In The Supreme Court of Bermuda

(COMMERCIAL COURT)

CIVIL JURISDICTION

2007: No. 246

BETWEEN:

JOHN MACMILLAN STEVENSON PATTON
(as Trustee of the J M S Patton Will Trust)

First Plaintiff

-and-

STEPHEN P COOK
(as Trustee of the J M S Patton Will Trust)

Second Plaintiff

-v-

THE BANK OF BERMUDA LIMITED

JUDGMENT
(In Court)

Date of Hearing: May 16-17, 2011
Date of Judgment: June 3, 2011

Timothy Marshall, Marshall Diel & Myers, for the Plaintiffs
Narinder Hargun, Conyers Dill & Pearman, for the Defendant

Introductory

1. The Plaintiffs are Trustees of a family Will Trust who complain that the Defendant Bank acted in breach of contractual and/or tortious duties owed to them as customers by virtue of the way in way they sold certain shares held in the relevant account. The Plaintiffs seek damages in the amount of $176,559, being the amount which would have been received by them had the shares been sold after a quarterly dividend was paid, as they contend ought to have occurred.

2. The amount in dispute is a modest one in Commercial Court terms, but is significant to both sides of the present dispute for different reasons. The Plaintiffs as Trustees are (or were at all material times) obliged to maximize the income generated by the Trust assets. The Bank is concerned to ensure that a generic form of contract in relation to a custodial banker/customer relationship is not construed in so liberal a way as to open the floodgates to litigation of a far higher financial order in future cases.

3. One peripheral point seemed obvious at the outset. With the benefit of hindsight, the First Plaintiff, Dr. Patton, demonstrated excellent financial judgment in deciding in July 2005 to sell 37,486 Butterfield Bank shares ("the Shares") with a view to diversifying the Trust's assets, at $42.50 per share in a rising market. Those shares today would likely sell at less than $1.40 per share. However, the present claim merely requires the Court to analyse the narrow issue of whether or not the Bank is liable to the Plaintiffs for failing to ensure that the Shares were sold on such date as would allow the Plaintiffs to receive the benefit of the dividend which was announced on July 26, 2005 and paid effective August 5, 2005.

The issues in controversy

4. The Plaintiffs' primary claim is pleaded as follows in paragraph 10 of their Amended Specially Endorsed Writ of Summons:

> "*It was a specific term of the Underlying Agreement that the Defendant would only deal with the Shares in accordance with the instructions of the Trustees, and in breach of that term and contrary to the Instruction, the Defendant sold the 37,486 Shares prior to the receipt of the dividend, the details of which are set out in the following paragraph.*"

5. The Defendant in paragraph 7 of its Amended Defence avers that:

> "*…the sale of the Shares was in accordance with the written instructions contained in the fax dated 26 July 2005…Further and in any event, the faxed instruction dated 26 July 2005 superseded the Instruction and/or Agreement, the existence of which is in any event denied.*"

6. The Plaintiffs' main[1] alternative claim is set out in paragraph 12 of the Statement of Claim in the following terms:

> "*Further and in the alternative, the Defendant owed the Plaintiffs a statutory duty under the Supply of Services (Implied Terms) Act 2003 as well as a common law duty to take reasonable care and exercise reasonable skill in interpreting, ascertaining, and acting in accordance with the Plaintiff's Instruction under the Underlying Agreement. The Defendant in selling 37,486 Shares prior to the receipt of the dividend failed to take reasonable care and skill in carrying out the Plaintiff's clear and unambiguous Instruction.*"

7. The Defendant's plea in response to this was in essential terms as follows:

> "*As regards paragraph 12 and 13 of the Statement of Claim, it is averred that the Account was a self-directed account. Only the Trustees could decide when to buy or sell the Shares….When Dr. Patton stated he wanted to sell the Shares on 26 July 2005 at $42.50 and confirmed his instruction clearly in writing, the Bank carried out his instruction and sold the shares for that price…*"

8. The central issues to be determined turn upon the construction to be placed on the agreement pursuant to which the Plaintiff's account with the Defendant was operated as regards whether either:

   (a) the Bank had an implied contractual or a tortious duty in the event of any ambiguity to exercise reasonable care and skill to ensure that they understood the Trustees' instructions (and if so, whether they breached such duty); or, alternatively

   (b) was any such implied contractual duty one which could not be contracted out of by virtue of the terms and effect of section 6 of the Supply of Services (Implied Terms) Act 2003?

