COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp. No. 95 of 2023

B E T W E E N

HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED

First Appellant

AND

THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED

(HONG KONG BRANCH)

Second Appellant

AND

BETTAS LIMITED

Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**

The Honourable Mr. Justice Isaacs, JA

The Honourable Mr. Justice Turner, JA

APPEARANCES: **Mrs. Tara Archer- Glasgow with Mr. Audley Hanna, Counsel for the First and Second Appellants**

Mr. Marco Turnquest with Ms Chizelle Cargill, Counsel for Respondent

DATES: **28 February 2024; 27 March 2024**

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Civil Appeal- Banking Mandate- Authority to Act- Jurisdiction- Liberian law- Findings of Fact -Expert Evidence- Costs

The appellants, Hong Kong Shanghai Banking Corporation Limited (HSBC), although identified as two separate entities, are one corporate legal entity incorporated in Hong Kong but carried on banking business through a branch in The Bahamas. The respondent, Bettas Limited is a company incorporated in Liberia and was a customer of HSBC. In September 1986, the respondent opened an account with HSBC's Nassau branch and deposited around $26 million. The appellants claimed that the account was administered from its Hong Kong office, but the respondent disputed this. The appellants refused to comply with instructions from Sunder Kundanmal and later Adrian Kundanmal who were directors of the respondent company, claiming uncertainty over their authority to act on behalf of Bettas. On 22 November 2011 the respondent Bettas sued HSBC, seeking a declaration that Adrian Kundanmal was entitled to give instructions and an order for HSBC to transfer the funds to Bettas. On 5 April 2023, the trial judge found that the account was opened in Nassau, and that Mr. Kundanmal was duly appointed as a director of Bettas, and HSBC was in breach of the banking mandate by not complying with Mr. Kundanmal's instructions.The trial judge ordered HSBC to transfer the funds to Bettas and pay Bettas' costs. On the 12 May 2023, the appellants filed a notice of appeal against the decision of the trial judge on the grounds that, inter alia, the judge erred in determining the existence of a banking relationship and the first appellant's corporate status, failure of the judge to consider jurisdictional issues, failure to weigh evidence appropriately and incorrect findings of fact. On 28 February 2024 after hearing the parties, the Court reserved its decision.

Held: The appeal is dismissed in part. The order of the court below is varied. The order requiring HSBC to pay the costs of Bettas in the court below is set aside. HSBC should bear it's own costs in the court below. HSBC is to pay the costs of Bettas in this appeal to be taxed if not agreed.

HSBC was incorporated in Hong Kong and registered in The Bahamas, operating as a bank in The Bahamas under a license. The jurisdiction of the courts in The Bahamas applied when the action started in 2012. HSBC did not provide reasonable grounds for why Hong Kong would be a more appropriate forum, and the Court finds no basis to interfere with the judge's decision not to stay the trial. The substantive issue concerns the authority of Adrian Kundanmal to give instructions on behalf of Bettas, a company incorporated under Liberian law. The judge favored the evidence presented by Bettas over that of HSBC, and the appellate court should not interfere with the trial judge's factual findings unless they are completely unreasonable. The expert witness did not indicate anyone other than Adrian Kundanmal with the authority to give instructions on behalf of Bettas, and there is no evidence to suggest that someone else has an interest or can give instructions on behalf of Bettas. In conclusion, there is no reason to overturn the judge's declaration that HSBC is obligated to act on the instructions of Bettas as given by Adrian, and HSBC must be accountable for the monies in its account since inception.

Ousman Bojang v Attorney General SCCivApp No 139 of 2022 considered

JUDGMENT

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. This is an appeal against the decision by Charles J (as she then was) where she ordered the appellant to pay monies in an account at the appellant to the respondent upon the instruction of Adrian Kundanmal ("Adrian") whom she found was a director of the respondent with authority to give instructions on behalf of the respondent.

2. For the reasons set out in this judgment I dismiss this appeal in part and order the appellants to pay the costs of the respondent in this court. I will vary the order of the court below which required the appellant to pay the respondent's cost in the court below.

3. The appellant, Hong Kong Shanghai Banking Corporation Limited ("HSBC" or "the appellant") although identified as two separate entities is, as a matter of law, one corporate legal entity. It is a company incorporated under the laws of Hong Kong. It carries on banking business throughout the world. It carries that business through branches or in some cases through subsidiary companies. In The Bahamas, until 2014, it carried on banking business through a branch. I will refer to it at times as 'the Bahamas branch'. HSBC was registered in The Bahamas under section 172 of the Companies Act. That section provides:

> **172. (1) Subject to subsection (2), no foreign company may begin to carry on any undertaking in The Bahamas until it is registered under this Act.**
>
> **(2) Subject to section 173, a foreign company, upon payments of the prescribed fee, shall be entitled to be registered under this Act for any lawful undertaking.**

4. Because it carried on banking business, it was also required to have a licence under the Bank and Trust Companies Regulation Act. It had such a licence.

5. The Respondent, Bettas Limited ("Bettas"), is a company incorporated in the Republic of Liberia. It is accepted that Bettas was a customer of HSBC. It was a matter of dispute in the court below whether the account was opened in The Bahamas through the branch in Nassau or whether it was opened with the branch of the bank in Hong Kong. For reasons which I explain in this judgment, that dispute was in fact not material. It is not disputed that Bettas was a customer of HSBC and not one of it's subsidiaries. There is no dispute that the relationship between Bettas and HSBC is one of contract. Whether the governing law is that of The Bahamas or that of Hong Kong is also immaterial as there is no evidence that the law governing the relationship between HSBC and its customer, Bettas, is different under the laws of The Bahamas than under the laws of Hong Kong.

6. I set out below what the trial judge said were agreed facts which set out the background to this dispute. I acknowledge that the appellant has submitted that not all of the of the 'agreed' facts were agreed and that the judge fell in error in some instances. I will deal with some of those differences during the course of this judgment.

7. In paragraphs 10 to 22 of the judgment she said:

> **"Agreed factual background**
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> **In September 1986, Bettas, by its then directors Benedict Joseph Young, Cheng Wing Kwong and Ann Mary Pak, executed the mandate directed to the Manager of HSBC. The Mandate established an International Deposit Account for Bettas and set out certain of the terms and conditions on which Bettas' Account would be managed.**
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> **The Mandate permits HSBC HK to act on the instructions of Chandru or Sunder singly.**
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> **A document described as a certified copy of the Register of Directors and Officers of Bettas provided that, on 3 September 1986, Benedict Joseph Young, Cheng Wing Kwong and Ann Mary Pak resigned as directors. On the same day, it is Bettas' position that Sunder was appointed Bettas' sole director, president and secretary.**
>
> **Chandru was Bettas' sole shareholder and was purportedly issued bearer share certificates for shares two and three, representing 100 shares in Bettas.**
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> **By letter dated 22 September 1986, HSBC Nassau confirmed that Chandru had visited its office and that he placed USD26,400,000 on deposit ("the Funds") with the HSBC, Bahrain Office, valued as of 22 September 1986. Bettas had transferred the Funds to HSBC Nassau from its account at Canadian Imperial Bank of Commerce ("CIBC").**
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> **On 1 October 1986, HSBC HK, by letter, advised Bettas that (i) it had established the eight US Deposits (Term Deposits) on 22 September 1986; (ii) the Account would continue under the administration of HSBC HK and (iii) Bettas should send all instructions to HSBC HK by letter or by authenticated cable from a bank.**
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> **By letter dated 23 February 1987, HSBC HK acknowledged that Sunder was appointed Bettas' Sole Director, President, Secretary and Treasurer.**
>
> **By letter dated 27 November 1989, Sunder, on behalf of Bettas, instructed HSBC HK that:**

"(A) All term deposits maturing will have one hundred twenty-day terms at the best prevailing rate and would be rolled over automatically at maturity.

