Privy Council Appeal No. 17 of 2001

Union Bank of Jamaica Limited *Appellant*

v.

Dalton Yap *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 28th May 2002

Present at the hearing:-

Lord Steyn
Lord Hutton
Lord Millett
Lord Rodger of Earlsferry
Sir Denis Henry

*[Delivered by **Lord Rodger of Earlsferry**]*

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1. The plaintiff and appellant is the Union Bank of Jamaica Ltd ("the Bank"), formerly known as the Jamaica Citizens Bank Ltd. The defendant and respondent, Mr Dalton Yap, was an employee of the Bank from 1988 until being dismissed on 1 October 1993. To begin with, Mr Yap was the Assistant General Manager, Technology, but from 1 January 1993 until his dismissal he was the General Manager, Technology and Operations. It is of some importance to notice that, until he fell out of favour, the defendant was a highly valued employee of the Bank. As the trial judge explained,

> "He shone, if one accepts the various evaluations that were done of him by the managing directors and the Board; and there is no reason not to accept them. He went on various courses as his experience broadened. Technology is his forte. He has a diploma in electronic engineering from the Radio College, Canada. When he entered banking in 1982 he did so as an executive trainee in the computers

department as a member of a task force to implement a computerised banking system at Citibank."

2. In the action in the Supreme Court of Judicature of Jamaica which has given rise to this appeal, the Bank sought damages from the defendant for loss resulting from their credit card operation which, they alleged, was due to breach of contract, conspiracy, deceit and negligence on the part of the defendant in regard to that operation.

3. After a trial before Panton J, which lasted some eleven days, his Lordship rejected all but one of the Bank's allegations. The one part of the Bank's claim that the judge upheld related to certain events in July 1993. These will have to be examined in some detail later in this judgment. Arising from those events his Lordship held that the defendant had been negligent and had breached his contract of employment with the Bank, thus causing them loss. By his judgment dated 22 September 1997 the judge found the defendant liable to pay the Bank damages in respect of his breach of contract and assessed those damages at US$106,226.04. Mr Yap appealed to the Court of Appeal (Forte P, Bingham and Walker JJA) and on 15 June 2000 the Court of Appeal allowed the appeal. On 12 February 2001 the Court of Appeal granted the Bank final leave to appeal to their Lordships' Board.

4. The issues in the case were essentially ones of fact and the decision of the trial judge depended on his assessment and interpretation of the evidence that he heard. It follows, of course, that the appeal to the Court of Appeal also turned on issues of fact, as does the appeal to the Board. The approach which an appellate court must apply when dealing with an appeal on fact from a judge who has seen and heard the witnesses giving evidence is not in doubt. Their Lordships refer for convenience to the decisions of the House of Lords in *Thomas v Thomas* [1947] AC 484 and of the Board in *Industrial Chemical Co (Jamaica) Ltd v Ellis* (1986) 35 WIR 303. One situation where, exceptionally, an appeal court may be entitled to differ from the judge of first instance on such questions of fact is described by Lord Thankerton ([1947] AC 484, 488) in these terms:

> "The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the

witnesses, and the matter will then become at large for the appellate court."

As Lord Shaw of Dunfermline observed in the earlier case of *Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35, 37, the appeal court cannot interfere unless it can come to the clear conclusion that the first instance judge was "plainly wrong". In the present case, in the light of the criticisms advanced by Miss Phillips QC on behalf of Mr Yap, the Court of Appeal in effect concluded that the trial judge had failed to take proper advantage of having seen and heard the witnesses and had, for that reason, gone wrong. They accordingly allowed the appeal.

5. Their Lordships, having similarly had the advantage of the well marshalled and well presented submissions of Miss Phillips, are satisfied that the Court of Appeal reached the correct conclusion and that this is one of those exceptional cases where the appellate court was entitled, indeed bound, to interfere with the decision of the trial judge on a matter of fact.

6. The background to the case involves the Bank's operations when processing VISA and Mastercard credit card transactions. It is therefore necessary to describe, in much simplified terms, how these systems, which involve vast international networks of computers, work. For the sake of simplicity, their Lordships refer to VISA only but the Mastercard system works in much the same way. For present purposes it is unnecessary to analyse the interlocking legal relationships among the various parties.