The contract

9. The Shares were held, it is common ground, by the Bank pursuant to the terms of a Custodian Account Contract dated January 20, 1997 ("the Contract"). The key Terms and Conditions were the following:

> "*…(2) The Bank will hold, disburse or otherwise deal with the Securities in accordance with such instructions as may be given by the customer from time to time. The Bank may require any such instructions to be in writing and the Bank*

[1] A further alternative common law negligence claim is pleaded in paragraph 13 of the Statement of Claim, but in substance it adds nothing to the common law claim pleaded in paragraph 12.

will incur no liability in consequence of its acting or omitting to act on any such instructions should there be any doubt, error or ambiguity therein.

(3) The Bank is authorized without reference to the customer to take any action in relation to the Securities as it may in its discretion from time to time consider necessary or expedient and in particular but without in any way limiting the generality of the foregoing:-

(a) request payment of and receive all interest, dividends, bonuses and other distributions in respect of the Securities.

(b) deal with any Securities either as principal or agent through any such broker/agent as the Bank in its discretion thinks fit after receipt of instructions from the customer.

(c) utilize the services, including nominee facilities of any safekeeping agent with whom the Bank has established arrangements.

(d) in the absence of timely instructions from the customer, take up such rights or new issues of such shares in relation to the Securities or to sell such rights or to renounce the same as the Bank in its discretion thinks fit..."

10. The Plaintiffs' counsel pointed to paragraph (3) as an indication that the Bank had considerable discretion despite the nomenclature of the account. The Bank's counsel argued that paragraph (2) made it clear that the Bank was not liable for any ambiguities in the Plaintiffs' instructions.

Factual findings-what instructions did the Plaintiffs give in relation to the sale of the Shares?

11. Although oral evidence was given by Dr. Patton, the 1st Plaintiff, and by Martha Myron and Cole Simons on behalf the Bank, the central facts were not in dispute. It was common ground that:

    (a) Martha Myron (now no longer employed by the Bank) in June 2005 became the Trust's Relationship Manager who met with Dr. Patton on July 18, 2005 to discuss, *inter alia*, his desire to sell the Shares before the dividend date in order to diversify the Trust's portfolio. He also stated at the meeting that his step-mother derived income from the Trust;

    (b) although the precise dividend date was not known, Butterfield Bank dividends were at that time generally declared and paid on a quarterly basis;

(c) Martha Myron offered to forward to the Bank's trading desk an anonymous expression of interest in selling a large bloc of Butterfield Bank shares, to which Dr. Patton agreed. She further told him that she would be away over the Cup Match holiday;

(d) Cole Simons was at all material times also a relationship manager with the Bank. On July 26, 2005 he was contacted by the Bank's trading desk in the absence of Martha Myron and was told there was interest in the market in a large bloc of Butterfield shares. Simons called Myron at home and Myron told Simons to contact Dr. Patton. Mr. Simons called Dr. Patton who said he wished to sell at $42.50 per share and the relationship manager requested written confirmation of these oral instructions, which were received by the Bank from Dr. Patton by fax later that same day;

(e) neither Mr. Simons nor Dr. Patton raised the issue of the timing of the sale when the client gave his oral and written instructions in relation thereto;

(f) on July 26, 2005, the Butterfield Bank announced its quarterly dividend, as reported in the Royal Gazette the following day, to be payable as of August 5, 2005 (a 41 cents dividend and a 1 for 10 stock split). Some of the Shares were sold on July 27; the vast majority were sold on August 1 with a settlement date of August 4, 2005, one day prior to the dividend payment date;

(g) Ms. Myron returned to work on August 4, 2005 and spoke to Dr. Patton by telephone, during which conversation he expressed concern about the timing of his trade;

(h) at a meeting on September 21, 2005 chaired by Manager Barbara Tannock, Dr. Patton stated he felt the Trust was entitled to the dividends because he had told the Bank that he did not want to sell the Shares before the ex-dividend date.