(B) Statements, deposits, renewal confirmations, and any other correspondence concerning the subject account should be held at International Deposits Department until further notice."

On or about 10 June 1985, Dupuch & Turnquest, the then Bahamian Attorneys

("D&T") for Bettas, purportedly prepared a Will for Chandru's Bahamian estate. By the Will, Chandru purportedly appointed Sunder as his sole executor and beneficiary of his Bahamian Estate. On 25 July 1995, Chandru passed away.

On or about 5 February 2009, Sunder purported to give the 2009 Sunder instruction to HSBC HK, for him to be provided with Bettas' statement of account.

HSBC HK sought to ascertain Sunder's authority and did not comply with the

instruction.

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

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

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

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

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

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

8. On 22 November 2011, Bettas commenced this action. Originally, the defendants were HSBC and HSBC Bank plc which was the London subsidiary of HSBC. Shortly after the commencement of the action, each Defendant filed an application seeking to stop the case. The first defendant, HSBC, by an Amended Summons filed 29 November 2012 sought to have the action struck out as against it under RSC O.18 r. 19(1)(a), (b) and (d); the second defendant, HSBC Bank plc by a Summons filed 18 May 2012 sought to have the ex parte order granted on 7 February 2012 to file and serve a Notice of Concurrent Originating Summons and any future pleadings on HSBC Bank plc in London England set aside on the grounds that (a) The Bahamas is not the appropriate forum for the claim and (b) there was not sufficient supporting evidence to grant leave under RSC O. 11 r. 1(f) and/or (j). The applications were successful before the Supreme Court judge but the Court of Appeal set aside the order striking out the action and the action was allowed to proceed.

9. The writ and statement of claim was subsequently amended to delete HSBC Bank plc, as a defendant. The defendants were the two branches of HSBC, in Nassau and Hong Kond. As I said earlier, they are one and the same legal entity. The amended statement of claim was served on 15 February 2019. It was in the following terms:

"1. The Plaintiff is a company that was incorporated under the laws of the Republic of Liberia as a Liberian Non-resident Domestic Corporation and at all material times was a customer of the Defendants.

2. The First Defendant is a company that was incorporated under the laws of the Commonwealth of The Bahamas and at all material times carried on business as a commercial bank in New Providence.

3. The Second Defendant is a company incorporated under the laws of Hong Kong and at all material times carried on business as a commercial bank in Hong Kong

4. Mr. Adrian Kundanmal ("Adrian") is the current sole director and shareholder of the Plaintiff having been voted in as a director on 12th March, 2009.

5. Mr. Sunder Kundanmal ("Sunder") is a former director of the Plaintiff having been a director of the Plaintiff from 3rd September, 1986 until 1st April, 2011.

6. Mr. Chandru Kundanmal ("Chandru") is a former shareholder of the Plaintiff having passed away on 25th July, 1995.

Banking contract between the Plaintiff and the First Defendant

7. On or about 2nd September, 1986 the Plaintiff's directors resolved that the Plaintiff should open a US Dollar Account(s) &/or Time Deposit Account with the First Defendant in Nassau and that either Chandru or Sunder be authorized to sign on these accounts singly for and on behalf of the Plaintiff.

8. The Plaintiff's directors also on or about 2nd September, 1986 executed a banking mandate ("the mandate") with the First Defendant in the form of a resolution of the Plaintiff's Board of Directors on the First Defendant's standard form. Sunder signed as a signatory on the mandate. Chandru did not sign as a signatory on the mandate.

9. In or about mid-September, 1986 the Plaintiff's directors provided the First Defendant with all the necessary corporate resolutions and copies of its bylaws to facilitate the opening of an account with the First Defendant.

10. After the Plaintiff executed the mandate and provided the First Defendant with the necessary corporate resolutions and copies of its bylaws in or about late September or early October, 1986 the First Defendant agreed to act as the Plaintiff's banker and established an account ("the account") for the Plaintiff in its International Deposits Department.

11. In addition to the terms and conditions set out in the mandate the following terms were implied in the said contract between the Plaintiff and First Defendant:

a. That the First Defendant would pay the Plaintiff on demand all or any part of the sums that it owed to the Plaintiff; and,

b. That the First Defendant would provide the Plaintiff on demand with information as to the state of account between the Plaintiff and the First Defendant.

12. In or about late September, 1986 the Plaintiff transferred approximately USD$26 million dollars from the then Canadian Imperial Bank of Commerce in New Providence to the First Defendant to fund the account.

Establishment of term deposits

13. Following establishment of the Plaintiff's account at the First Defendant, in or about late September or early October, 1986 the parties agreed that the Plaintiff's account would continue under the administration of the Second Defendant in its International Deposits Department and that the Plaintiff should send all instructions to that office by letter or by authenticated cable from a bank. The First Defendant and/or the Second Defendant then established Account No.567-264957 for the Plaintiff to facilitate its banking activities.

14. On or about 1st October, 1986 the Plaintiff was advised by letter from the Second Defendant that it had established eight USD Deposits ("the term deposits") on 22nd September, 1986 for the Plaintiff.

Transfer of funds to the Second Defendant

15. The Second Defendant is thus holding the Plaintiff's funds, which are subject to the term deposits, to the account of the Plaintiff and/or the First Defendant.

16. In addition to the express terms and conditions set out in the term deposits the following terms were implied into the contract between the Plaintiff and the Second Defendant:

a. That the Second Defendant would pay the Plaintiff on demand all or any part of the sums that it owed to the Plaintiff or alternatively all or any part of the sums due on the maturity of the term deposits; and,

b. That the Second Defendant would provide the Plaintiff on demand with information as to the state of account and the state of the term deposits.

17. On or about 27th November, 1989 the Plaintiff, acting through Sunder, instructed the Second Defendant that *inter alia* all the term deposits should have one hundred twenty day

terms at the best prevailing rate and should be rolled over automatically at maturity.

Funds

18. As of 1st August, 1995 the sum of approximately CAD$69,428,468.39 stood to the credit of the Plaintiff with the Second Defendant and/or alternatively with the First Defendant, which funds were held in nine term deposits.