7. Credit cards bearing the VISA logo are issued to customers by banks and other financial institutions which are licensed by VISA. The cards can be used to make payments at merchants which belong to the scheme. Certain banks and other institutions act as "merchant acquirers". They sign up or "acquire" merchants for the scheme and also perform a variety of functions in processing transactions involving the merchants, the many issuing banks and their cardholders. For instance, they provide the means for merchants to have the issuing bank authorise their cardholder to pay for a purchase with his credit card. When a cardholder wishes to buy, say, a camera from a merchant, the merchant first obtains the necessary authorisation from the cardholder's issuing bank via the acquiring bank. Once authorisation is granted, the merchant generates what is referred to in the evidence as a "paper", requesting payment of the price from the acquiring bank. The acquiring bank is responsible for paying the merchant the price minus a discount to pay for the service provided to the merchant.

The acquiring bank in turn requests payment from the issuing bank through the computer network. The issuing bank will credit the acquiring bank's account and debit the cardholder's account with the price of the camera. The camera may turn out, of course, to be so defective that the cardholder is entitled to demand his money back. In that event the issuing bank will reverse the debit on its cardholder's account and will charge back the sum to the acquiring bank. The acquiring bank will then have the right in its turn to charge back the sum to the merchant but, if the merchant turns out to be insolvent, the loss will lie on the acquiring bank.

8. Although this is not spelled out in the judgments of the courts below, on the evidence it is clear that the present case arises out of the plaintiff's activities as an acquiring bank.

9. The credit card system is known to be vulnerable to fraud. In particular it can be abused by fraudulent merchants. One area of trading that is especially open to such abuses is telemarketing, where sales are made to cardholders over the telephone and payment is made by credit card. In such cases the merchant may conclude a transaction over the telephone and so become entitled to payment from the acquiring bank, but then fail to supply the goods or service in question. Or else the merchant may obtain the cardholder's credit card details and then use them to generate a wholly bogus or fraudulent transaction, apparently entitling the merchant to payment from the acquiring bank. Various more or less ingenious scams have been devised. In these situations the matter will come to light when the cardholder finds that his account with the issuing bank has been debited for the fraudulent transaction. But the security department of VISA have a computerised system for monitoring transactions and can detect when a particular merchant generates a suspiciously large number of transactions or transactions which are, for some other reason, doubtful. The security department will then have the issuing banks check with the cardholders and in this way will discover if the transactions are fraudulent. If on further investigation it turns out that the merchant is generating fraudulent transactions, then VISA will instruct the acquiring bank concerned to close the merchant's account.

10. The integrity of the systems and the reputation of the VISA and Mastercard marks therefore depend to a large extent on the integrity of the merchants who are entitled to use them. That is particularly so in the case of telemarketing. In 1993 VISA therefore had certain rules that were designed to minimise the risks involved in that form of trading. Before an acquiring bank accepted a merchant, they required to inform themselves about it

and about its trade. Not least, the bank had to know where the merchant was based. At the relevant time VISA had a rule by virtue of which the Bank could acquire telemarketing merchants only if they were based in Jamaica. Similarly, the Bank were not entitled to process paper generated by transactions outside Jamaica. This was referred to as "the Local Paper Rule".

11. The merchants taking part in the VISA and Mastercard schemes benefit from the business that they attract because their customers can pay by credit card. The acquiring banks therefore provide a valuable service to the merchants in processing the transactions. Equally, the fees that the banks can charge for this service make it potentially profitable for them to have processing arrangements with large numbers of merchants.

12. At the relevant time the Bank were keen on developing this side of their business. For this purpose they had a marketing division whose job it was to try to attract suitable merchants. The General Manager in charge of that division was Mr Ewart Scott and Mrs Alarene Wong was the manager. According to the Bank's procedures, before a merchant was accepted, various checks were carried out to make sure that it was suitable. If the merchant was suitable and was taken on, the Bank and the merchant would sign a Merchant Agreement regulating the relationship of acquiring bank and merchant. The actual opening of the merchant's account was not carried out by the marketing division but by the operations division – apparently for security reasons. So it was the responsibility of the marketing division to acquire the merchants and to instruct the operations division to open the accounts for them. The operations division would then be responsible for operating the account. It would also be the operations division that actually carried out the procedures for closing a merchant's account. At the relevant time Mr Yap was the Assistant General Manager, Technology and Operations. In other words, according to the working structure of the Bank, he was involved in its operations side, dealing with the technical matters of opening, running and closing accounts, rather than in the marketing side, deciding which merchants to acquire. The evidence suggests that in practice the roles may not always have been kept entirely distinct.