12. Having regard to the oral and documentary evidence, I find that:

(a) Dr. Patton did orally instruct Ms. Myron on July 18, 2005 that he wished to sell the Shares ex-dividend. Ms. Myron recorded this instruction (albeit not expressed as a formal instruction) in her contemporaneous meeting notes and in the Bank's electronic client file;

(b) Ms. Myron did not refer to the ex-dividend instruction when she asked Mr. Simons to contact Dr. Patton on July 26, 2005 about the prospective sale. Mr. Simons saw no need to refer to the Trust's electronic client file to which he had access;

(c) the Trust's electronic file on July 26 when Mr. Simons spoke to Dr. Patton by telephone contained the following entry in a 'Call Report' in relation to Ms. Myron's July 18, 2005 meeting with Dr. Patton: "*He indicated that he did not want to sell before he could take advantage of the dividend (ex-dividend date)…We ended the meeting with our indication that we would put an anonymous expression of interest of a large block sale with a trading desk, and if a buyer appeared that Dr. Patton could then decide if he wanted to participate. I also told him that I would be away…* ";

(d) Dr. Patton on July 18, 2005 made a clear and unambiguous oral statement as to the time-frame within which he wished to sell the Shares. He did not feel it necessary to reiterate these instructions when he orally and in writing instructed the Bank on July 26, 2005 that he wished to sell the Shares for a specified price. This was in part due to the fact that the only issues canvassed in his telephone call with Mr. Simons were (a) did Dr. Patton wish to sell the Shares; and (b) if so, at what price;

(e) the written instructions given by Dr. Patton on July 26, 2005 could only fairly be read as instructions for an immediate sale. The relevant fax was inconsistent with the earlier oral instructions, in stating:

> "*…As per our phone conversation, please offer for sale 37,486 Butterfield Bank shares, held by the JMS Patton Will Trust…at an offer price of BD$42.50…*";

(f) if Mr. Simons possessed actual knowledge of Dr. Patton's previous verbal instructions as regards the timing of the sale had sought and received the July 26, 2005 written instructions, he would likely have raised the inconsistency with Dr. Patton before forwarding the instructions to the trading desk to proceed with the sale;

(g) if the sale had been closed on or shortly after August 6, 2005 (instead of on July 27 and, as regards most of the Shares, on August 1, 2005), the Plaintiffs would have received the benefit of the dividend;

(h) the Plaintiffs more likely than not would have been able to sell the Shares ex-dividend during the six months immediately following the actual sale for at least the same price. The market share price in fact rose in the six months after the sale complained of with monthly share volumes well in excess of the size of the Plaintiffs' bloc of shares, and average trade prices above the $42.50 sought by Dr. Patton[2];

(i) the volume of customers of the Bank holding custodial accounts makes it commercially impracticable for its relationship managers to routinely check

[2] Trial bundle pages 79-81.

the conformity of written instructions with previous oral instructions not referred to therein.

13. I found all witnesses to be credible and any inconsistencies or controversies were due to errors in recollection or semantic differences on matters of peripheral importance which do not require formal determination by this Court.

Legal findings: which party under the Contract bore the risk of ambiguities in instructions?

The key legal issue

14. The dispute in substance turns on a legal analysis of the terms of the Contract (which clearly contemplate that the Bank is not responsible for any ambiguities when written instructions are requested and given) and the Supply of Services (Implied Terms) Act 2003. There was clearly an ambiguity between the Plaintiffs' written instructions (which appeared on their face to authorize an immediate sale of the Shares) and the Plaintiffs' earlier more general oral instruction that he wished to sell ex-dividend.

15. The central question raised by the present action is who was contractually responsible for resolving any ambiguities in instructions: the Trustees as customers or the Bank as custodian?

The contractual position

16. Under the strict terms of the Contract, I find that the Trustees agreed to indemnify the Bank for any liability flowing from "*any doubt, error or ambiguity*" in relation to the written instructions they supplied in relation to the sale of the Shares on July 26, 2005. It was for the Dr. Patton to ensure that, when he gave his formal instructions in relation to a specific sale at a specific price on July 26, 2005 to Mr. Cole Simons, express reference was made to the oral instruction given 12 days earlier to Ms. Martha Myron as to the timing of the sale. The Bank as a mere custodian of the Trust's assets was not acting in an advisory capacity. As a result, it was not obliged to clarify with Dr. Patton whether, despite his clear written instructions to sell the Shares at $42.50 to a potential purchaser identified by the Bank's trading desk, he only wished to sell if the purchaser was willing to purchase ex-dividend.