The Defendants' obligations under the banking contract and term deposits

19. In the premises, the Defendants were obliged to comply with the instructions of Sunder and Adrian given on behalf of the Plaintiff in their capacities as the Plaintiff's directors;

a. To pay the Plaintiff on demand all or any part of the sums that the Defendants owed to the Plaintiff or alternatively all or any part of the sums due upon the expiry of the term deposits; and,

b. To provide the Plaintiff on demand with information as to the state of account and the state of the term deposits between the Plaintiff and the Defendants.

20. On or about 5th February, 2009 Sunder, in his capacity as a director of the Plaintiff, requested that the Second Defendant provide the Plaintiff with a statement of account and current balance of the Plaintiff's account.

21. On or about 8th April, 2011 Adrian, in his capacity as a director of the Plaintiff, met with representatives of the Second Defendant in Hong Kong and requested a full set of account statements for the Plaintiff's account from 1st January, 1995 to date. At this meeting Adrian furnished the Second Defendant with an executed board resolution authorizing the production of these documents. The said letter and board resolution were subsequently provided to the Defendants herein.

22. Further, by the commencement of this action the Plaintiff has demanded the repayment of all the funds in its account at the Defendants or alternatively that the Defendants release all the funds which are subject to term deposits upon their maturity to the Plaintiff.

23. However, in breach of contract and/or the terms of the term deposits, the Defendants have wrongfully failed or refused to comply with the instructions given by or on behalf of Sunder and/or Adrian on behalf of the Plaintiff to provide bank

statements and or to repay the sums in its account or which are subject to term deposits at maturity as instructed or at all and therefore the Plaintiff has suffered loss and damage.

24. In the premises, the Defendants are indebted to the Plaintiff for a sum to be determined on an account taking place; further or alternatively, the Defendants are liable to the Plaintiff in the said sum to be determined for breach of contract.

25. Further, the Plaintiff claims interest pursuant to the Civil Procedure (Award of Interest) Act 1992 and/or the rules of equity on the amount found due to the Plaintiff at such rate and for such period as the court thinks fit.

AND the Plaintiff claims:

1. A declaration that the Plaintiff is entitled to the repayment of the balance of funds standing in its name in its account held by the Defendants as banker to the Plaintiff and deposited therein by the Plaintiff.

2. A declaration that the Plaintiff is entitled to the repayment of all funds standing in its name in its account held by the Defendants as banker to the Plaintiff and deposited therein by the Plaintiff which are subject to term deposits upon maturity.

3. A declaration that the Defendants are obligated to comply with the instructions of Adrian given on behalf of the Plaintiff in his capacity as sole director of the Plaintiff (a) to pay the Plaintiff on demand all or any of the sums that the Defendants owes to the Plaintiff or alternatively all or any part of the sums due on the maturity of the term deposits and (b) to provide the Plaintiff on demand with information as the true state of account and the true state of the term deposits.

4. An order that the Defendants do all things within their power to transfer to the Plaintiff forthwith the balance of funds standing in its name in its account or held on term deposits by the Defendants as banker to the Plaintiff, together with all interest earned thereon.

5. An account be taken by the court as to the respective principal amounts deposited with the Defendants as banker for the Plaintiff and any interest earned on the said funds.

6. Further or alternatively, damages for breach of contract;

7. Interest at the contractual rate applicable to the said account;

8. An order that the Defendants pay or transfer to the Plaintiff such sums as are found to be due to the Plaintiff upon the taking of the account in paragraph three above.

9. An order that the file in this action be sealed.

10. Interest (compound, or in the alternative, simple) as such rate and for such period as the court thinks fit assessed pursuant to the equitable jurisdiction of the court or pursuant to the Civil Procedure (Award of Interest) Act 1992.

11. Costs.

12. Further or other relief, including all further necessary or appropriate accounts, inquiries and directions."

10. On the 17th May, 2019, HSBC served a defence. It was a joint defence of the two named defendants. That defence was in the following terms:

1. The First and Second Defendants adopt the definitions used in the Plaintiff's Amended Statement of Claim filed herein on 15th February 2019 (the "Amended Statement of Claim") unless stated otherwise and without thereby making any admissions. References to paragraph numbers are references to paragraphs in the Amended Statement of Claim and references to the "Defendants" are references to the Defendants collectively, unless the context requires otherwise or unless otherwise specified.

2. Without prejudice to the Defendants' rights to take objection to, and/or to seek to stay all or part of the Plaintiff's actions and/or to seek Further and Better Particulars, the First and Second Defendants plead the following herein by way of defence.

3. The Defendants make no admission to paragraph 1 and the Plaintiff is put to strict proof of the contents therein.

4. Save that the First Defendant prior to becoming inactive carried on business as a commercial bank in New Providence, paragraph 2 is denied as pleaded. In particular the First Defendant avers that it is not incorporated under the laws of the Commonwealth of The Bahamas; but rather, at all material times, was a branch of the Second Defendant and registered as

a foreign company under the Companies Act, Chapter 308 of the Revised Laws of the Commonwealth of The Bahamas. As such, the First Defendant is not incorporated in the manner alleged and is not a separate legal entity from the Second Defendant.

5. Paragraph 3 is admitted.

6. The Defendants make no admission to paragraph 4 and put the Plaintiff to strict proof of the matters contained therein.

7. With respect to paragraphs 4, 5 and 6 of the Amended Statement of Claim, the Defendants do not deny that Sunder Kundanmal is a former director of the Plaintiff or that Chandru Kundanmal is a former shareholder of the Plaintiff. However, the Defendants put the Plaintiff to strict proof with respect to when Sunder Kundanmal ceased to be a director of the Plaintiff; the date that Chandru Kundanmal passed away and/or ceased to be a shareholder of the Plaintiff; by whom and the date when Adrian Kundanmal was appointed a director of the Plaintiff; and/or how and when Adrian Kundanmal became the sole shareholder of the Plaintiff.

Alleged banking contract between the Plaintiff and the First Defendant

8. The Defendants make no admission to paragraph 7 and put the Plaintiff to strict proof of its contents therein, in particular to the elements of the purported resolution and its effect.

9. Paragraph 8 of the Amended Statement of Claim is not admitted as pleaded. The Defendants aver that the mandate executed by the Plaintiff (the "Mandate") was not in the form utilised by the First Defendant (i.e. the Nassau branch of The Hongkong and Shanghai Banking Corporation Limited); but rather, was in the form used by the Second Defendant. The Defendants further aver that, while not executed by him on 2nd September, 1986, Chandru Kundanmal did execute the Mandate on or before 22nd September, 1986.

10. Paragraph 9 is not admitted by the Defendants as pleaded and the Plaintiff is put to strict proof of the matters alleged therein.

11. Paragraph 10 is not admitted as pleaded. In particular, as set out herein, the Mandate was for the establishment of account numbered 567-264957 (the "Account") in Hong Kong with the Second Defendant.

12. Paragraph 11 is not admitted; and the Defendants put the Plaintiff to strict proof thereof. In particular, it is averred

that, at no material time, were there terms in any agreement which required the First Defendant specifically to make payment to or to provide information to the Plaintiff. As the Account was opened with the Second Defendant, any duty to inform or to pay funds would have been owed by the Second Defendant. Further, as shall be set out below, any duty owed by the Second Defendant to the Plaintiff was subject to the Second Defendant's terms and conditions from time to time and its express and/or implied duty to ensure that those purporting to act on behalf of the Plaintiff had the requisite authority to do so.