13. The Bank's case, as it now stands, is that in July 1993 the defendant breached his contract of employment with them by reopening the account of one telemarketing merchant, LMP Marketing Ltd, and by opening an account for another telemarketing merchant, Worldwide Marketing.

14. As their Lordships have explained, telemarketing with the use of credit cards exposes cardholders and banks to the risk of loss due to fraud. In their pleadings and at the trial the Bank's position was that, in an executive meeting attended by Mr Yap in about February 1993, a decision had been taken that processing transactions for such merchants was indeed too risky: the risks outweighed the potential benefits and the Bank should not enter into merchant agreements with merchants engaged in telemarketing. On that basis, any involvement by the defendant with telemarketing companies in the summer of 1993 would have been contrary to the Bank's policy and would in effect have been a frolic by him in breach of his contract of employment. Having considered the evidence, the trial judge concluded that a meeting had indeed probably been held early in 1993, attended by the defendant and other senior managers. The matter of telemarketing was discussed. The judge was unable to conclude, however, that a decision was taken at that meeting that the Bank should not become involved with telemarketing. Subsequent actings on the part of Bank officials were inconsistent with such a conclusion. The judge's decision on this point meant, of course, that the supposed policy as settled in February 1993 fell away as a basis for alleging that the defendant had been in breach of contract in reopening the LMP Marketing account and opening the Worldwide Marketing account.

15. The fallback position of the Bank was that, even if they had not adopted a policy against involvement with telemarketing merchants early in 1993, it was clear from a memorandum issued by Mr Lumsden to Ms Hew on 6 July 1993 that the Bank's policy was to have no further involvement with merchants of that kind. The judge accepted this and therefore held that by opening the Worldwide Marketing account the appellant had acted in "clear defiance of the plaintiff's policy". It followed that the defendant was liable for the loss sustained by the Bank as a result of the opening of the Worldwide Marketing account. The defendant's position was that no such policy had been announced on 6 July. Furthermore, in opening the account he had been acting in accordance with decisions taken by the management of the Bank as a whole. In effect, he said, the Bank were now trying to make him carry the can for the unfortunate results of the management decision that the Worldwide Marketing account should be opened.

16. The evidence in the case showed unmistakably that during 1993 the Bank were acting as the acquiring bank for a number of merchants who were engaged in telemarketing and who were generating apparently fraudulent transactions. It was also clear

that in a number of cases the Bank had merchants who did not appear to be based in Jamaica and that paper was being generated from transactions from outside Jamaica. These were matters of great concern to VISA whose security department contacted the Bank repeatedly about various merchants, including LMP Marketing and Worldwide Marketing. VISA instructed the Bank to close the accounts of these merchants and that was eventually done. The Bank did not in fact lose money as a result of the LMP Marketing transactions but, as a result of the transactions with VISA and Mastercard involving Worldwide Marketing, it eventually lost US$106.226.04. The trial judge found the defendant liable to pay the Bank that sum in damages on the basis that it was as a result of his breach of contract that the Worldwide Marketing account had been opened, contrary to the policy of the Bank.

17. Even though the only claim for damages and the only award of damages related therefore to the opening of the Worldwide Marketing account, the judge dealt also with the allegation that the defendant had reopened the LMP Marketing account after being instructed to close it. The judge saw the defendant's alleged opening of the Worldwide Marketing account as an activity of the same kind as his alleged reopening of the LMP Marketing account in the period after 6 July. Since he perceived that the two matters were linked in this way, their Lordships consider it right to consider both of them, beginning with LMP Marketing.

