IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

COMMERCIAL CAUSE NUMBER 308 OF 2015

BETWEEN

OIL & PROTEIN COMPANY LIMITED....................................CLAIMANT

AND

NBS BANK LIMITED...DEFENDANT

AND

JOHN BIZWICK ....1ST THIRD PARTY

AND

AUBREY CHALERA... 2ND THIRD PARTY

CORAM: HON. JUSTICE J. N. KATSALA
F. Mbeta and C. Kalua, of counsel for the claimant
J. Mwakhwawa, D Njobvu and P. Mpaka, of counsel for the defendant
L. Gondwe and C. Kadyampakeni, of counsel for the third parties
E. Makombe, Court Clerk/Recording Officer

JUDGMENT

Introduction

This is my judgment on the trial of the claim brought by the claimant, a limited company, against the defendant, a commercial bank duly registered in Malawi. The claim was begun by a specially indorsed writ of summons dated 23 December 2015, seeking damages for breach of an oral agreement, alternatively, for breach of a duty of care owed by the defendant to the

claimant as its bankers, that is, the duty to ensure that the claimant's banking and related needs and or services are not jeopardized or unduly compromised. The defendant served a defence denying the existence of an oral agreement between itself and the claimant or owing and/or breaching any tortious duty of care as alleged by the claimant or at all.

The defendant took out a third party action against the third parties seeking indemnity in the event that the defendant is found liable to the claimant herein, on the ground that the two may have discharged their duties in a manner contrary to the law with intent to defraud the claimant as the defendant's prospective creditor. The third parties, Messrs. John Bizwick and Aubrey Chalera, were at all material times, the defendant's Chief Executive Officer and Head of Corporate Banking, respectively. They too served their defences denying any wrong doing in the discharge of their duties or being liable to indemnify the defendant as alleged or at all.

Witnesses

The parties herein called a total of 7 witnesses. The claimant called Zameer Karim. The defendant called Bernadetta Mandoloma, Leah Donga, Marsha Machika and Lusekelo Mwamondwe. Initially John Bizwick and Aubrey Chalera put in witness statements on subpoena at the instance of the claimant. It is only after they were joined in the action as third parties that they also filed witness statements in their defence.

I do not wish to narrate what each of the witnesses told the Court in their testimony because I want to keep this Judgment reasonably short. However, I wish to assure the parties that I have scrutinised and considered all the testimony and evidence before me in coming up with the findings of fact contained in this judgment. I have spent a lot of time analysing each piece of evidence in detail just to make sure that no relevant evidence is omitted when coming up with the conclusions and the decision herein.

Facts

The claimant is a limited company carrying out business in Malawi. Farm-Chem Wholesalers and Astro Chemicals are the claimant's sister companies. Mr Zameer Karim is the Managing Director of the claimant as well as the two sister companies. The defendant is a duly registered commercial bank with branches throughout the Republic. At all material times Mr John Bizwick was the defendant's Chief Executive Officer whilst the second third party, Mr Aubrey Chalera, was the defendant's Head of Corporate Banking Division. The claimant and its sister companies were the defendant's customers and held several bank accounts in their names. Most of the times Mr Zameer Karim dealt with Mr Aubrey Chalera in respect of its banking requirements and services pertaining to his companies. Basically, Mr Aubrey Chalera was the face of the defendant in terms of corporate banking services whilst Mr Zameer

Karim was the face of the claimant and the sister companies. These two gentlemen knew each other very well since they interacted on numerous occasions.

By a Facility Agreement dated 20 September, 2011 between the claimant and the Eastern and Southern African Trade and Development Bank (the PTA Bank), the claimant was availed an import finance facility of up to USD9,190,000 for the benefit of Farm-Chem Wholesalers and Astro Chemicals for the purpose of purchasing inorganic fertilizer to be supplied to the Malawi Government under the Government's Farm Input Subsidy Program (FISP). Farm-chem Wholesalers and Astro Chemicals are the claimant's sister companies. Under the terms of the Facility Agreement, it was agreed that there would be appointed an Agent Bank to receive funds from buyers through a Collection Account. The Agent Bank would provide US Dollars (equivalent to the funds received) and remit the funds (in US Dollars) to a PTA Bank Designated Account to repay the claimant's loan, together with interest, costs, commission charges and other expenses thereon.

Subsequent to the PTA Bank and the claimant concluding the Facility Agreement, they entered into an Accounts Agreement with the defendant under which the defendant was appointed as the Agent Bank. The Accounts Agreement, entered into on 10th October 2011, among other things, provided for the creation and establishment of a Collection Account to be maintained by the defendant and in which the PTA Bank was solely and beneficially interested. Further, it was agreed that the defendant, as Agent Bank, would have only those duties, obligations and responsibilities expressly referred to in the Accounts Agreement, and that the Agent Bank would not be bound in any way by the Facility Agreement or by any other agreement between the claimant and PTA Bank. Thus, it would appear that the understanding amongst the parties was that the Agent Bank's only duties and responsibilities were those set forth in the Accounts Agreement. It was also agreed that the claimant was to cause to be paid directly into the Collection Account all Receivables under the contracts of the sale of fertilizer to Malawi Government and that the defendant was to use the deposits to buy US Dollars. These US Dollars were to be paid into an account known as PTA Designated Account to meet the claimant's obligations under the maturing advances made under the Facility Agreement. The Accounts Agreement also provided that none of the terms or provisions of the Agreement could be waived, altered, modified or amended in any respect except by an instrument in writing duly executed by the claimant, the defendant and the PTA Bank.