13. The Defendants make no admission to Paragraph 12; and the Defendants put the Plaintiff to strict proof of the matters contained therein.

Alleged establishment of term deposits

14. On 1st October, 1986 the Second Defendant advised the Plaintiff by letter, that it had opened the Account on 22nd September, 1986 and that the Second Defendant would continue to administer the Account. The Plaintiff was directed to send all instructions to the Second Defendant by letter or by authenticated cable from a bank. Save as aforesaid paragraph 13 is not admitted by the Defendants and in particular it is not admitted that the Plaintiff established any account with the First Defendant.

15. Paragraph 14 is admitted.

Transfer of funds to the Second Defendant

16. Paragraph 15 of the Amended Statement of Claim is not admitted as pleaded. In particular the Second Defendant puts those purporting to have authority to act on behalf of the Plaintiff to strict proof that they are authorised to so act and to receive the funds managed or held to the credit of the Plaintiff by the Second Defendant.

17. The Defendants do not admit paragraph 16 and the Plaintiff is put to strict proof of the matters contained therein; in particular, to any implied contractual terms as alleged or otherwise.

18. With respect to paragraph 17, the Second Defendant does not deny that it received instructions from Sunder Kundanmal on behalf of the Plaintiff that the deposits should have 120 day terms at the best prevailing rate and should be rolled over automatically at maturity.

Funds

19. Having regard to the obligation of the Second Defendant to maintain the confidentiality of its banking relationships and the uncertainty which exists with respect to the identity of the current directors of the Plaintiff and their authority to act on its behalf, the Defendants are unable to admit or to deny paragraph 18 of the Amended Statement of Claim as pleaded.

The Defendants' alleged obligations under the contract and term deposits

20. With respect to paragraph 19 of the Amended Statement of Claim, the Second Defendant does not deny that it was obliged to comply with the instructions of Sunder Kundanmal when he was duly vested with the authority to issue instructions on behalf of the Plaintiff. In this regard, the Second Defendant avers that it duly complied with all such instructions of Sunder Kundanmal at the material times. As shall be set out below, the Second Defendant legitimately ceased complying with directions allegedly made on behalf of the Plaintiff when the authority of the persons purportedly acting on behalf of the Plaintiff became sufficiently questionable to put the Defendants on inquiry as further set out at paragraphs 29.1 to 29.11 below. Save as aforesaid paragraph 19 of the Amended Statement of Claim is not admitted.

21. The Second Defendant contends that the deposits held by it for the benefit of the Plaintiff remained dormant in excess of approximately 20 years prior to Sunder Kundanmal's communications with the Second Defendant in February 2009, claiming to act on behalf of the Plaintiff. Save that it is admitted that on or about 5th February, 2009, Sunder Kundanmal purported to give instructions to the Second Defendant for the provision of the Plaintiff's statement of account, paragraph 20 of the Amended Statement of Claim is not admitted. In particular it is not admitted that Sunder Kundanmal was vested with the authority at that time to issue such instructions on behalf of the Plaintiff and the Plaintiff is put to strict proof in this regard.

22. With respect to paragraph 21 of the Amended Statement of Claim, it is admitted that Adrian Kundanmal met with representatives of the Second Defendant on or about 8th April, 2011, and that at that time he requested account statements. It is also admitted that at this meeting Adrian Kundanmal presented to the Second Defendant's representatives what he purported to be a resolution of the board of the Plaintiff. Save as aforesaid paragraph 21 is not admitted. The Defendants,

however, put the Plaintiff to strict proof as to the authenticity, the effect and the meaning of the said resolution and to the standing of Adrian Kundanmal to conduct business and to give instructions to the Second Defendant on behalf of the Plaintiff.

23. On 30th June 2011, the Defendants' English solicitors, Stephenson Harwood LLP ("SH"), wrote to English solicitors acting on behalf of Adrian Kundanmal, Reed Smith LLP ("Reed Smith"), giving notice that, inter alia, in light of certain inconsistencies in the documents produced by Sunder Kundanmal and Adrian Kundanmal the Second Defendant was not, inter alia, satisfied that Adrian Kundanmal had authority to direct the Second Defendant on behalf of the Plaintiff in relation to the deposits. The Second Defendant will rely at trial upon the contents of the letter, and all other relevant correspondence between SH and Reed Smith, for their full meaning and effect.

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

25. The Second Defendant contends that it was at all material times acting in compliance with the express and/or implied terms of its agreement with the Plaintiff, its policies and practices in place at the material time in relation to the deposits and regarding requests being made in relation to the same.

26. Save that it is admitted that persons purporting to act on behalf of the Plaintiff have made demands for payment, paragraph 22 of the Amended Statement of Claim is not admitted as pleaded. The Defendants put the Plaintiff to strict proof as to the persons duly authorised to act on its behalf and to issue instructions to the Second Defendant on its behalf. The Second Defendant contends that it never denied that it was holding or managing deposits to the credit of the Plaintiff.

27. Save that it is denied that the Defendants breached any contract with the Plaintiff and/or term of the deposits as alleged or at all, or that any actions of the Defendants have caused the alleged loss and damage, paragraph 23 of the Amended Statement of Claim is not admitted and the Defendants put the Plaintiff to strict proof as to the persons duly authorised to act on its behalf and to issue instructions to the Second Defendant on its behalf.

28. Paragraphs 24 and 25 of the Amended Statement of Claim are not admitted and the Plaintiff is put to strict proof with respect to the persons duly authorised to act on its behalf, to issue instructions to the Second Defendant on its behalf and to authorise the pursuit of the relief sought within the Amended Statement of Claim or at all. Further the Defendants do not admit that the Plaintiff is entitled to the relief sought in the prayer to the Amended Statement of Claim and the Plaintiff is put to strict proof in relation to the relief sought.

The Defendants' Case

29. The Defendants' position is that the First Defendant does not maintain or hold any deposits on behalf of the Plaintiff. The Second Defendant has always maintained that, at all material times, it administered the said deposits on behalf of the Plaintiff. The Second Defendant is, and was at all material times, entitled (and required) to ensure that it was in receipt of appropriate/legitimate documentation which proved that the persons, other than the ones who were a party to the Mandate, who were attempting to conduct business on behalf of the Plaintiff were duly authorised to do so. The Second Defendant (acting reasonably at all material times) is not satisfied as to the authority of Adrian Kundanmal (on the Plaintiff's case, the sole shareholder and sole director of the Plaintiff) to act and to issue instructions on behalf of the Plaintiff. The reasons for the Second Defendant not being satisfied include, inter alia, the following:

The Will

29.1 From August, 1986, the sole shareholder of the Plaintiff was Chandru Kundanmal. In March, 2009, the Defendants were informed via Messrs. Dupuch & Turnquest, Bahamian attorneys, that Chandru Kundanmal had passed away on 25th July, 1995.