18. On 29 June a fax was sent from the VISA security department to the defendant notifying him that LMP Marketing was depositing fraudulent sales drafts with the Bank. On 2 July Mr. Dawson, the Vice President of VISA , wrote to Mrs Wong enclosing reports on LMP Marketing and another of the Bank's merchants, International Concepts. The report on LMP Marketing indicated that it was depositing fraudulent charges, violating the VISA Local Paper Rule and laundering sales drafts. The report on International Concepts indicated that it was likely that it was involved in a fraudulent scheme with two of the Bank's other merchants, Travel Connection and Floral Exchange. Mr Dawson indicated that, as a result, the Bank's arrangements with LMP Marketing, Travel Connection and Floral Exchange were to be terminated and that International Concepts should be investigated. If irregularities were found, the arrangement with International Concepts was also to be terminated. When she received the letter, Mrs Wong interrupted a meeting that Mr Scott was attending to show it to him.

19. On 6 July Mr Dawson wrote again with two more reports on LMP Marketing and indicated that the Bank were not complying with the previous instructions to terminate their arrangements with the three merchants. It appears that the defendant was not in the office on 6 July and so, in his absence, Mr George Lumsden and Mrs Wong instructed Ms Lesley Hew to terminate a number of accounts, including the LMP Marketing account. The memorandum containing this instruction is the document which, according to the trial judge, set out the Bank's policy that they should no longer be involved with telemarketing merchants. Its terms are therefore of some importance. It is headed "Telemarketing Merchant Accounts" and says:

> "Since Mr. Dalton Yap is out of office today, please arrange for the following merchant accounts to be immediately terminated:-
>
> Travel Connection
> Floral Exchange
> L.M.P. Marketing
> International Concept
> S.E.C.T.
> Universal Bancard Systems
>
> It is extremely important that the above-mentioned accounts are closed as requested by letter received from Joseph Dawson, Vice President – Visa International.
>
> Attached is a copy of the letter for your perusal."

The memorandum was copied to the defendant, to Mr Scott and to a Mrs Jasmine Chin.

20. On 7 July the defendant wrote to Mr Dawson and confirmed that the processing of sales vouchers for LMP Marketing, Floral Exchange and Travel Connection had been terminated. The trial judge found as a fact that the LMP Marketing account had been closed on about 6 July. The Bank allege, however, that, even though this was done, the defendant promptly reopened the account. The judge accepted that the defendant had indeed reopened the account two days later. Before the Board counsel for the defendant did not dispute that reopening the account in this way, when instructions had been given to close it, would have been a breach of contract by the defendant. She contended, however, that there was no evidence to show that, if the account had been reopened, it was the defendant who had reopened it.

21. The finding that the LMP Marketing account had been reopened rests in part on the defendant's letter dated 7 July to Mr Dawson saying that the processing of sales vouchers for LMP Marketing, Floral Exchange and Travel Connection had been terminated by the Bank. He added that the Bank would continue to accept credits to cardholder accounts from these merchants for transaction reversals and possible charge backs. Despite this, the VISA screening system detected that the Bank had processed 145 transactions on behalf of LMP Marketing in the late evening of 8 July. Mr Dawson wrote to the defendant about this on 9 July and insisted that he ensure that no further deposits were made on the account. On 21 July in an internal memorandum to Mr Lloyd Wiggan, Mrs. Wong said that a number of accounts, including Travel Connection, Floral Exchange and LMP Marketing, were "still opened". This was to facilitate credit transactions even though no merchant transactions were said to have been processed through the accounts since 2 July. The defendant was away from the office on holiday from 27 July until 17 August. On 29 July Mr Lumsden instructed Mr Beckford, as Assistant Manager Operations, to close a number of accounts with immediate effect. These included Travel Connection, Floral Exchange, LMP Marketing and International Concepts. The processing of VISA and Mastercard transactions for these merchants was to be suspended without delay. This instruction was implemented by a letter dated 30 July to Ceridian Network Services. It appears that the LMP Marketing account was indeed closed with effect from this date.

22. The evidence that their Lordships have narrated as to the position of the LMP Marketing account after the instruction was given to close it would be consistent with the view that, even though Mr Yap had been instructed to close the account and had given the appropriate instructions, for some reason his orders had not been given immediate effect. That inference would be consistent with other evidence in the case which tends to suggest that closing accounts was often by no means instantaneous and took considerably longer than might have been expected. The judge's finding that the LMP Marketing account was actually reopened seems to be based on evidence relating to a letter dated 7 September 1993 from Mr Merlin F Reaume, as Chairman of the Capital Investment Bank, to Mr Scott in which he complained that the Bank, having stopped processing their transactions, were holding a balance of funds that were due to Capital for credit card transactions. Capital shared an address with LMP Marketing in

Antigua and Mr Reaume is referring to transactions for LMP Marketing. He says inter alia:

> "As a matter of fact, although the Bank stopped processing VISA transactions on July 5, 1993, we requested a second merchant account on July 8, 1993 and said account was made available to us without any mention that transactions being submitted were not being processed."