17. The clear words of clause (2) of the Terms and Conditions in the Contract do not fairly admit any alternative construction:

> "*(2) The Bank will hold, disburse or otherwise deal with the Securities in accordance with such instructions as may be given by the customer from time to time.*" *The Bank may require any such instructions to be in writing and the Bank will incur no liability in consequence of its acting or omitting to act on any such*

instructions should there be any doubt, error or ambiguity therein." [emphasis added]

18. Bearing in mind that the Bank was dealing with a retiree who was a non-professional trustee of a family trust, albeit one that appeared to be a sophisticated investor who had freely chosen a custodial account, in the best of all possible worlds his written instructions of July 26 would have been queried rather than simply passed on to the trading desk. Ms. Myron would have alerted Mr. Simons to the fact that the client's previously expressed desire was to sell ex-dividend; or Mr. Simons would have perused the Trustees' electronic file before calling Dr. Patton. But the Bank's employees were not legally required to extend themselves in such a way. Having regard to the nature of the Contract between the parties, the onus was on Dr. Patton to ensure that there was no "*doubt, error or ambiguity*" in his instructions. He ought not to have relied upon either (a) Ms. Myron passing on Dr. Patton's oral instructions about the timing of the proposed sale to Mr. Simons, or (b) Mr. Simons (whom Dr. Patton had no basis for believing had direct personal knowledge of his prior oral instructions to Ms. Myron about his desired timing for the sale), eliciting the oral instructions from Ms. Myron or the client file.

19. It is perhaps understandable that, as a retired doctor, it would not occur to Dr. Patton that professional persons in receipt of his earlier verbal instructions would simply forget or ignore them. A doctor filling in for a colleague would not ordinarily deal with a patient without reading the colleagues notes; likewise the case of a lawyer representing a colleague's client. The preponderance of Dr. Patton's banking experience until comparatively recent times, moreover, would probably have embraced an era in which bankers were able to give customers more individualised attention and gratuitous advice[3]. The very job title of 'relationship manager', assigned to Bank employees who handle investment customers, somewhat disarmingly harkens back to those more gentlemanly days. Beneath this somewhat charming veneer, however, modern banker-customer relations are in reality both commercially and legally more rigidly defined than they once were.

20. Under the Contract, therefore, a relationship manager relaying investment instructions to the Bank's trading desk in relation to a custodial account is not a fiduciary in the sense that the customer is entitled to rely on the manager to exercise business judgment or to furnish advice to the customer. Not only is this legally the relationship upon which the parties agreed (the Bank could have been engaged to make investment decisions on the Plaintiffs' behalf). The volume of customers (in particular international business clients) which the Bank services in this custodial manner makes this so impracticable that it is highly unlikely that the Bank would have contracted on the terms contended for by the Plaintiffs.

[3] Such gratuitous advice gave rise to a banker's liability in negligence in the landmark case of *Hedley Byrne-v-Heller & Partners Ltd.* [1964] A.C. 465, and indirectly contributed to the modern banking practice of strictly defining by contract the respective rights of banker and customer which appertains today.

21. Mr. Marshall was right to submit that clause (3) of the Terms and Conditions does confer discretionary powers on the Bank. However, none of these powers is concerned with ambiguous instructions or detracts in any way from the clear provisions of clause (2) upon which the Defendant relies.

