 28 April, 2023 I dismissed the action of the Plaintiff and held that Zaltic Solutions Inc had not proven its case against the Defendants.
2. I advised that I would give expanded reasons for the decision and now do so.
3. This action involved claims for relief from fraud, breach of contract, professional negligence and gross negligence.

Background

4. The Plaintiff, Zaltic Solutions Inc. ("**Zaltic**") is a company registered under the laws of the British Virgin Islands and is beneficially owned by Mr. Mauricio Roberto De Carvalho Ferro ("**Mr. Ferro**"), a Brazilian citizen.
5. The First Defendant, XL Partners Ltd. ("**XL**") is an international business company registered under the laws of the Commonwealth of The Bahamas carrying on the business of asset management.
6. The Second Defendant, Deltec Bank and Trust Limited ("**Deltec**") is a company incorporated under the laws of the Commonwealth of The Bahamas and licensed by the Central Bank of The Bahamas as a bank and trust company.
7. Mr. Fernando Gimenez ("**Mr. Gimenez**") is an individual personally known to Mr. Ferro who at the material time managed the affairs of Zaltic and gave instructions on its behalf. He was also a "business introducer" who brought prospective clients to XL who required asset management services.
8. Zaltic was introduced to XL by Mr. Gimenez for such investment management services.
9. By an undated Management Agreement ("**The Management Agreement**"), XL was formally engaged by Zaltic to act as Zaltic's investment asset manager.
10. On 01 April 2016, XL and Deltec executed an External Independent Asset Manager Agreement whereby it was agreed that XL would act as an independent asset manager to any client it brought to Deltec who opened accounts and deposited assets with Deltec.
11. Zaltic established an investment management account ("**Account**") with Deltec and Mr. Ferro executed, *inter alia*, the following documents on or about December 16 2016: (i) Deltec's Account Opening Form and Agreement ("**AOA**"); (ii) Deltec's Special Power of Attorney for Independent Managers ("**SPOA**"); (iii) Deltec's General Terms and Conditions ("**T&Cs**"); and (iv) Deltec's Waiver of Instructions Given by Telephone, Electronic Mail and/or Facsimile ("**Waiver**"). Under the SPOA, XL was appointed as attorney-in-fact to act on behalf of Zaltic with certain powers and restrictions to manage the Account.
12. Various authorized payments were made from the Account at Mr. Gimenez's request from January to July of 2017. No written authorization for Mr. Gimenez to act on behalf of Zaltic was ever tendered into evidence, however, instructions from him were accepted by XL. The email account mainly used by Mr. Gimenez to issue such instructions was fegimenez@gmail.com. Up to February 2017, Mr. Gimenez would send instructions directly to Deltec, thereby bypassing XL. [XL was, however, copied on the e-mail instructions sent by Mr. Gimenez to Deltec.]
13. On or about March 2017, XL informed Deltec and Mr. Gimenez that instructions for all of Zaltic's accounts managed by XL should come from XL and not Mr. Gimenez.
14. Thereafter, requests for payments were made by Mr. Ferro by sending a letter of instructions addressed to Deltec and Mr. Gimenez to Mr. Gimenez. The letter of instructions was then forwarded by Mr. Gimenez to XL who then forwarded the instructions to Deltec.

15. On 07 July 2017, a payment request for the transfer of US\$71, 500.00 was sent to XL from the email address: fegiminez@email.com. The email contained a letter purportedly bearing Mr. Ferro's signature. This payment request was allegedly not from Mr. Ferrero ("**First E-mail Request**").
16. On or about 17 July 2017, a second payment request was sent to XL from the e-mail address feginmenez@email.com. This request was for US\$150,000.00. This e-mail request also had a letter of authorization attached which also purportedly bore Mr. Ferro's signature. This payment request was allegedly not from Mr. Ferro either ("**Second E-mail Request**" and collectively, "**E-mail Requests**").
17. XL complied with the two E-mail Requests and sent instructions (with authorization letters purportedly bearing Mr. Ferro's signature attached) to Deltec to execute both payments. Prior to executing either of these payments, Ms. Kaylisa Adderley of Deltec contacted Ms. Alma McIntosh of XL by telephone to confirm the instructions, which Ms. McIntosh did. Once confirmed, Deltec processed the payment instructions from the two E-mail Requests.
18. On 14 July 2017, Mr. Gimenez sent an email to Ms. McIntosh of XL requesting a statement of account for all transactions of Zaltic between May and July of 2017. XL sent the requested statement of account.
19. On 20 July 2017 a transfer instruction purportedly signed by Mr. Ferro for US\$250,000 was received by Ms. McIntosh from an email address that purportedly belonged to Mr. Gimenez - feginmenez@email.com ("**Third E-mail Request**"). This was yet another request which purportedly did not come from Mr. Gimenez or Mr. Ferro. Upon receipt of the Third E-mail Request, Ms. McIntosh forwarded it to Deltec for processing. She subsequently sent the swift code to Mr. Gimenez on the same day. Mr. Gimenez advised that Mr. Ferro did not instruct that payment. Mr. Gimenez then contacted Mr. Mitsuo Alves of XL about the Third E-mail Request and, upon his instructions, Ms. McIntosh notified Deltec to cancel the transfer instruction. It was later discovered that the "E-mail Requests" were potentially fraudulent.
20. Once made aware of the potential fraud, Mr. Gimenez asked Ms. McIntosh to cancel payment instructions emanating from the E-mail Requests, which she immediately communicated to Deltec. Unfortunately, the payments had already been processed and executed by the time it was discovered that neither of the two E-mail requests were authorized by Mr. Ferro.
21. Paragraph 9.1 of the The Management Agreement expressly stated that XL "*shall use [its] best efforts to manage the Client's Assets, with the diligence that [it] would take for [its] own affairs*". Zaltic claimed that there was an implied term in the The Management Agreement that there would be due care and diligence in the execution of XL's services.
22. By a Specially indorsed Writ of Summons and an amended Specially indorsed Writ of Summons filed on 11 December 2018 and amended on 27 November 2020 respectively, Zaltic brought an action against the First and Second Defendants for breach of contract, negligence and/or gross negligence. seeking the following relief:

".....as against XL:

(1) Special Damages of US\$221,500.00

(2) General Damages

(3) Interest, pursuant to the Civil Procedure (Award of Interest) Act, 1992

(4) Costs

(5) Further or other relief

.....as against Deltec

(1) Special Damages of US\$221,500.00

(2) General Damages

(3) Interest, pursuant to the Civil Procedure (Award of Interest) Act, 1992

(4) Costs

(5) Further or other relief"

23. XL filed its Defence and Amended Defence on 11 February 2019 and 06 October 2020 respectively. XL denied the allegations made by Zaltic and claimed that, from December of 2016 and during the continuance of the Management Agreement, business dealings had developed whereby Mr. Gimenez would forward an email attaching a letter from Mr. Ferro making a payment request to Deltec. The instructions, XL alleged, were directed to Deltec and not XL.
24. XL also averred in its Defence that it had informed Deltec that all future instructions relating to trades only would be submitted by XL.
25. XL further averred that Mr. Gimenez would send an email to Deltec attaching transfer instructions signed by Mr. Ferro on behalf of Zaltic. XL was copied in these emails so that it was made aware of intended withdrawal of funds and could thereby adjust liabilities in the account in order to meet the outgoing amounts. It maintained that it never gave instructions to Deltec for withdrawal of funds except for trades.
26. XL also admitted that it had received an email sent to it by fegimenez@email.com on or about 07 July 2017. Attached to the email was a letter addressed to Deltec requesting a transfer payment of US\$71,500.00 to a third party purportedly signed by Mr. Ferro on behalf of Zaltic.
27. On or about 17 July 2017, XL admitted he had received the Second email only, but averred that the email had a letter attached dated 10 July 2017 authorizing a transfer of US\$150,000.00 purportedly signed by Mr. Ferro on behalf of Zaltic.
28. XL also averred that its liability to Zaltic for the transfers is excluded by virtue of express stipulations in the The Management Agreement. Paragraph 9 of the The Management Agreement provides:

“9.3 The Manager shall not be liable for the improper performance by the Bank or any third parties of their obligations towards the Client and the Manager.

9.4 Any damages deriving from the use of the post office telecopy, telephone, fax and email as well as any other means of transmission that may generate losses delays and or alterations, shall be at the Client’s expense.

9.5 Any damages resulting from a lack of legitimation or from undetected false documents shall be at the Client’s expense.”

29. Zaltic filed its Reply to Defence on 07 March 2019 and denied the allegations made in XL’s Defence.
30. Deltec filed its Defence on 06 January 2021 and denied any liability for the two transactions emanating from the E-mail Requests. Deltec averred that the attached letter containing payment instructions had a signature which matched the signature of Mr. Ferro.
31. Deltec also averred that pursuant to the SPOA executed by Zaltic, XL was appointed by Zaltic to request and authorize payment transactions on behalf of Zaltic in relation to the account. Deltec pleaded that the SPOA expressly stated that Deltec had no obligation whatsoever to monitor or supervise the transactions carried out by XL and that Deltec would not assume or be responsible for any liability arising as a result of the acts of XL in its role as Attorney-in-fact.
32. Deltec averred that by virtue of the T&Cs, Zaltic authorized Deltec to rely and act on any instructions or other communications which purport to have been given by Zaltic or from any person duly authorized to act on behalf of Zaltic.
33. Deltec averred that Zaltic executed Deltec’s Waiver which authorized Deltec to act on any given instructions received by email which appeared to Deltec to be given by Zaltic or the Attorney-in-fact authorized to act on behalf of Zaltic. Moreover, Deltec averred that the Waiver provided that if Deltec acted on instructions which were given in accordance with the said authorization, the instructions were deemed to be valid.
34. Deltec also averred that XL authorized the instructions as authorized in both E-mail Requests and that it was not negligent nor breached any contract. Lastly, Deltec pleaded that it was not made privy to either of the E-mail Requests at the time of the purported fraud (as it was not included on the E-mail Requests), only the letters of authorization.