29.2 A copy of the will of Chandru Kundanmal, dated 10th June, 1985 (the "Will"), was provided to the Defendants by Dupuch & Turnquest on or about 19th May, 2009. By its relevant terms, the Will left the Bahamian property of Chandru Kundanmal to Sunder Kundanmal. The Will on its face appeared to be related exclusively to Chandru Kundanmal's Bahamian property. The shares in the Plaintiff, a Liberian entity, would not, by a reasonable interpretation, have been captured by the disposition.

29.3 Letters of Administration with the Will annexed (the "Probate") were not granted until 2011, notwithstanding the fact that Chandru Kundanmal apparently passed away 16 years prior. The Probate referred to a will dated 10th May, 1985, notwithstanding the fact that the Will was dated 10th June, 1985.

29.4 Adrian Kundanmal has claimed to be the sole shareholder of the Plaintiff and that he acquired that shareholding as a result of (i) Sunder Kundanmal's alleged inheritance of Chandru Kundanmal's shares in the Plaintiff under the Will and (ii) Sunder Kundanmal's alleged subsequent assignment of his shareholding in the Plaintiff to Adrian Kundanmal. No satisfactory documentation has been provided to the Defendants to verify Adrian Kundanmal's claim to be the sole shareholder of the Plaintiff.

29.5 The Defendants shall refer to the Will during the course of the trial of this action for its full terms and effect.

Shares in the Plaintiff

29.6 During the period March, 2009 to April, 2011, the Second Defendant was provided with a series of purported corporate documents in relation to the shares of the Plaintiff as follows:

a) A copy of a Written Consent of the Board and Directors dated 12th March, 2009 that (i) any existing or previously issued share certificate shall be cancelled and deemed void; and (ii) new share certificates shall be issued immediately;

b) A copy of a Register of Members reflecting the issuance of a share certificate (No.4) to "Chandru Kundanmal, deceased" on 25th March 2008; a further copy of a Register of Members reflecting the issuance of a share certificate (No.4) to "Chandru Kundanmal, deceased" on 25th March, 2009 (stated by Dupuch & Turnquest to be a corrected version of the Register of Members); and a copy of a share certificate (No. 4) in the name of "Chandru Kundanmal, deceased" dated 25th March, 2009;

c) A director's written resolution dated 1st April, 2011 referring to the issuance of a new share certificate (No.4 for a total of 100 shares) on 25th March, 2009 and approving the cancellation of said share certificate and issuance of a new share certificate (No. 5) for the said shares (being the entire issued share capital of the Plaintiff) to Adrian Kundanmal; and

d) A copy of a share certificate (No.5, dated 2nd April, 2011) for 100 shares in the capital of the Plaintiff in the name of Adrian Kundanmal.

Having regard (inter alia) to the fact that (i) the share certificate (No.4) referenced at b) above was purportedly issued to Chandru Kundanmal more than 13 years after his alleged death, (ii) the date on the share certificate (25th March, 2009) was not consistent with the date of the share issuance as stated in the Register of Members (25th March, 2008) (albeit the Register of Members was subsequently corrected); (iii) the alleged inheritance of Chandru Kundanmal's shares by Sunder Kundanmal being only evidenced by the Will, which did not effect the disposition of property outside of The Bahamas and therefore did not include the shares of the Plaintiff, a Liberian company, (iv) the absence of evidence showing that the shares had ever effectively vested in Sunder Kundanmal; and (v) the alleged assignment of Sunder Kundanmal's alleged interest in the Plaintiff's shares to Adrian Kundanmal being effected after power of attorney had allegedly been granted to Adrian Kundanmal by Sunder Kundanmal; there was in the reasonable view of the Second Defendant, no clear explanation as to how Adrian Kundanmal came to be the owner of the shares in the Plaintiff, and the Defendants were put on reasonable enquiry. The Defendants shall refer to these purported corporate documents and the Will during the trial of this action for their full terms and effect.

29.7 <u>As stated above, the Defendants are reasonably concerned that the said shares have not in fact passed to Sunder Kundanmal or, therefore, Adrian Kundanmal and that a claim may subsequently be made by a third party to the deposits being held to the account of the Plaintiff.</u>

29.8 Further, and as referenced above, the Defendants understand from documents provided to them by or on behalf of Sunder Kundanmal and/or Adrian Kundanmal, that on 1st April, 2009 (being two years before Sunder Kundanmal had allegedly assigned his purported inherited shareholding in the Plaintiff to Adrian Kundanmal), Sunder Kundanmal had entered into a General Durable Power of Attorney designating Adrian Kundanmal as his attorney in fact. It is not clear to the Defendants upon what basis such a Power of Attorney was granted. Sunder Kundanmal claimed to remain a director of the Plaintiff until 1st April, 2011 and purportedly continued to undertake acts as a director (including apparently signing resolutions of the Board of the Plaintiff) until that date.

Authority of Adrian Kundanmal

29.9 During the period March, 2009 to April, 2011, the Second Defendant was provided with a series of purported corporate documents in relation to the directorship of the Plaintiff as follows:

a) A copy of a Written Consent of the Board and Directors dated 12th March, 2009, signed by Sunder Kundanmal, that Adrian Kundanmal be named as a Director and vice president of the Plaintiff and that Sunder Kundanmal continue as a Director and be named as president of the Plaintiff;

b) A copy of a written resolution of the Directors dated 1st April, 2011, signed by Adrian Kundanmal (for himself) and Adrian Kundanmal on behalf of Sunder Kundanmal accepting the resignation of Sunder Kundanmal as a director of the Plaintiff with immediate effect (the "Resignation Resolution");

c) A copy of a written Consent of the Board of Directors dated 1st April, 2011, signed by Sunder Kundanmal and Adrian Kundanmal accepting the resignation of Sunder Kundanmal as president, treasurer and secretary of the Plaintiff; and electing Adrian Kundanmal as president, treasurer and secretary of the Plaintiff.

29.10 Having regard to the circumstances the Defendants were put on reasonable enquiry, particularly having regard to the fact that the Resignation Resolution (which Adrian Kundanmal executed both on his own behalf and on behalf of Sunder Kundanmal) was executed on the same date as other purported resolutions of the Plaintiff which were signed by both Adrian Kundanmal and Sunder Kundanmal and in view of the General Durable Power of Attorney that had purportedly been entered into by Sunder Kundanmal in favour of Adrian Kundanmal two years earlier (in April 2009).

29.11 In addition to the foregoing, the Mandate permits the Second Defendant to act on the instructions of either Sunder Kundanmal or Chandru Kundanmal singly and not on instructions from any other party. The standard form of mandate was specifically amended to refer to Sunder Kundanmal and Chandru Kundanmal personally and to delete the reference to 'directors' (indeed, the Defendants understand that Chandru Kundanmal was never a director of the Plaintiff). To date, the Second Defendant has not been provided with an amending resolution varying the Mandate to give Adrian Kundanmal authority to direct the Second Defendant in relation to the deposits.