At the material time there was a shortage of foreign exchange currency in Malawi. Therefore, it was difficult for businesses and individuals to pay for goods and services imported into the country. Consequently, considering the

strategic nature of the fertilizer imports under FISP, the Reserve Bank of Malawi (hereinafter "the Reserve Bank"), provided an assurance in writing to Ecobank Malawi Limited, the bank initially intended to be the Agent Bank, that in the event that the Ecobank was un able to source foreign exchange from the market for settlement of the claimant's obligation to PTA Bank, it would make available foreign currency in United States Dollars for the full repayment of the claimant's debt under the aforesaid Facility Agreement.

The Malawi Government paid for the FISP fertilizer in November and December 2011. However, the money was not paid into the Collection Account as agreed in the Facility Agreement and the Accounts Agreement. It was deposited in bank accounts for the claimant's sister companies, Astro-Chem and Farm-Chem Wholesalers, the entities which transacted the business with the Malawi Government. The claimant's Managing Director, Mr. Zameer Karim, was the sole signatory to those bank accounts. However, there is an Assignment Agreement executed by the two businesses in favour of the PTA Bank. Under this Agreement both Astro-Chem and Farm-Chem Wholesalers assigned the proceeds from the sale of the FISP fertilizer to the PTA Bank. According to this Agreement the assigned proceeds were to be paid into the Collection Account and to purchase US Dollars to be paid into the PTA Bank Designated Account. Further, the assignment of the proceeds to PTA Bank under the Assignment Agreement and the entry into the tripartite Accounts Agreement were expressly stated to be conditions precedent to the disbursement of the facility to the claimant under the Facility Agreement.

Pursuant to the aforesaid comfort under the FISP arrangement and at the instance of the claimant, on or about 13 January 2012, the Reserve Bank availed to the defendant the sum of USD6,502,500 (herein after "the forex") to be applied towards the claimant's repayment of its debt to the PTA Bank under the Facility Agreement. The defendant paid from its own funds the sum of K1,074,358,005.75 for the forex. When informed about the availability of the forex, the claimant advised the defendant that it was not ready to buy the forex. And the claimant did not deposit money into the Collection Account, as was required under the Accounts Agreement, which could have been used to purchase the forex from the defendant to be paid into the PTA Bank Designated Account. In the circumstances, the defendant proceeded to sell the forex to its customers.

On or about 7 May 2012, the Reserve Bank devalued the local currency, the Kwacha, by about 49 percent. Despite such massive devaluation, the Kwacha continued to depreciate in value. As a result, the claimant found itself paying or being required to pay far much more money to the PTA Bank to service the facility than it would have paid if it had purchased and remitted the forex in January 2012.

Claimant's case

The claimant's case is that by an oral agreement between the claimant and the defendant made sometime in January 2012, the defendant was to put to its own use the forex or part thereof on condition that the defendant would refund and remit the same to the PTA Bank on behalf of the claimant under the Accounts Agreement by 30 April 2012 in order for the claimant to meet its obligations under the Facility Agreement. It is further averred that the defendant was fully aware that the claimant would suffer penalties, interest on arrears and termination of the import finance facility if the forex or part thereof was not remitted to the PTA Bank by 30 April 2012.

The claimant contends that despite several reminders and requests, and in breach of the said oral agreement to refund the forex or part thereof by 30 April 2012 for remittance of the same to the PTA Bank on behalf of the claimant under the said Accounts Agreement, the defendant only refunded and remitted a total sum of USD2,005,800. The defendant failed or neglected to refund the remaining sum of USD4,496,700 by 30 April 2012. It is the claimant's contention that as a result of the aforesaid defendant's breach, the claimant has suffered loss and damage as follows: -

a. Foreign exchange loss on the remaining sum of USD4,496,700 following the devaluation of the Kwacha to the United States Dollar on or about 7 May 2012 as follows:

    i. The defendant remitted the sum of USD847,000 on behalf of the claimant in July 2012 by which remittance the claimant suffered foreign exchange loss in the sum of K96,558,000.

    ii. The claimant remitted the sum of USD120,000 through Ecobank Malawi Limited on or about 20 September 2012 thereby incurring foreign exchange loss in the sum of K15,955,164.

    iii. The claimant remitted the sum of USD90,000 through Ecobank Malawi Limited on or about 25 September 2012 thereby incurring foreign exchange loss in the sum K12,319,020.

    iv. The claimant failed to remit the remaining sum of USD3,439,700 for which the foreign exchange loss was in the sum of MK1,829,920,400 as of 8 January 2016.

b. The claimant was charged penalty interest under the Facility Agreement in the total sum of USD1,937,883.82 for the period between 1 May 2012 and January 2016.

c. The claimant had to apply for the restructuring of the Facility Agreement and was charged the sum of USD44,452.22 as restructuring fees.

d. As part of the restructuring process of the Facility Agreement the claimant had to provide Security Guarantees from other financial institutions for which the total sum of USD245,000 was paid by the claimant as guarantee fees.

e. The PTA Bank could no longer avail any sums of money to the claimant under the said Facility Agreement or renew the same in the subsequent years leading to lack of alternative less expensive financing of the claimant's businesses.