Alternative claim in tort

22. Mr. Marshall for the Plaintiffs contended that they could assert an alternative claim in tort. He relied in this regard on the following statement in '*Chitty on Contracts'* (30th edition, 2008) Vol. 1, paragraph 6-088, citing *Henderson-v- Merrett Syndicates Ltd*. [1995] 2 AC 145 as authority:

> "*It is now clear that one party to a contractual relationship may owe duties in tort to the other: these duties may overlap with contractual duties, and where this is the case the claimant may have alternative causes of action in contract and tort.*"

23. This statement does no more than to suggest in very abstract terms that overlapping contractual and tortious claims "may" exist, without supporting the conclusion which counsel appeared to invite the Court to reach, namely that if a contractual claim failed an alternative overlapping claim in tort could still succeed. In fact the true legal position is, as Mr. Hargun contended, that concurrent duties may be owed in contract and tort in the sense that (a) a plaintiff may chose whether to sue in contract or tort, but (b) the extent of tortious liability will be qualified by the extent of the contractual liability. As Lord Goff opined (giving the leading judgment of a unanimous House of Lords) in *Henderson-v- Merrett Syndicates Ltd*. [1995] 2 AC 145 at 194:

> "*…I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded…*"

24. The latter statement must, however, be understood in its proper context. Lord Goff was considering the development of the *Hedley Byrne* principle in the contractual context of managing agents and Lloyd's Names:

> "*The managing agents have accepted the Names as members of a syndicate under their management. They obviously hold themselves out as possessing a special expertise to advise the Names on the suitability of risks to be underwritten; and on the circumstances in which, and the extent to which, reinsurance should be taken out and claims should be settled. The Names, as the managing agents well knew, placed implicit reliance on that expertise, in that*

they gave authority to the managing agents to bind them to contracts of insurance and reinsurance and to settlement of claims. I can see no escape from the conclusion that, in these circumstances, prima facie a duty of care is owed in tort by the managing agents to such Names…"[4]

25. Outside of the sort of context considered by the House of Lords in *Henderson-v-Merrett Syndicates Ltd*. [1995] 2 AC 145, which is far removed from the present case, the utility of seeking to rely upon a concurrent tortious duty of care owed between parties to a contract will ordinarily be doubtful. As Lord Scarman opined in a Privy Council decision which has been followed in Bermuda at all court levels, *Tai Hing Cotton Mill Ltd.-v- Liu Ching Hong Bank Limited* [1986] A.C. 80 at 107B:

> "*Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship.*"

26. Be that as it may, in the instant case the terms of the Contract have expressly excluded any implied requirement for the Bank to exercise reasonable care and skill in relation to the interpretation of the Plaintiffs' investment instructions; so any concurrent claim in tort fails on precisely the same grounds as the contractual claim has been rejected. Tortious liability has not been excluded in the sense of a comprehensive exemption clause; rather, the parties have expressly agreed that the Bank will not be liable for any doubts, errors or ambiguities contained in or arising from the Plaintiffs' own written instructions.

The Supply of Services (Implied Terms) Act 2003

27. The Plaintiffs' final fall-back position is the argument that any purported exclusion of an implied duty to exercise reasonable care and skill on the Bank's part is prohibited by the 2003 Act. Section 3 of the Act provides as follows:

> "**Implied term about care and skill**
>
> *3 In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.*"

28. The application of the Act to the Contract was neither formally conceded nor seriously contested. The Defendant's position was that it made little difference to the result whether the Act was held to apply to the Contract or not.

29. Under section 2(1) of the Act, "*'contract for the supply of a service' means a contract under which a person ("the supplier") agrees to carry out a service, but does not include a contract of service or apprenticeship*". Section 7 of the Act empowers the

[4] [1995] 2 A.C. 145 at 182 D-F.

Minister to disapply the Act to certain categories of services; but no orders have yet been made. Section 2(1) defines 'Minister' as the Minister responsible for consumer affairs. This implies that the Act is consumer protection legislation and that its scope of operation will be defined by orders made pursuant to section 7(1) exempting certain types of services (presumably non-consumer services) from the operation of the Act. This leaves the Court, in the absence of any section 7(1) orders to date, with the unhappy task of deciding on a case by case basis whether the Act applies to a particular contract for the supply of services. Alternatively, perhaps, the Court could conclude that the Act applies to all contracts save for those which the Minister expressly exempts under section 7, an unattractive option which would interfere with freedom of contract rights too intrusively to be countenanced absent clear legislative intent.