Issues

35. By Zaltic’s Statement of Facts and Issues filed the 08 April 2022, they claim that the issues for determination were:
 - (i) Did XL breach clause 9.1 of the The Management Agreement by complying with the two (2) fraudulent e-mail requests and instructing Deltec to execute both?
 - (ii) Did XL breach an implied term of the Management Agreement, to exercise the reasonable skill and care expected of a reasonably competent Independent

- Manager in managing the assets of Zaltic by complying with the two (2) fraudulent e-mail requests and instructing Deltec to execute both requests?
- (iii) Did XL breach the SPOA by directing Deltec to withdraw and/or transfer the funds relative to the two (2) fraudulent e-mail requests?
 - (iv) Was XL negligent or grossly negligent by:
 - (a) Failing to notice that the two (2) fraudulent e-mail requests were from a spoofed e-mail address fegimenez@email.com and not from Mr. Gimenez's email address fegimienez@gmail.com;
 - (b) Not waiting to receive a follow up telephone call from Mr. Gimenez confirming the payment requests, as was normally done;
 - (c) Not calling or e-mailing Mr. Gimenez or Zaltic to confirm whether they had authorized the fraudulent payment requests;
 - (d) Not noticing that the manner in which the fraudulent cover letters were written did not correspond with how Mr. Gimenez wrote his letters;
 - (e) Not noticing the typographical and grammatical errors in the cover letter and invoice for the second payment request, which should have raised suspicions that it was a fraudulent request; and
 - (f) Not noticing that the invoices were easily made up and obviously fake?
 - (v) Did Deltec breach the AOA by executing the instructions received from XL, relative to the two (2) fraudulent e-mail requests, when XL was not an authorized agent under SPOA to give those instructions?
 - (vi) Did Deltec breach the SPOA by executing instructions from XL, relative to the two (2) fraudulent requests, when XL was not authorized to give those instructions?
 - (vii) Did Deltec breach an implied term of the AOA, to exercise the reasonable skill and care expected of a reasonably competent Bank and Trust Company, by executing the two (2) fraudulent e-mail requests?
 - (viii) Was Deltec negligent or grossly negligent by:
 - (a) Not calling Mr. Ferro to confirm whether he had authorized the transactions relative to the two (2) fraudulent e-mail requests;
 - (b) Not noticing that the invoices for the two (2) fraudulent e-mail requests were easily made up and obviously fake; and
 - (c) Not noticing that the charter flights for the two (2) fraudulent e-mail requests were not departing from or arriving in Brazil, where Mr. Ferro resides.
 - (d) In relation to the first fraudulent e-mail request, by not noticing that,
 - (i) The invoice and the wiring instructions provided a company address in London, but requested payment in US Dollars, not Pounds Sterling;

- (ii) The address for Print Storm Limited on the invoice (One Lime Street, London, EC3M 7HA) is different from its address on the wiring instructions (31 St. John Street, Anup House, Unit 1, 1st Floor, Leicester, England, LE1 3WL); and
 - (iii) The word “Adress” is misspelled on the wiring instructions.
- (e) In relation to the second fraudulent e-mail request, by not noticing that,
- (i) In the wiring instructions, there is a space or a typographical error after 150,000.00 between the open parenthesis and the word “One”;
 - (ii) In the wiring instructions, the amount in words, “One hundred and fifty thousand”, is missing the word dollars;
 - (iii) The date for the charter flight on the first invoice (May 5th, 2017 – October 5th, 2017) overlaps with the date for the charter flight on the second invoice (June 23rd, 201 – July 1st, 2017);
 - (iv) On the invoice there is a grammatical error with the word “State” in the amount stated in words, “One Hundred and Fifty Thousand United State Dollars Only”;
 - (v) In the wiring instructions and the invoice, the funds were being transferred to Raiffeisen bank in Romania, a well-known center for cybercrime in Eastern Europe; and
 - (vi) The invoice does not provide a company address for Loydz Jets.

36. XL filed its Statement of Facts and Issues on 12 April 2022. XL stated that the issues are:

- (i) Whether the disputed email instructions were fraudulent?
- (ii) If so:
 - (a) Whether or not Zaltic or its agents or representative’s email systems were hacked by fraudsters and that this (these) hack(s) resulted in the issuance of the disputed email instructions.
 - (b) Whether or not XL or its agents or representatives email systems were hacked by fraudsters and that this (these) hack(s) resulted in the issuance of the disputed email instructions.
 - (c) Whether or not Deltec or its agents or representatives email system(s) were hacked by fraudsters and that this (these) hack(s) resulted in the issuance of the disputed email instructions?
 - (d) Whether the First and Second Defendants owed a duty of care in respect of the security of its email communications and the payment instructions addressed and provided to Deltec?