In the alternative, it is the claimant's case that the defendant owed the claimant a tortious general duty of care to take reasonable care in rendering services to the claimant as its customer so as to ensure that the claimant's banking and related needs/services are not jeopardized or unduly compromised. The claimant avers that this duty of care arises from the following circumstances: -

a. The defendant was fully aware and/or ought to have been aware that due to the acute scarcity of foreign exchange in the country at the material time it was going to be very difficult to make available the said sum of USD6,502,500 or part thereof by 30 April 2012. In the circumstances, the defendant ought not to have used the funds for its own purposes. The defendant breached that duty by proceeding to use the said sum of USD6,502,500 in the circumstances thereby failing to make available the sum of USD4,496,700 within time, that is by 30 April 2012.

b. The defendant ought to have taken due regard to the special arrangement under which the Reserve Bank provided the said sum of USD6,502,500 and ensure that the claimant is not exposed to any uncertainty or loss and damage surrounding the availability of foreign exchange in view of the claimant's obligation to repay its loan with the PTA Bank after the Reserve Bank had provided the funds.

c. Since the claimant would not be in a position to know the defendant's ability to provide the sum of USD6,502,500 or part thereof the claimant's remittance to PTA Bank from sources other than the provision already made by the Reserve Bank, the defendant proceed to recklessly and/or negligently make

representations to the claimant that it had the capacity to refund the said sum of USD6,502,500 or part thereof.

d. The defendant was fully aware of the claimant's obligations under the Facility Agreement with the PTA Bank and the consequences of breach of the same on the claimant. Despite knowledge of the uncertainty on whether it would have enough foreign exchange for the claimant's remittance to the PTA Bank due to the prevailing scarcity of foreign exchange, the defendant proceeded to use the funds for its own purposes.

e. The defendant ought to have known that the claimant's interests would be jeopardized if the defendant took advantage of the fact that the said sum of USD6,502,500 would only be made available for the claimant's PTA Bank remittances through the defendant and it made decisions to put the funds to its own use other than the claimant's remittance to the PTA Bank that would bring uncertainty on the foreign exchange availability for the claimant's remittances.

f. The defendant advised the claimant that it had invested the sum of USD6,502,500 or part thereof with another bank in order to ensure the availability of the same to the claimant for its remittances to the PTA Bank when the Letters of Credit would be due but failed to make the total sum of USD4,496,700 available for the claimant's remittances on time. The claimant relied on that advice and believed that the defendant would make the foreign exchange available within time. Consequently, the claimant suffered loss and damage when the defendant failed to make the foreign exchange available as expected.

The claimant avers that as a result of the defendant's breach of the said tortious general duty of care to exercise reasonable care when rendering services to the claimant as its customer by failing to ensure that the foreign exchange was available for the claimant's remittances within the repayment period, the claimant suffered loss and damage as stated above. Therefore, the claimant claims:

a. Foreign exchange losses in the total sum of MK1,954,752,584 as of 8 January 2016 and any further foreign exchange losses thereafter.

b. Reimbursement of the following sums:

i. USD1,937,883 penalty interest for the period between 1 May 2012 and 8 January 2016, and further interest charged on the facility thereafter till date of full payment.

ii. USD44,452.22 restructuring fees.

iii. USD245,000 guarantee fees.

b. Compound Interest at 5% above the defendant's commercial base lending rate from respective dates of claimant's payment up to the date of full payment as follows:

i. On the sum of K96,558,000 from July, 2012;

ii. On the sum of K15,955,164 from 20 September 2012;

iii. On the sum of K12,319,020 from 25 September 2012;

iv. On the sum of USD44,452.22 paid as restructuring fees from the date it was paid;

v. On the sum of USD245,000 paid as guarantee fees from the date it was paid; and

c. Damages for causing the termination of the PTA Bank Facility Agreement.

Defendant's case

On the other hand, the defendant's case is that its relationship with the claimant as regards the PTA Bank facility was governed by the Accounts Agreement it entered into with the claimant and the PTA Bank dated 10th October 2011. The defendant in its defence relies on the material terms of the Accounts Agreement, which provided, inter alia, that: -

(i) "The Borrower [the claimant] shall cause to be paid directly into the Collection Account all receivables under the contracts. Such deposit shall be withdrawn and shall be utilized by the Agent Bank [the defendant] to buy Dollars which Dollars shall be paid into the PTA Bank Designated Account to meet the Borrower's obligations under the maturing advances made under the Facility Agreement. [Clause 2.3];

(ii) PTA Bank Designated Account means a US Dollar account opened in the sole names of PTA Bank wheresoever, and into which the

Agent Bank shall on the advice of the PTA Bank, make payments into after purchasing Dollars from the local foreign exchange market using the balances available in the Collection Account. The amounts credited to the PTA Bank Designated Account shall be used solely to pay off the Borrower's obligations to PTA Bank under this Agreement [Clause 1.2];

(iii) The Agent Bank accepts and holds the funds in the Collection Account and shall disburse such funds pursuant to the terms of this Agreement and not otherwise... [Clause 2.4];