30. In the present case, the Bank contracted with a local family trust actively represented by an individual non-professional and non-institutional trustee (a retired family member), and passively represented by a second individual non-institutional trustee. The account established required the Trust to make all substantive investment decisions with the Bank merely holding the investments and implementing the trustees' instructions. The main purpose of the Trust seems to have been to generate income for beneficiaries. It is not, perhaps, obvious that this type of banking customer falls within the parameters of the consumer protection legislation. Since the Defendant did not positively challenge the operation of the Act to the Contract, I will assume for present purposes that the Act does apply to the present transaction, even though the position would have been far clearer had the Plaintiffs been either (a) individuals acting in respect of their own assets, on the one hand, or (b) large institutional or sophisticated investors acting solely through professional agents, on the other hand. A fuller consideration of the application of the Act remains open for future determination.

31. Some very general support for the proposition that the banking relationship in the present qualifies as a 'consumer' or private relationship as opposed to a 'commercial' one may, however, be found in *dicta* in the Court of Appeal for Bermuda decision in *Kessler-v-Hill* [2005] Bda LR 57. In this case, Acting President Sir Anthony Evans (giving the Judgment of the Court) upheld the decisions of both Timothy Marshall (sitting as a sole arbitrator) and Bell J of this Court that an arbitral dispute concerning residential property was not a 'commercial' arbitration. He concluded (at page 5):

> "*We doubt whether it is possible or even helpful to attempt an overall definition of 'commercial' for the purposes of the 1993 Act. The task defeated UNCITRAL and it is clear that several factors must be taken into account. Did the parties or either of them enter into the transaction in the course of their business activities? What was the purpose of the transaction—was it private, as in retail sales of consumer goods, or in the case of property, for private use, or was it for some business use? But above all, what type of transaction was it? Not in the legal sense of sale or*

leasing, and not what type of contract, but what was the nature of the relationship between the parties?"

32. The sole question which requires determination for present purposes is whether clause 2 of the Contract is invalid for inconsistency with the following provisions of the Act:

> "***Contracting out***
> *6 The terms implied by this Act in a contract for the supply of a service shall have effect notwithstanding any agreement, course of dealing between the parties or usage.*"

33. Mr. Hargun submitted that section 6 of the Act did not go so far as to have the dramatic impact of prohibiting the parties to contracts for services governed by the Act from limiting the liability for breaches of duty which might otherwise exist. He relied, by way of analogy, upon the contrast between the prohibition on limiting the *duties* of directors (Companies Act 1981, section 97(1)) and the power to exclude or exempt directors from *liability* for any breaches of duty (section 98(1)). Moreover, he referred to the Explanatory Memorandum which explicitly demonstrates the intent of the Act was to codify the common law. At common law it was clear that exemption clauses were permissible insofar as they purported to exempt a contracting party from liability for negligence: *J.B. Astwood & Son Limited –v- Marra and Marra*, Court of Appeal for Bermuda, Civil Appeal 1979 No. 28, per Blair-Kerr (P) at page 29[5]. Mr. Marshall had no riposte to these compelling submissions.

34. I accept entirely that this analysis may, on superficial analysis, seem unsatisfactory from a consumer protection standpoint. It seems to beg the question of what useful purpose the Act serves if it does not alter the common law position at all and leaves suppliers of services free to effectively impose blanket exemption clauses on their customers. What section 6 arguably achieves is to prohibit suppliers from services from contracting on terms that *excludes altogether* any duty of care and skill. This would leave intact the contractual freedom to agree that no liability shall attach to any negligence attaching to all or particular aspects of the service provision. In other words, the duty to exercise care and skill still exists; the parties are free to agree that if the duty is breached, the injured party will not be able to seek compensation.

35. If the Act was intended to alter the common law so significantly by taking away altogether existing freedom to contract rights, section 6 does not appear to convey such intent in sufficiently clear terms. By way of comparison, section 98(2) of the Bermuda Companies Act 1981 expressly states that bye-law or contractual indemnities for fraud or dishonesty "*shall be void*". What is the intended effect of section 6 of the 2003 Act?