30. Having regard to, inter alia, the matters set out at subparagraphs 29.1 to 29.11 above, the Defendants aver that the Second Defendant was put on legitimate enquiry and has a duty to act prudently in the circumstances. As such, the Defendants aver that the Plaintiff should be required to establish, to the satisfaction of this Honourable Court, that it has duly appointed directors and/or officers vested with the mandate to issue due and proper instructions on its behalf. Accordingly, the Defendants shall refer to the relevant purported resolutions and other corporate documentation during the trial of this action for their full legal effect.

31. Further, having regard to the fact that the Defendants have acted prudently upon being put on reasonable enquiry, the Defendants costs of the action should be paid or alternatively there should be no order as to costs in the context of these proceedings.

Save as herein before expressly admitted to, each and every allegation contained in the Amended Statement of Claim is denied as if each were set out herein and traversed seriatim. [Emphasis added]

11. It is to be noted that HSBC does not deny the existence of the account or that it holds monies for Bettas. It asserts that having regard to the various circumstances set out in paragraph 29 of it's defence it is put on inquiry as to whether Adrian and Sunder Kundanmal (Sunder) had the authority to give instructions to act on behalf of Bettas. HSBC's position was that it had bona fide concerns that if it acted on the instructions of Adrian it may be liable to others for the monies held in Bettas' account at HSBC. It's position was that it had no interest in the matter and was in a position similar to that of an interpleader. HSBC said it would only act if a court of competent jurisdiction determined that Adrian had the right to give instructions on behalf of Bettas. Earlier, it regarded the courts of England as the appropriate forum and later its position was that the courts of Hong Kong was the appropriate forum.

12. On 11 April, 2022 the matter came on for trial. This was after numerous case management hearings which began on 9 November, 2020 where various directions were given. One of the directions given was that "any summonses and or applications are to be filed by 28 September, 2021. Other hearings took place and a pre trial review took place on the 7 February, 2022 prior to the start of the trial.

13. At the trial Bettas adduced evidence of one witness of fact. HSBC adduced three witnesses of fact. Bettas and HSBC each adduced one expert witness on Liberian law. All of the witnesses were cross examined.

14. The judge reserved judgment. On the 5 April, 2023 the judge delivered a judgment. It was 85 pages long. It set out the evidence led and set out her findings on disputed evidence of the factual witnesses. In the judgment, she also analyzed the evidence of

the two expert witnesses on Liberian law and set out her findings on issues of Liberian law.

15. The trial judge summed up her findings.

16. On the disputed evidence of facts she said:

> **"Factual findings on witnesses of fact**
>
> **[122] On a balance of probabilities, having observed the demeanour of the witnesses as they testified, I prefer the evidence of Adrian as opposed to that of the Defendants' witnesses. I do however accept some aspects of the evidence of the Defendants' witnesses especially that of Mr. Saigal. I found Christina and Mr. Chau's evidence to be unreliable especially when they testified during cross-examination.**
>
> **[123] With respect to Mr. Saigal, he had no personal knowledge of any facts relating to the establishment of the Account since he only joined HSBC HK in 2005. He did not personally perform a search of HSBC Nassau's accounts to ascertain whether or not Bettas had an account with it. He admitted that the Defendants did not raise any concern with Sunder about his signature on any documents and that no other person has come forward to lay a claim to any of Bettas' funds and that HSBC HK's main concern was whether Sunder and now Adrian has authority to act on Bettas' behalf.**
>
> **[124] Christina's role in these proceedings appear to be minimal since she did not seem to recall anything not even any of the dealings she had with Adrian. I did not believe her given the enormity of the funds that HSBC HK admitted that it is holding as an "interpleader" for Bettas. That said, her evidence was rather unhelpful.**
>
> **[125] Like Mr. Saigal, Mr. Chau also had no personal knowledge of any of the matters in this case. His evidence mainly consisted of his reliance on the affidavits of Ms. Johnson to demonstrate that Bettas never had an account with HSBC Nassau although I find as a fact that both Chandru and Sunder visited HSBC Nassau where the Account was initially set up. It was at that branch that USD 26,400,000 was deposited. I also find as a fact that the movements of Bettas' Funds around the globe to Bahrain, London and Hong Kong was not within Bettas' knowledge, control and consent.**
>
> **[126] While the Defendants invited this Court to treat Adrian's evidence with caution, I found him to be clear and straightforward in his evidence. He was obviously peeved that he and Sunder were given the 'runaround' especially since**

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

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

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

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

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

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

forward to seek information about the Account since it was set up in 1986.

[132] The Defendants alleged that they were "put on reasonable inquiry." They have failed to plead any facts that could put them or any reasonable bank on inquiry. The corporate resolutions and issuance and cancellations of shares referred to in paragraph 29 of the Defence were all done in accordance with Bettas' Articles of Association and are valid. Their very own Mr. Steve Smith, in his 2008 memo, stated that no real attempt was made to find and trace anyone associated with Bettas' Account although they had addresses and telephone numbers for Sunder."

17. On the disputed expert evidence of Liberian law, the judge said:

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

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

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

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

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

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

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

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

18. The judge after identifying the issues for the court's consideration said:

Conclusion

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

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

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

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

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

19. The trial judge then made the following orders:

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

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

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

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

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

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

20. HSBC has appealed that order. The notice of appeal is 8 pages long with a number of grounds. It is not necessary to set out the entirety of the notice. In their written submission HSBC helpfully shortens the grounds as follows:

Ground 1 – Error in Finding that Account Established in The Bahamas but Administered in Hong Kong and that there was a Banking Relationship between the Respondent and the First Appellant

Ground 2 – Incorrect finding that the First Appellant is a domestic Bahamian Corporation Against the Weight of the Evidence

Ground 3 – Failure to Properly Consider and Determine the Forum Challenge

Ground 4 – Error In Giving Too Much Weight to Evidence of Adrian Kundanmal in Circumstances Where He Had No Personal Knowledge

Ground 5 – Improper Exercise of Discretion In relation to Appellants' Factual and Expert Evidence

Ground 6 – Incorrect Finding That Adrian Kundanmal Is Entitled To Give Instructions to the Appellants And the Appellants Are In Breach Of The Banking Mandate

Ground 7 – Misapplication of Various Relevant Legal Authorities

Ground 8 – Incorrect Finding that Sunder Kundanmal and Adrian Kundanmal Were And Are, Respectively, Duly Appointed Directors And Officers Of the Respondent and Authorised To Act on the Respondent's Behalf

Ground 9 – Failure to Adequately Distinguish Between the Appellants When Determining Their Respective Rights, Liabilities and Obligations

Ground 10 – General Error In Applying The Law And Considering The Entirety of The Evidence Led At Trial

21. I will deal with the grounds under four heads.

Jurisdiction

Appropriate Forum

Findings of Fact

Findings on Liberian law

Jurisdiction and Governing law

22. The language of the trial judge may have been infelicitous, but there is not any dispute that HSBC is incorporated in Hong Kong and was registered in The Bahamas under the Companies Act. It also carried on the business of banking in The Bahamas pursuant to a licence granted to it under the Banks and Trust Companies Regulation Act. There is no credible dispute that Bettas was a customer of HSBC and that it's relationship was contractual. This is so whether it was governed by the laws of The Bahamas or the laws of Hong Kong. There is no need to distinguish between the rights, liabilities and responsibilities of the "two" appellants. There is none. They are the same legal entities with the same rights, duties and obligations to Bettas.