(iv) Save as provided in this Section, the Agent Bank shall not make or permit any disbursement of the deposited funds or any debit or deduction of any kind from the Collection Account other than in accordance with terms of this Section 3. [Clause 3.1];

(v) PTA Bank shall from time to time provide the Agent Bank with details of the funds the Borrower is to deposit into the PTA Bank Designated Account on the due dates. These funds shall be transferred from the Collection Account after conversion of the same into Dollars. [Clause 3.2];

(vi) All instructions, notices, certifications and approvals made or presented to the Agent Bank hereunder shall comply with Clause 10.1, shall be in writing and shall be signed by the party giving the same. [Clause 3.4];

(vii) The Agent Bank shall not be bound in any way by the Facility Agreement or by any other Agreement or contract between the Borrower and PTA Bank, it being understood that the Agent Bank's only duties and responsibilities shall be as set forth in this Agreement… [Clause 4.2]

(viii) The Agent Bank shall have no responsibility to enquire or ascertain as to the performance or observance by any other party of its obligations under this Agreement (or the Facility Agreement) or the existence of a Default. [Clause 4.3 (b)]

(ix) None of the terms or provisions of this Agreement may be waived, altered, modified or amended in any respect except by an instrument in writing which is duly executed by the Borrower, Agent Bank and PTA Bank. [Clause 7.1]"

Relying on the terms of the Accounts Agreement, the defendant states that the claimant did not apply the proceeds from the sale of fertilizer to Malawi Government towards the repayment of any debt under the facility with the PTA Bank and consequently, there were no funds for purchase of US$ in the Collection Account. The defendant further states that on 13 January 2012 it purchased US$6,502,500 from the Reserve Bank using its own money and therefore the US$6,502,500 belonged to it (the defendant). In accordance with Clauses 2.3 and 3.2 (i) of the Accounts Agreement, the defendant was ready and willing to prioritize sale of these Dollars to the claimant so as to apply the same towards repayment of the claimant's debt with the PTA Bank and/or to deposit this amount into the PTA Bank Designated Account provided the claimant had deposited, and/or caused to be deposited, funds into the Collection Account which funds the defendant would have used to purchase the Dollars in accordance with the Accounts Agreement.

The defendant denies entering into an oral agreement for use, refund and remittance of funds as alleged by the claimant and contends that the dollars were acquired using the defendant's own money and therefore belonged to the defendant and denies the allegation that the claimant consented to the defendant to use the sum of US$6,502,500 or part thereof as alleged or otherwise since the defendant did not need such consent as the money was not held in the claimant's account and/or did it belong to the claimant. The defendant states that the said sum of US$6,502,500 having been acquired using its own Malawi Kwacha funds and not any funds from the Collection Account, or any funds belonging to the claimant or any other person, the defendant was free to use the amount of US$6,502,500 as it deemed fit. The claimant further denies that it agreed to any condition to make available the said amount of US$6,502,500 for remittance to the PTA Bank under the Accounts Agreement by 30 April 2012 and contends that in any case the date of 30 April 2012 was unknown to the defendant since it was not a party to the Facility Agreement.

Further and/or in the alternative, it is the defendant's case that if the oral agreement alleged by the claimant had existed (which is denied) it would only amount to an attempt to vary the terms of the Accounts Agreement already entered into between the claimant, defendant and the PTA Bank (for instance Clause 4.2) and contrary to Clause 7.1 of the Accounts Agreement which states that none of the terms or provisions of the Agreement may be waived, altered, modified or amended in any respect except by an instrument in writing duly executed by the claimant, the defendant and the PTA Bank. The defendant also states that if the alleged oral agreement existed the same was illegal and/or unenforceable because: -

(i) At all material times the claimant was not a person entitled to selling or lending or exchanging foreign currency with any other person.

(ii) At all material times if, notwithstanding the defendant's use of its own funds to acquire the foreign currency, the Reserve Bank made available the said sum of $6, 502, 000 to the defendant for the use of the claimant only, the claimant was aware that the Reserve Bank made available the said sum solely for the repayment of the claimant's debt to the PTA Bank.

(iii) It flouted the provisions of the exchange control legislation.

(iv) It was not an agreement under seal and on the facts pleaded in the Re-amended Statement of Claim and in the Further and Better Particulars the claimant failed to provide any consideration to support the alleged oral agreement.

(v) It was a promise on the part of the defendant to the claimant to pay the claimant's debt to the PTA Bank when due and there is no memorandum in writing of the alleged contract sufficient to satisfy the Statute of Frauds 1677.

(vi) It was a promise on the part of the defendant to the claimant to pay the claimant's debt to the PTA Bank when due under which the claimant suffered no performance whatsoever and the claimant offered no consideration.

Further, the defendant denies that it was aware that the claimant would suffer penalties, interest on arrears or termination of the Facility Agreement if the sum of US$6,502,000 was not remitted to the PTA Bank by 30 April 2012 or at all. In any case, under Clause 4.2 of the Accounts Agreement, it was clearly provided that the defendant's duties and responsibilities were only those set out in the Agreement and the allegations relating to penalty, interest on arrears, etc, are aimed at creating duties and responsibilities for the defendant outside the Accounts Agreement. And even if it was aware, the risk of loss including the default risk and currency risk exposure in relation to the foreign currency, on the true construction of the Accounts Agreement and the founding term sheet, at all material times, was on the claimant. In the circumstances, if the oral agreement existed the claimant freely and negligently or recklessly not caring about the risk on itself entered into the alleged oral agreement. Also, if the oral agreement existed, the claimant entered into such agreement due to its inability to redeem the foreign currency in Malawi Kwacha and suffers to bear the risk of losses the claimant claims in this action or any other losses, if at all. The defendant also denies failing or neglecting or being obliged to refund the sum of $4,496,700 by 30 April 2012 as alleged by the claimant.