23. During the cross-examination of the defendant, he said that he had given instructions to his department for the LMP Marketing account to be closed and that normally when he gave instructions to his staff the instructions were carried out. When taxed with the fact that transactions were still being processed for LMP Marketing on 8 July, the defendant said that it could have been an error with the processing department. He was then asked whether he closed and then reopened the account. He replied "No. That is totally untrue. That is a fairy tale". He was shown the letter from Mr Reaume and immediately pointed out that Mr Reaume was speaking of "a second merchant account" and that he was not referring to the first account having been reopened. The defendant agreed that the relevant passage in the letter meant that a second account had been opened. The judge indicated that he did not think that counsel for the Bank had been suggesting that the defendant had personally opened the second account, but counsel then made it clear that this was indeed the suggestion. The defendant replied that he advised VISA to close the accounts and "I do not know under what circumstances the second account was opened".

24. The trial judge records his conclusion on the reopening of the LMP Marketing account as follows:

> "Based on the evidence given by the defendant on pages 368 to 370 of the record of the notes of evidence, I find that the account for LMP Marketing, though closed on the 6th July, 1993, was reopened about two days later. The defendant, I find, sought to avoid providing answers in relation to this reopening while he was being searchingly cross-examined by Mr Hylton. In my judgment the defendant was the person who gave the instructions for the reopening.
>
> There is absolutely no doubt that the defendant was, at the time of the reopening of this account, fully aware of the implications of this act. He knew of the likelihood of loss to the plaintiff thereby."

In the light of the evidence their Lordships have difficulty with the trial judge's conclusion that Mr Yap "reopened" the account. The defendant's evidence relating to Mr Reaume's letter was to the effect that the original LMP Marketing account had not been reopened: what had happened was that a second account had been opened. That evidence was not challenged and seems to be consistent with the terms of the letter. On the other hand, what material difference, if any, there would be between opening a new account and reopening an existing account was not explored in evidence. Interestingly, during the cross-examination of the defendant on Mr Reaume's letter, the judge himself did not appear to think that it was being suggested to the defendant that he himself had opened the second account. When asked about it, the defendant said that he did not know under what circumstances the second account was opened.

25. There was evidence that, generally speaking, the defendant would give the instructions to his subordinates for the opening of accounts. But both counsel informed the Board that there was no other evidence that showed that the defendant had been responsible for reopening the original LMP Marketing account. The judge found that the defendant had sought to avoid answering questions about "this reopening". Their Lordships accept, of course, that the trial judge was in the best position to assess the demeanour of the defendant when giving evidence. None the less, even if the defendant did try to avoid answering questions on the point, that would not in itself allow the judge to jump the evidential gap and conclude that the defendant had given instructions for the LMP Marketing account to be reopened or, indeed, for a second account to be opened.

26. The judge's conclusion goes further. He decided that the defendant not only "reopened" the account but did so, knowing of the likelihood of loss to the plaintiff thereby. When considering whether the defendant, with a successful career at the Bank, would have opened this second account for LMP Marketing after being told to close the original account and in the knowledge that the Bank was likely to suffer loss as a result, the Board ask the old question *cui bono*? Why would the defendant have done this? What would he have had to gain? The answer, as counsel for the Bank accepted, was that he would have had nothing to gain.

27. Their Lordships need not come to a final view on whether the trial judge was entitled on the evidence to reach the conclusion that he did on the LMP Marketing allegation. The evidence is sufficiently unclear, however, to make it appropriate to put that

matter entirely out of the picture in considering the allegation relating to Worldwide Marketing. The events relating to the opening of the Worldwide Marketing account, to which their Lordships now turn, are therefore not to be evaluated on the basis that the defendant had already been involved in reopening the LMP Marketing account shortly after 6 July.