23. In 2012 when this action was commenced, HSBC was subject to the jurisdiction of the courts of The Bahamas.

Forum Challenge

24. HSBC submits that the judge failed to properly address the forum challenge. In my view this ground has no merit. There can be no dispute that The Bahamas court had the jurisdiction to hear this matter. When this action was commenced, HSBC was registered in The Bahamas under the Companies Act and was carrying on banking business in The Bahamas. It did not cease to carry on banking business until 2014, well after this action

was commenced. HSBC never applied to the court for a stay of the proceedings against it. It is correct that applied to strike out the action under Order 18 Rule 19 of the then Rules of the Supreme Court, It is also correct that HSBC Bank plc applied to strike out the order granting leave to serve it out of the jurisdiction under the court's long arm jurisdiction. But the action against HSBC Bank plc was discontinued. It is also correct that action against HSBC continued after the successful appeal against a dismissal order under Order 18 Rule 19. HSBC did not apply to stay the action against it. As noted in paragraph 21 above as far back as 9th November, 2020 the judge at a case management hearing directed that any interlocutory applications be made by September, 2021. This was done after the defences were served and HSBC foreshadowed that it served a defence "without prejudice to the Defendants' rights to take objection to, and/or to seek to stay all or part of the Plaintiff's actions".

25. HSBC's argument that the Court of Appeal's judgment restoring the action after it was struck out under Order 18 Rule 19 prevented it from applying earlier for a stay of the proceedings against it is in my judgment misconceived. The court in it's judgment on appeal simply stated the well known proposition that striking out of an action under Order 18 Rule 19 is a draconian remedy which should only be exercised in clear cases. There was nothing in that judgment which prevented HSBC from applying shortly after it served its defence to stay the action on the ground that there was a more appropriate forum to adjudicate on the dispute. Whilst the issue of a strike out under Order 18 rule 19 may have been 'res judicata', that has nothing to do with a application for a stay on an appropriate forum ground. In her judgment, the trial judge said:

> **The Defendants actively took part in these case management hearings and made at least three applications, none of which included a summons to challenge the jurisdiction of the Court to hear this matter. However, in both oral and written submissions, the Defendants referred to the Summons filed on 18 May 2012 by the then Second Defendant, HSBC Bank Plc to renew its application for this Court to consider the issue of forum non conveniens arguing that, although such an application ought generally to be made at an early stage of the proceedings, the Court could exercise its discretion under its inherent jurisdiction to grant such a stay at this stage of the proceedings because this is an exceptional case since the Defendants, at an early stage, contested the jurisdiction of this Court and expressly argued that The Bahamas was not the appropriate forum for the trial of this dispute.**
>
> **However, the Court of Appeal ordered that the existence of a banking relationship in The Bahamas be tried. The Defendants submitted that if this Court were to find that there has never been any relationship or account in The Bahamas, then it would ineluctably follow that (i) The Bahamas is not the natural or appropriate forum for the trial of the dispute between Bettas and HSBC HK; (ii) Hong Kong would be an available forum**

which would clearly be more appropriate for the dispute than The Bahamas and (iii) these proceedings should be dismissed against HSBC Nassau and stayed against HSBC HK.

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

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

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

Consequently, the Court did not permit the Defendants to raise a forum challenge finding that HSBC HK submitted to the jurisdiction of this Court when it filed an unconditional appearance. True, the Court ought not to make orders which cannot be enforced but there are avenues open to Bettas to apply to the courts of Hong Kong to enforce an order of this Court if it is successful. This submission is, however, premature.

In my judgment, if HSBC HK had intended to challenge the jurisdiction of the Court, a proper application supported by affidavit evidence ought to have been made and drawn to the attention of this Court. Nothing prevented HSBC HK from doing so.

To reiterate, such a serious challenge to the jurisdiction of this Court cannot be raised in submissions. More than likely, had it been raised earlier, it would have been dealt with as a separate issue long before the trial would have commenced since a forum

challenge, if successful, has the ability of staying the proceedings.

26. I accept that HSBC challenge was not to the jurisdiction of the court but rather a challenge to whether the court was an appropriate forum and whether Hong Kong was a more appropriate forum. But in my judgment, it was a proper exercise of the judge's discretion not to entertain an application for a stay on a 'appropriate forum ground' which was being made on the first day of the trial. This was not a jurisdiction argument which can be made at any time since a court cannot exercise a jurisdiction that it does not have. It is an application whether the court should exercise a jurisdiction it undoubtedly has to determine a dispute in favour of having the matter determined in another more appropriate forum.

27. In this appeal, HSBC has not advanced any grounds why Hong Kong is a more appropriate forum other that the monies are now in Hong Kong and that since the commencement of this action HSBC no longer carries on banking business in The Bahamas. There is no suggestion that the laws of Hong Kong are different from the laws of The Bahamas on the contractual relationship.

28. In a letter of 30 July, 2009, HSBC position was:

> **We have considered the claim carefully and, after examining the documents supplied, have decided that we are unable, at this stage, to progress matters further. We are, however, keen to have a resolution to your clients' claim.**
>
> **We believe this would be best achieved by your obtaining a formal order from a court in the UK. We will co-operate fully with any court proceedings and would, of course, respect any order that was delivered.**

29. On the 30 June, 2011, HSBC's position was:

> **Accordingly, the Bank invites your clients to apply to the English Courts for an order establishing AK's authority to give instructions on behalf of the Company. This suggestion was previously made to SK (by way of the Bank's letter to his legal representatives, Dupuch & Turnquest & Co dated 30 July 2009, but for some reason SK chose not to make such an application.**
>
> **Bank does not intend to take an unduly hostile position on any such application, but would put AK to proof of his authority and would seek to test the evidence and make appropriate submissions to the Court. We cannot see any reason for AK not to make such an application, if he believes he is entitled to act on behalf of the Company, and if he is not willing to do so, that would be a further matter of concern to the Bank.**

> **Should your clients fail to make such an application, the Bank reserves the right to make an application itself to the Court for a declaration in relation to the ownership of the sums held in the Account.**

30. Later in a letter from it's English solicitors dated 28 July, 2011, HSBC position was:

> **As set out in our letter of 30 June 2011 the Bank considers itself to be on inquiry as to whether AK is cntitled to instruct the Bank on behalf of the Company. We therefore invited your client to make an application to the Court for an order establishing AK's authority. For the reasons set out below, notwithstanding your letter of 12 July 2011, the Bank's position remains unchanged.**
>
> **.....**
>
> **Appropriate venue**
>
> **In relation to the appropriate venue for the application. for the avoidance of any doubt, we confirm that the Bank will abide by a decision of the English Courts.**

31. The position of HSBC was that England (not Hong Kong) was an appropriate forum and that it would abide by a decision of the English court. It is unclear why England can be an appropriate forum but The Bahamas is not. This is particularly so since the matter had nothing to do with England or HSBC Bank plc. In an affidavit filed on behalf of HSBC on the 28th November, 2012, Mildred Johnson said:

> **"Additionally, even if this court were to hold that a cause of action existed against the First Defendant, the Second Defendant HSBC Bank plc, which is a member of the HSBC group, could not be a necessary or proper party to this action. This is not the entity referred to in the evidence of the Plaintiff as holding the deposits for the claimed account. <u>In fact, the Second Defendant has no relationship with this material at all</u> and even if the Plaintiff had a cause of action against the First Defendant in the Bahamas, the Second Defendant could not be a necessary and proper party to the litigation." [Emphasis added]**

32. In these days of remote hearings the fact that the bank's witnesses are physically in Hong Kong is immaterial. There is no suggestion that additional evidence could have been adduced in Hong Kong that could not have been adduced in The Bahamas or that other procedures existed in Hong Kong that made it a more appropriate jurisdiction to adjudicate on the dispute. In my judgment, The Bahamas was an appropriate forum in 2012 as England would have been in 2011.