Further and/or in the alternative, the defendant states that the claimant did make some inquiries on forex towards the end of May 2012 but was requesting that the defendant should avail it US Dollars at the rate that was applicable before the Kwacha was devalued and allowed to float. The defendant did not accept this request and the US Dollars could not be sold to the claimant. Further and/or in the alternative, the defendant states that if it failed to carry out any instructions for remittance of foreign currency outside Malawi in or around April 2012 from the claimant or any of its customers, such failure was caused by unavailability of forex and was outside the control of the defendant. And if the claimant had the local currency to acquire the foreign currency, the claimant was at liberty to buy such forex from elsewhere using funds which were available to it since the primary obligation to settle any debts to the PTA Bank rested on the claimant. It is also averred that if the claimant suffered any loses as alleged, the claimant failed to mitigate its losses in the circumstances.

In the further alternative, the defendant contends that between January and July 2012, it did in fact remit forex in the amount of US$5,747,134.00 to the PTA Bank and other parties in accordance with the claimant's instructions; provided the claimant had the equivalent local currency and gave instructions for remittance of funds to the defendant, who was ready and willing at all times to execute the claimant's instructions.

The defendant denies that it rendered services to the claimant in a banker-customer relationship in relation to the claimant's performance of its obligations under the Facility Agreement and also denies that it owed the claimant a tortious general duty of care to take reasonable care in rendering banking and related needs and services concerning the satisfaction or performance by the claimant of its obligations to the PTA Bank. The defendant contends that at all material times, the claimant and the defendant's relationship concerning the remittance of funds to the PTA Bank under the Facility Agreement was subject to the terms of the Accounts Agreement. The defendant denies that the claimant relied on any advice from the defendant as to the availability of foreign currency on any alleged due date or at all. The defendant also denies that it had any obligation or breached any obligation not to use the funds for its purposes or at all and denies the alleged effect of any knowledge on the part of the defendant of the claimant's obligation, exposure and duties under the Facility Agreement and denies emergence of any common law duty in tort over and above the directions of the Accounts Agreement and its founding documents. It is also the defendant's case that if the defendant had any obligation not to use the forex and/or owed the claimant any tortious duty of care and if the defendant nevertheless used the said sum on agreement with the claimant as alleged, the claimant voluntarily

assumed the risk of the loss it may have suffered. And that if the defendant owed the claimant the tortious duty of care as alleged, the defendant exercised due and appropriate care, and is not liable in tort in the circumstances having regard, among other things, to the contractual context informed by the Accounts Agreement, the use of the defendant's own funds to acquire the foreign currency, the claimant's failure to acquire the forex immediately upon the defendant purchasing the forex, the claimant's failure to transact business in accordance with the Accounts Agreement, the experience and knowledge of the claimant of normal banking and corporate transactions, the involvement of the claimant in the dealings concerning the said sum of $6,502,500 and the overall circumstances as revealed by the evidence before the Court.

Issues for determination

The parties herein agree that despite the many issues they may have raised through their pleadings, during the trial and indeed in their submissions, the court's determination on the following questions will effectively dispose of this matter as the dispute between them will have been determined. The issues are: -

a. Whether or not the claimant and the defendant entered into an oral agreement in January 2012 for the defendant to put the forex or part thereof to its own use from January 2012 and to make it available under the Accounts Agreement on 30 April 2012 for satisfaction of the Facility Agreement.

b. If there existed an oral agreement between the claimant and the defendant for the defendant to put the forex to its own use, is the said oral agreement enforceable against the defendant?

c. If the claimant entered into an oral agreement with the defendant for the defendant to put the forex to its own use and if the said oral agreement is enforceable, is the claimant entitled to claims for penalty interest, restructuring fees, guarantee fees under the Facility Agreement, and for foreign exchange losses, commercial interest at 5% above the defendant's base lending rate, damages, and costs of the action as stated in the statement of claim?

d. In the alternative to the issues in (a) to (c) above, if, notwithstanding the factual and legal context of the said issues, the claimant and the defendant entered into an oral agreement for the defendant to put the forex to its own use, did the defendant owe the claimant common law tortious general duty of care to take reasonable care in rendering banker – customer services and/or did the defendant breach that

duty as to entitle the claimant to claim for damages or any of the reliefs sought against the defendant?

e. If the claimant's case as pleaded is made out against the defendant would the 1st and 2nd Third Parties, in their management of and concerning the forex as the defendant's Chief Executive Officer and Head of Corporate Banking at the material time, respectively, have been in willful neglect and in breach of binding terms of a written Accounts Agreement between the claimant, the defendant and the PTA Bank and/or the Financial Services Act, 2010 and/or Directives made thereunder or any financial services law and/or their employment contracts, policy guidelines and the general law or would the 1st and 2nd Third Parties thereby have so conducted the business of the defendant with intent to defraud the claimant as the defendant's prospective creditor, as to be personally liable for losses, if any, would have been suffered by the claimant?