36. The intended effect of section 6 is in my judgment ambiguous. To resolve the resultant ambiguity, recourse may be had to the legislative history of the Act. And

[5] Although other cases were cited by counsel, this case involved a consumer contract.

this supports the Defendant's contention that the common law contractual right to exclude liability for negligence remains intact. The introduction to the Explanatory Memorandum (upon which Mr. Hargun expressly relied) states as follows:

> "*This Bill puts into statutory form basic obligations owed by those who provide services. The Bill enunciates principles that have been developed at common law. However, the Consumer Affairs Board has recommended that the obligations should be enshrined in statute. The advantages are clarity and certainty, ease of reference doing away with the need to identify and understand the cases at common law and the restatement in statutory form will attract public attention and make known the fact that the law does impose duties on those who supply services.*"

37. The explanation for the clause which became section 6 of the Act is the crucial one, however. This states as follows: "*Clause 6 makes a departure from the corresponding English law (Supply of Goods and Services Act 1982) and prohibits contracting out of the implied terms*". In my judgment these words do not clearly support an intention to prohibit limiting the liability for certain acts of negligence by contract, as clause (2) of the present Contract seeks to do. Nor does it support the view that Parliament intended to prohibit all forms of exemption or indemnity clauses. What the Explanatory Memorandum arguably supports is the proposition that the implied terms cannot be contracted out of *altogether*, so that effectively the duty to provide services with reasonable care and skill is nullified.

38. No such nullification has occurred in the present case on any view. All the parties have done is to delineate the scope of the parties' respective duties in such a way that the Bank is not required to provide any service at all in respect of implementing written instructions save to give effect to their reasonably understood meaning. As regards all other services, the implied duty to exercise care and skill (*and liability for breaching it*) remains intact. In this regard I was assisted by authorities relied upon by Mr. Hargun in his Supplementary Submissions which illustrate that a principal is generally required to give his agent clear instructions. For instance, Devlin J in *Midland Bank Limited-v-Seymour* [1955] 2 Lloyd's Rep. 147 at 153 stated:

> "*In my judgment, no principle is better established than that where a banker or anyone else is given instructions or a mandate of this sort, they must be given to him with reasonable clearness…when an agent acts upon ambiguous instructions, he is not in default if he can show that he adopted what was a reasonable meaning. It is not enough to say afterwards, that if he had construed the document properly, he would on the whole have arrived at the conclusion that in an ambiguous document, the meaning which he did not give to it could be better supported than the meaning which he did give to it…*"

39. As to the commercial significance of clauses such as clause (2), the Bank's counsel referred for illustrative purposes to the "proper instructions" clause in another custodian contract considered by Bell J in *Phoenix Global Fund Ltd.-v- Citigroup*

Fund Services (Bermuda) Limited [2009] Bda L.R. 68 (at paragraph 99). This clause seems more pertinent for present purposes than the indemnity clauses considered in the same case. In this light, it may be helpful to turn once again to the terms of clause (2) of the Terms and Conditions of the Contract:

> "*(2) The Bank will hold, disburse or otherwise deal with the Securities in accordance with such instructions as may be given by the customer from time to time. The Bank may require any such instructions to be in writing and the Bank will incur no liability in consequence of its acting or omitting to act on any such instructions should there be any doubt, error or ambiguity therein.*"

40. This clause does not primarily aim to exempt the Bank from liability for negligence in relation to the execution of its contractual duties. Rather it aims to expressly provide that the scope of the Bank's duties in relation to the Securities held by it do not extend beyond following the clear instructions of the Plaintiffs, when they have been required to give written instructions. If the Plaintiffs' written instructions contain ambiguities, doubts, or errors, the Bank will not be liable (applying the common law rules) if it adopts a reasonable interpretation (or refuses to carry out unintelligible instructions altogether). Put another way, the Plaintiffs agree that they are obliged to give clear written instructions (when asked to do so) and that it forms no part of the Bank's contractual obligations to do more than to implement such instructions according to a reasonable view of their terms.

41. If the scope of the Bank's duties is viewed as being limited in this way, there can be no implied obligation to exercise reasonable care in relation to non-existent contractual duties. No question of an exemption or indemnity ultimately arises. For this primary reason I find that no breach of the 2003 Act occurred.