28. The allegation which the trial judge found established was that the defendant opened an account for Worldwide Marketing in defiance of the Bank's policy and of VISA regulations. Worldwide Marketing purported to be a flower shop. Although the evidence did not disclose precisely when the account was opened, counsel were agreed that it was shortly after 21 July. Their Lordships will return shortly to the events leading up to that time. But, after the account was opened, on 29 July Mr Luis Soublette of the Security department of VISA wrote to the defendant, who was actually away on holiday, to say that Worldwide Marketing had possibly been laundering sales drafts. A sample of the account numbers used in twelve transactions had revealed that the transactions had been conducted outside Jamaica, in violation of VISA regulations. On 9 August Mr. Dawson from VISA telephoned Mr Scott about a number of merchants who were causing concern, including Worldwide Marketing. He apparently insisted that the account should be terminated. On the same day Mr Scott duly instructed the operations branch to close Worldwide Marketing's account with immediate effect. On 10 August Mr Dawson wrote to Mr Scott by fax, confirming their telephone conversation and the instruction to close the account. Despite Mr Scott's instruction to close the account, many transactions on the account were processed on 9 and 10 August, as VISA pointed out in letters to the Bank on 12 and 13 August. VISA asked that the position be investigated. On 17 August Mr Scott wrote to Mr Dawson to say that the Worldwide Marketing account had not been closed but that no further transactions had been processed on the account. In effect, the account had been suspended. On the same day Arlene Bell, the Owner/President of Worldwide Marketing wrote to the Bank threatening them with legal action as a result of the suspension of Worldwide Marketing's account. Two days later, on 19 August Mr George Lumsden, the Bank's Assistant General Manager – Retail Banking, wrote to Mr Dawson enclosing that letter and asking for information to back up the Bank's suspension of the account. He said that the Bank would appreciate any direction in the form of policies or other guidelines to assist them in handling "this and other requests which may be open to laundering or telemarketing fraud." Mr Soublette of VISA's Security division replied the following day giving details of nine

cardholders who stated that they had not authorised the transactions in their name and asking Mr Lumsden to try to discover if Worldwide Marketing was indeed a flower shop and, if so, what type of flowers was being sold in such quantities.

29. In due course the Bank instituted an internal investigation into this and various other aspects of the Bank's operations as an acquiring bank for telemarketing merchants. The investigation eventually led to the defendant being dismissed. The damages awarded against the defendant represent the amount of the Bank's loss as a result of the chargebacks to them on the Worldwide Marketing account in both VISA and Mastercard transactions.

30. The trial judge's conclusion on the reopening of the Worldwide Marketing account was in these terms:

> "The reopening of LMP Marketing was not the only activity of the defendant in this regard after the closure of the accounts on the 6th July, 1993. Another significant act was his opening of Worldwide Marketing Ltd. At the stage at which this account was opened, there is no doubt that the defendant knew that such an act was inimical to the interests of the plaintiff. VISA had given instructions for the closure of all such accounts, pointing to possible fraudulent dealings. Furthermore, the July 6 memorandum from Marketing to Operations was in effect. Most damaging perhaps is the fact that Worldwide Marketing Ltd involved persons who had been connected with the already closed accounts. The opening of this account clearly violated VISA's regulations as well as the plaintiff's now known policy."

The judge continued:

> "In my judgment, the reopening of LMP Marketing and the opening of Worldwide Marketing constituted a breach of the defendant's contract of employment with the plaintiff. This was clear defiance of the plaintiff's policy. It follows that the defendant is liable for the losses sustained by the plaintiff from this breach. In the case of Worldwide Marketing Ltd., he is liable for the loss recorded at page 507 of Ex. 2, that is, US$106,226.04."

31. The first important criticism that can be made of the judge's conclusion is that the memorandum of 6 July does not announce a policy that the Bank are not to acquire any more telemarketing merchants. On the contrary, it simply gives an instruction to the

operations division to close certain specified accounts. And indeed, when the defendant wrote the following day to Mr Dawson it was to tell him that the accounts of LMP Marketing Ltd, Floral Exchange and Travel Connection had been terminated but that International Concepts was being investigated. In other words, far from having no continuing involvement with telemarketing merchants, Mr Yap was indicating that the account of one such merchant had not been closed. This letter was copied to Mr Scott, Mr Lumsden and Mrs Wong. None of them reacted with outrage or even surprise, as would have been expected if the Bank had just adopted a policy against any further involvement with telemarketing merchants. This confirms that the memorandum was not intended to announce any general policy with regard to telemarketing merchants and that the trial judge was mistaken in thinking that it did.