I have decided to deal with the issues by raising and answering a few questions in the hope that at the end of the day the issues will have been sufficiently dealt with and the rights of the parties defined and the dispute sufficiently determined.

Submissions

In this judgment I have deliberately not set out in detail all the arguments that were advanced before me, still less all the references that were properly drawn to the Court's attention. I have as much as possible expressly considered the main points, but, where I have not specifically dealt with the submissions, it is not because I consider them as unworthy of consideration or have dismissed them out of hand. I have tried to carefully weigh all the evidence and submissions, but also endeavoured to keep this judgment not unnecessarily long. Thus, it is as long as it should be.

I am grateful to counsel for the helpful and constructive way in which the trial was managed and conducted, and for the high quality of the written and oral submissions. My task in coming up with this judgment has been considerably simplified.

Purchase of USD6.5 million from the Reserve Bank

In the present case, the Reserve Bank could not sell the USD6.5 million directly to the claimant. According to the evidence before me, the Reserve Bank does not sell forex to persons other than banks. So, even though the claimant may have asked for the forex from the Reserve Bank, it (the claimant) could not buy the forex directly from the Reserve Bank. It could only buy the forex through a dealer bank, like the defendant.

Following email exchanges between the claimant's Managing Director, Mr Zameer Karim, and Mrs Leah Donga of the Reserve Bank, on 13 January 2012 a sum of USD6,502,500 was allocated to the defendant by the Reserve Bank for onward resell to the claimant. The claimant was duly informed by the Reserve Bank of this allocation and was asked to follow up with the defendant. It must be mentioned that the defendant was to resell this forex to the claimant at a price that would have given the defendant a profit as was the norm in such transactions. The defendant paid the Reserve Bank the sum of K1,074,358,005.75 as the purchase price for the forex.

However, the claimant did not pay the defendant the said sum of K1,074,358,005.75 which was used to purchase the forex from the Reserve Bank. The defendant paid the Reserve Bank for the forex using its own money. Further, at the time of such purchase, the claimant had not deposited the K1.074,358,005.75 or any money into the Collection Account which could have been used to purchase the forex as agreed under the Accounts Agreement.

Who did the forex belong to?
In these circumstances, who did the forex belong to – the claimant or the defendant? This question is fundamental to the dispute in this action.

In my considered view, the forex belonged to the defendant. Whilst it cannot be denied that it is the claimant who approached the Reserve Bank for the sale of the such a huge amount of forex to the defendant, the claimant did not buy the forex. It is the defendant who bought the forex. This was in line with the policy of the Reserve Bank of not selling forex direct to persons other than dealer banks. The claimant did not pay to the defendant the cost of the forex. The defendant used its own money to pay for the forex. In these circumstances, I do not see how the forex can be said to have belonged to the claimant. In my opinion, to say that the forex belonged to the claimant would be tantamount to saying that the K1.07 billion the defendant paid to the Reserve Bank for the forex was the claimant's money - which is far from the truth. During cross examination Mr Zameer Karim admitted that the claimant did not pay for the forex and that the defendant paid for the forex using its own money. As such, I do not see how it can be said that the forex belonged to the claimant.

In *Easy Pack Limited v NBS Bank Limited v Iponga Enterprises and Another* Commercial Cause No. 3 of 2013 (unreported), Mtambo, J. held that according to the Exchange Control Regulations, when a bank, as a licenced institution, acquires forex from the central bank, the bank does so in its own right and cannot do that as an agent of any of its customers. The full rights in the forex are vested in the bank. I have not been persuaded to hold otherwise especially

in the circumstances of the present case. I totally agree with my learned brother judge.

I would even proceed to say that, even if the claimant had paid for the forex, it (the forex) would still have remained the bank's (defendant's) property for as long as it remained in a bank account at the defendant. The nature of the relationship between a banker and a customer as it relates to property in bank deposits is well settled at law. In *Chilala v Republic* 7 MLR 37 at 40-41 the Supreme Court of Appeal approved the dicta in *R v Davenport* (3) [1954] 1 WLR 571 that: -

> "… although one talks about a person having money in a bank, it is just as well that it should be understood that the only person who has money in a bank is a banker. If I pay money into my bank either by paying cash or a cheque, that money at once becomes the money of the banker. The relationship between banker and customer is that of debtor and creditor. He does not hold my money as an agent or trustee; the leading case of *Hill v. Foley* (1848) 2 HLC 28, exploded that idea. Directly the money is paid into the bank, it becomes the banker's money, and the contract between the banker and the customer is that the banker receives a loan of money from the customer as against his promise to honour the customer's cheques on demand. When the banker is paying out, whether in cash over the counter or by crediting the bank account of somebody else, he is paying out his own money, not the customers money, but he is debiting the customer in account. The customer has a chose in action, that is to say, a right to expect that the banker will honour his cheque, but the banker does it out of his own money."