33. In our judgement there is no basis for this court to interfere with the judge's exercise of her discretion not to stay the trial which was about to commence.

Findings of Fact

34. HSBC argues that the judge was wrong to find that the monies were deposited at HSBC in Nassau. This is a finding of fact and it is settled law that an appellate court will not set aside a finding of fact made by a trial judge unless it is unreasonable and plainly wrong. The law was summarized recently in **Ousman Bojang v Attorney General** SCCivApp No 139 of 2022 . In that judgment this Court said:

> **It is settled law that a judge's factual findings can only be overturned on appeal if they are plainly wrong or the judge's decision is one that no reasonable judge could have reached or is rationally insupportable. This point has repeatedly been made by this Court. A recent example is that of Minister Responsible for Crown Land v Findeisen SCCivApp No 79 of 2022. As recently as this year this was pointed out by the English Court of Appeal in Deutsce Bank AG v Sebastian Holdings Inc [2023] EWCA Civ 191 where the court considered and applied the decisions of the English court in Volpi v Volpi [2022] EWCA Civ 464 and Walter Lily & Co v Clin [2021] EWCA Civ 136.**
>
> **30. The court pointed at paragraph 54 of the Deutsche Bank Case:**
>
> **"54 These considerations apply with particular force when an appeal involves a challenge to the judge's assessment of the credibility of a witness. Assessment of credibility is quintessentially a matter for the trial judge, with whose assessment this court will not interfere unless it is clear that something has gone very seriously wrong. It is not for this court to attempt to assess the credibility of a witness, even if that were possible, but only to decide, applying the stringent tests to which I have referred, whether the judge has made so serious an error that her assessment must be set aside."**
>
> **31. Earlier, in Volpi v Volpi (which was applied in Deutshe Bank) the court regarded the following as settled law:**
>
> **"(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.**
>
> **(ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.**

(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

28 (iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been [sic] better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

35. Although in my judgment, nothing turns on where the monies were deposited, the finding that the monies were deposited at the branch in Nassau is a reasonable finding of fact by the trial judge. There was no witness who was present in 1986 when the monies were deposited. However, there are two pieces of correspondence in 1986 when the account was opened which the trial judge records in her judgment which in my view makes her finding unassailable She records:

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

"The subject customers have been dealing with this Bank since mid 1977 and our experience has been entirely satisfactory. These customers carry substantial deposit balances and as noted above, the accounts are handled in a satisfactory manner."

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

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

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

36. In our judgment, it cannot be said that the judge's finding that the account was opened at the Nassau branch of HSBC was plainly wrong. It is not clear what is meant by the assertion that the account was 'administered' from Hong Kong. What ever that means from an internal policy point of view of HSBC, the contractual relationship was between Bettas and HSBC. The finding that the account was opened at the branch in Nassau is not one that could or should be set aside by this appellate court.

37. In my judgment, the substantive issue is whether the judge erred in finding that Adrian had authority to give instructions on behalf of Bettas. As Bettas is a company incorporated under the laws of Liberia, this a matter of Liberian law. In this regard, the judge heard evidence from two experts and preferred the evidence of the expert called by Bettas over the expert called by HSBC. This a matter for the trial judge. It is settled law that an appellate court should not interfere with a trial judge's finding of facts, unless the finding of facts are completely unreasonable. This includes the evaluation of expert evidence of foreign law which is an issue of fact in the trial. In the judgment, the judge made it clear why she preferred and accepted the evidence of Ms. Blamao. At paragraph 179 of the judgment the judge said:

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

38. There is nothing unreasonable in that finding. Indeed, it is consistent with common sense. Counsel for HSBC asks the court to set aside that finding as it was not reasonable for the judge to have preferred the evidence of Ms Blamo over Mr. Rutkowski. With respect, it would be no more unreasonable for the judge to prefer the evidence of Mr. Rutkowski over that of Ms Blamo. As pointed out, we are not trial judges. The findings of fact are the duty of the trial judge. As I said the appellate court only sets aside those findings if they are completely unreasonable and plainly wrong. It is not without significance that even the expert witness did not suggest that there was somebody else other than Adrian who had the authority to give instructions on behalf of Bettas. There is nothing in any public register of Liberia to suggest that there was any other person outside the Kandamal family that had anything to do with Bettas. Nobody in more than twenty years made any contact with HSBC about Bettas other than the Kandamals. The money certainly does not belong to HSBC and there is nothing in the evidence or in

HSBC's own investigations to suggest that someone else has an interest or can give instructions on behalf of Bettas.

39. In summary, I see no reason to set aside or overturn the judge's declaration that HSBC is obliged to act on the instruction of Bettas as given to it by Adrian. HSBC must account to Bettas for the monies it has had in its's account since inception.

40. However, I am concerned that the judge made an order requiring HSBC to pay Bettas' costs of the action. The matters pleaded in paragraph 29 of it's defence, were sufficient to put HSBC on inquiry as to whether Adrian (and Sunder before him) had the authority to give instructions on behalf of Bettas. It sought the protection of a court order and this in my judgment was the prudent thing to do. In a letter of 30th June, 2011 referred to earlier, HSBC's solicitors said:

> **Bank does not intend to take an unduly hostile position on any such application, but would put AK to proof of his authority and would seek to test the evidence and make appropriate submissions to the Court.**

41. That appears to have been a responsible position for the bank to adopt. However, HSBC appeared to be actively resisting the claim by Bettas. This included asking for security for costs in an action it invited Bettas to make. This is buttressed by the fact that it has refused to accept the decision of the court below, when it has no interest in the matter and when it said that it would have accepted an order of an English court.

42. Having obtained the court order, this further appeal was not necessary. However all things considered, we set aside the order requiring HSBC to pay the costs of Bettas in the court below. HSBC's should bear it's own costs in the court below. However, HSBC must pay Bettas' cost of this appeal to be taxed if not agreed.

The Honourable Sir Michael Barnett, P

43. I agree.

The Honourable Mr. Justice Jon Isaacs, JA

44. I also agree.

The Honourable Mr. Justice Bernard Turner, JA