32. The other crucial criticism of the trial judge's decision is that, as far as can be seen, he took no account of a memorandum written on 21 July 1993 following a meeting, two days before, of the executive officers of the Bank, including Mr Scott, Mr Lumsden and Mrs King from the marketing side. The Worldwide Marketing account was opened shortly after 21 July. It is agreed that the defendant called the meeting and that its purpose was to discuss whether Worldwide Marketing should be acquired as a merchant. There was conflicting evidence as to what happened at the meeting. The position of the Bank and their witnesses was, of course, that there had been no decision to open an account for Worldwide Marketing and that the defendant's subsequent opening of the account was entirely unauthorised by anything that might have been said at the meeting. Their Lordships note that even holding a meeting to discuss the possible opening of an account for Worldwide Marketing would have been totally inconsistent with a fixed policy that the Bank were to acquire no more telemarketing merchants. In fact, however, the memorandum confirms that the opening of an account for Worldwide Marketing was under active consideration and that, while there might be practical difficulties, the Bank's senior officials had no objection to it in principle.

33. The memorandum from Mr Lumsden to Mr Yap was headed "Worldwide Marketing" and said:

> "With reference to our meeting of July 19, the proposal put forward by Worldwide Marketing appears to be an attractive source of new business and one which could utilize the capabilities of our credit card technology.

> Although the processing agent, Ciebrand is apparently a company of unquestionable integrity, the fact that they are dealing with WMM does not add any value to our comfort level of risk.
>
> I think the potential for considerable exposure exist given the 180 day charge back potential time span. The risk factor of the amount of lodgments of such a period has to be weighed against the potential processing fee income. I think that we should look even beyond a mercantile report and seek a bank guarantee through standby letter of credit for the full amount of all potential risk."

The memorandum was copied to Mr Scott. A date stamp on the copy produced in evidence suggests that the memorandum was received in the operations department on 22 July. There is a manuscript note on that copy in Mr Yap's handwriting addressed to "George" and signed "Dalton":

> "I agree with the standby LC and we should put this in motion and contact WWM for this."

Another date stamp suggests that the copy with the defendant's note was received in the marketing department for Mr Lumsden on 30 July and was presumably written by the defendant shortly before he went on holiday on 27 July.

34. Like the Court of Appeal, their Lordships are satisfied that Mr Lumsden's memorandum clearly indicated his approval of the opening of an account for Worldwide Marketing, provided that there were the proper safeguards of the kind that he suggested. It appears that the account was opened without these safeguards being in place. The responsibility for securing them would undoubtedly have lain with the marketing division. How the defendant came to open the account without those safeguards being in place does not emerge from the evidence. Nor do their Lordships pause to consider whether opening the account before being told that the safeguards were in place would itself have constituted a breach of the defendant's contract. Amidst a welter of allegations of wrongdoing in the statement of claim that was never suggested. What matters is that the defendant opened the account not as a defiant stroke of his own but as a business move that had been discussed and approved in principle by other members of the management team. Again, that is what their Lordships would expect, since the defendant as a responsible official of the Bank would have had neither motive nor incentive to open the account for any other purpose. As the Court of Appeal

observed, if opening the account had led to profits, the Bank would have been the beneficiary and the defendant would have been hailed as a hero. As it happens, the move turned out badly, but it did not for that reason amount to a breach of the appellant's contract of employment.

35. Their Lordships are accordingly satisfied that the trial judge misconstrued the memorandum of 6 July 1993 and failed to take account of the memorandum of 21 July 1993. Both mistakes critically affected the reasoning which led to his conclusion that the defendant had breached his contract of employment with the Bank by opening the Worldwide Marketing account. In these circumstances the Appeal Court were fully entitled to interfere with the judge's conclusions on the relevant matters of fact and to substitute their own conclusions based on the evidence. The Board agree with those conclusions.

36. For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed and that the appellant should pay the respondent's costs.