The moment the Reserve Bank transferred the US$6.5m into the defendant's account, it became the defendant's money. It remained so throughout though earmarked for the claimant to buy. The only thing that would have distinguished this forex and not make it subject of the banker's full property rights in the money would have been the satisfaction of the agreed criterion in the Accounts Agreement, i.e. the placement of proceeds of the sale of fertilizer (or indeed any money) in the Collection Account. The defendant would have been obliged to use that money to purchase the forex and put it in the PTA Bank Designated Account. And that is why the Accounts Agreement was meant to be independent of the ordinary banker-customer relationship between the claimant and the defendant.

From the customer–banker perspective, the position in the present case, as I see it, is that the claimant did not even become the defendant's creditor. The claimant having diverted the proceeds of the sale of fertilizer and having failed to put funds in the Collection Account, the claimant secured no rights in the

forex. The defendant did not become a debtor to the claimant as regards the forex. In other words, no legal relationship whatsoever was created between the defendant and the claimant by the mere fact of Mr Zameer Karim engaging the Reserve Bank about availing the forex to the defendant for the claimant to purchase. The forex belonged to the defendant.

Did the claimant have proprietary interest in the forex?
The claimant has argued that the fact that the forex was paid for by the defendant and that it belonged to the defendant and that the defendant was at liberty to deal with it as it saw fit may be true at law in as far as the legal title to the forex is concerned. However, Equity paints a different picture altogether. For in equity and under the law of trusts, the position is that there are several incidences of property/ownership which can be vested in different persons at the same time, all of who can say that they own an interest in the property in issue. Two of such incidences are the legal title and the equitable/beneficial title. In support of this submission, the claimant relies on a passage from the case of *Solomon v Walton* 109 Cal. App. 2d 381 (1952) where the court said:

> “The term "legal title" has been defined as "one cognizable or enforceable in a court of law, or one which is complete and perfect so far as regards the apparent right of ownership and possession, but which carries no beneficial interest in the property, another person being equitably entitled thereto; in either case, the antithesis of `equitable title.'" (Black's Law Dictionary, 3d ed., p. 1734.) In *Tobin v Gartiez*, 44 Nev. 179 [191 P. 1063, 1064], it is said:
>
> > ‘The term `legal title' does not have a strict legal meaning. A party may have the legal title to property although he is not the absolute owner in fee. In a broad sense it signifies title in fee as well as any inferior estate that may be carved out of an estate in fee.’
>
> It seems reasonable to conclude that the term "legal title" as used in the findings was intended as synonymous with the term "record title" and to describe a limited transfer of interest in the property.”

An equitable interest is an "interest held by virtue of an equitable title (a title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title) or claimed on equitable grounds, such as the interest held by a trust beneficiary." [*Black's Law Dictionary. Second Pocket Edition. p. 361. 2001 West Group. Bryan A. Garner (editor in chief)*]. It is so submitted.

The claimant agrees that, on the evidence, the defendant, having bought the forex from the Reserve bank, had legal title to the forex by virtue of that fact. However, it is argued that the fact that the defendant never applied for the

forex from the Reserve Bank and that it is the claimant who approached the Reserve bank for the forex for purposes of paying the PTA Bank facility, several equities in favour of the claimant were present in the issue which encumbered the defendant's legal title. This is despite the fact that the claimant did not indicate to the defendant the bank accounts to be debited in order for the claimant to buy the forex from the defendant. A combination of these factors created an equity in favour of the claimant in respect of the forex. Therefore, the claimant had an equitable interest. It could have been a grave error for the defendant to just proceed to dispose of the forex without the input of the claimant who was beneficially entitled to the same. As already stated, according to *Black's Law Dictionary*, an equitable interest is an interest held by virtue of an equitable title (a title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title) or claimed on equitable grounds. The fact that the Reserve Bank sold the forex to the defendant earmarked for resell to the claimant gave the claimant a beneficial interest in the forex, which gave the claimant, as the person that requested the forex from the Reserve Bank in the first place, the right to acquire the formal legal title in the forex from the defendant. So, whereas the defendant had the legal title to the forex, the claimant had the equitable/beneficial title thereto. That beneficial title was an encumbrance on the defendant's legal title, hence the defendant could not dispose of the forex as it saw fit. This is so even without the claimant paying a single Kwacha for the forex. The claimant so submits.

The claimant has cited the case of *Marr v Collie* [2017] UKPC 17, where the Judicial Committee of the Privy Council affirmed the dictum of the Court of Appeal as encapsulating the law on the point in the following manner:

> "The Court of Appeal had summarized the effect of the three decisions in paras 13 and 14 of its judgment:
>
>> '13. The authorities are clear, where parties are said to own property jointly, the beneficial interest is presumed to correspond to the legal interests in that land, as reflected in the maxim 'equity follows the law'. The presumption, however, may be displaced or rebutted by evidence that the purchase money was provided by the co-owners in unequal shares, in which case a presumption of resulting trust for themselves as tenants in common in proportions in which they contributed the purchase money replaces the presumption that the legal and equitable title coincide. Where however, a person purchases property in his name and another's name jointly, and provides all of the purchase money, the question is whether the other person, who did not provide any of the purchase money, acquires a beneficial interest in the property.

> 14. The aforementioned authorities clearly suggest that the answer to that question depends on the intention of the purchaser who provided the purchase money at the time of the purchase of the property. The presumption of a resulting trust will be negated by clear evidence that it was the intention of the purchaser, at the time of the purchase, to share the beneficial interest in the property with his co-owner.'"