42. However, if this were held to be a view of the Contract which was not properly open to me to take, I would find in the alternative that clause (2) validly indemnified the Defendant from any liability for negligently misinterpreting the Plaintiffs' unambiguous written mandate as understood in light of the earlier inconsistent oral instruction. I would find that section 6 of the 2003 Act does not exclude the ability of a party providing services to contractually obtain from its customers an exemption or indemnification against liability for negligent breach of contract, subject to any possible arguments that the scope of the indemnity is unreasonable and thus void for public policy reasons. I would find that section 6 merely prohibits any contractual attempt to oust the implied ***duties*** given statutory force by section 3; far clearer words would be required to repeal the common law right to agree exemptions from or indemnifications against ***liability*** for negligence.

43. Had issue been joined on the application of the Act to the Contract, a further reason for rejecting the Plaintiffs' submission that the 2003 Act applies to the Contract,

which was not canvassed in argument, would have required formal determination[6]. This is the impact of the presumption that legislation is (1) not intended to have retroactive effect, and (2) not intended to interfere with vested rights (e.g. under existing contracts). The Contract was entered into in January 1997, six years before the consumer protection legislation was brought into effect. There is nothing in the Act or the Explanatory Memorandum attached to the Bill which suggests that the Act was intended to interfere with vested rights under possibly thousands of existing contracts to which the 2003 Act potentially applied when it took effect.

44. As Lord Slynn opined in *Wilson et al-v-Secretary of State for Trade and Industry* [2003] UKHL 40 considering a different but somewhat analogous interpretative issue:

> "*19. The answer to this difficulty lies in the principle underlying the presumption against retrospective operation and the similar but rather narrower presumption against interference with vested interests. These are established presumptions but they are vague and imprecise. As Lord Mustill pointed out in L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486, 524-525, the subject matter of statutes is so varied that these generalised maxims are not a reliable guide. As always, therefore, the underlying rationale should be sought. This was well identified by Staughton LJ in Secretary of State for Social Security v Tunnicliffe [1991] 2 All ER 712, 724:*
>
> > *'the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'*
>
> *Thus the appropriate approach is to identify the intention of Parliament in respect of the relevant statutory provision in accordance with this statement of principle…*
>
> *22. In the present case Parliament cannot have intended that application of section 3(1) should have the effect of altering parties' existing rights and obligations under the Consumer Credit Act. For the purpose of identifying the rights of Mrs Wilson and First County Trust under their January 1999 agreement the Consumer Credit Act is to be interpreted without reference to section 3(1).*"

[6] The Bank's attention in the present case was seemingly focussed on the bigger legal picture concerning the impact of the Act on existing and future indemnity clauses in other cases as well as the narrower implications Contract in the present case.

Conclusion

45. The parties contracted on terms that absolved the Bank from the legal obligation, upon receipt of unambiguous written instructions to sell the Shares, to query whether the Plaintiffs had decided to abandon their previous orally articulated desire to sell the Shares "ex dividend." The view that these instructions meant to sell at the specified price immediately was a reasonable interpretation (in fact the only reasonable interpretation) for the Bank to place on the faxed instructions received on July 26, 2006.

46. The Plaintiffs' breach of contract claim fails and no alternative tortious liability exists. Even if (which finding I primarily reject) the Supply of Services (Implied Terms) Act applies to the Contract, the express terms of the Contract did not require the Defendant to resolve any ambiguities between the Plaintiffs' written instructions and any earlier oral instructions. Alternatively, clause (2) of the Terms and Conditions of the Contract constituted a valid exemption or indemnity clause as regards any liability in respect of the breach of implied condition complained of. This alternative statutory claim also fails.

47. It is entirely understandable that Dr. Patton genuinely believed that the verbal instructions he had previously given to the relationship manager assigned to handle his custodian account were sufficiently clear that they would not be departed from unless he expressly abandoned them. With that relationship manager on holiday when he gave his written instructions, the sale was processed without regard to his previous oral instructions and the limited contractual role assumed by the Bank did not oblige the persons dealing with the transaction to search out the record of those oral instructions from the Plaintiffs' electronic file. In the best of all possible worlds, the Bank would have queried with Dr. Patton whether he had changed his mind about selling ex-dividend; but it was not legally obliged to do having regard to the formal legal terms upon which the relevant account operated.

48. I will hear counsel as to costs.

Dated this 3rd day of June, 2011 _____
KAWALEY J