The claimant submits that the principle to be gleaned from the above case is that, where a legal title holder acquires property on behalf of another using his own funds, we look to the intention of the purchaser at the time of purchase for the answer as to whether that other person acquired a beneficial interest in the property, whose purchase price he never contributed to. The totality of the evidence in the present case, as already stated, is clear on that the defendant acquired the forex from the Reserve Bank using its own money for the sole purpose of onward resell to the claimant to enable the claimant to pay the PTA Bank facility. Therefore, the claimant acquired a full beneficial/equitable title to the forex even without paying the defendant for it. The defendant's intention when purchasing the forex was not for onward resell to whoever had the Kwacha equivalent, but to sell to the claimant to settle its indebtedness to the PTA Bank under the Facility Agreement.

The claimant further argues that indeed, it is only as a result of that beneficial/equitable title that the defendant had to seek the oral agreement of the claimant to sell the forex immediately, on the condition that the defendant would make a refund thereof to the claimant at the time the forex would be due to the PTA Bank under the Facility Agreement. The defendant's legal title did not entitle it to dispose of the beneficial or equitable title in the said forex because that title belonged to the claimant not to the defendant. Hence, the defendant could not independently pass the beneficial title in the forex to other people as it did not have that beneficial title to pass in the first place.

In the end, since the claimant is the one that had the beneficial title in the forex, it did have a proprietary interest in the forex to enable it to enter into the oral agreement with the defendant for the defendant to put the forex to its own use subject to refund on or before 30 April 2012.

This is the back bone of the claimant's arguments in this case.

In my judgment, the fact that it is the claimant, through Mr Zameer Karim, who obtained the letter of comfort from the Reserve Bank on the availability of foreign currency for the purposes of repaying the facility from the PTA Bank, and also, that he approached the Reserve Bank to sell the forex to the defendant earmarking it for resell to the claimant did not confer on the claimant any proprietary interest in the forex. To say that the claimant acquired proprietary interest by virtue of this would be a very simplistic way

of looking at the issue. It would be an erroneous conclusion because it lacks legal support.

It must be remembered that the defendant, being a commercial bank, is in the business of, among other things, buying and selling of foreign currency. It must also be remembered that the defendant bought the forex specifically for *resell* to the claimant. It was not bought on behalf of the claimant, or to be donated to the claimant or to be shared with the claimant. The transaction between the defendant and the claimant was to be purely commercial – a *sale*. The sale was to be conducted based on the rates prevailing on the day(s) of the transaction, and not on discounted rates or any special rates. The defendant was to make such profit as was allowable on such transactions in its ordinary day to day business. The evidence before this Court is that the forex was purchased by the defendant in its own name and not in the joint names of the defendant and the claimant. There is no evidence showing that though the defendant bought the forex in its name using its own funds, it was the defendant's intention to own the forex jointly with the claimant. Indeed, there is no evidence to show that it was the intention of the parties or the defendant that the profits from the resale of the forex should be shared between them. On this basis, it is my judgment that if one applies the principle in the *Marr v Collie* case (supra), which the claimant relies on, the only conclusion one can come to is that the claimant did not have any equitable/beneficial interest in the forex. I do not agree that what the claimant did in facilitating the defendant's purchase of the forex was sufficient to confer on the claimant any beneficial interest in the forex. With the greatest respect, I think the claimant is overstretching the principle in the *Marr v Collie* case.

It is my considered view that what the claimant did towards the defendant's purchase of the forex from the Reserve Bank only conferred on the claimant the right to the first option to buy the forex from the defendant. It was entirely up to the claimant to exercise that option or not. Obviously, this must be looked at in the context of the Accounts Agreement. The claimant's buying of the forex and the defendant's obligation to sell the forex to the claimant were subject to the Accounts Agreement. The parties were to carry out the sale of forex transaction in line with the Accounts Agreement which among other things, provided the obligations for each party. The evidence before me shows that the claimant failed to perform its obligations under the Accounts Agreement. This then changed the dimensions of the issue.

First, as it has already been stated herein, under the Accounts Agreement the claimant was required to put money into the Collection Account and then the defendant was to purchase forex equivalent to the amount deposited and remit it to the PTA Bank Designated Account. As earlier stated, the transaction between the claimant and the defendant was to be a sale. The claimant did

not deposit money into the Collection Account to purchase the forex. Had the claimant deposited the money into the Collection Account as per the Accounts Agreement, the defendant would have been under an obligation to purchase/sell the forex equivalent to that money and remit it into the PTA Bank Designated Account. In other words, the defendant would have been obliged to sell the forex to the claimant, as it were. Now, having not paid money into the Collection Account, and having clearly informed the defendant that they were not ready to pay money into the Collection Account for purchase of the forex, the defendant's obligation to sell the forex to the claimant did not arise.

It is clear to me that outside the Accounts Agreement, there was no obligation on the part of the defendant to sell forex to the claimant. Outside the Accounts Agreement, the relationship between the claimant and the defendant was the ordinary customer-banker relationship. In that relationship, the defendant was under no obligation to sell forex to the claimant. In that relationship, the claimant would have had to apply for forex just like any other customer of the defendant. In that relationship, the defendant would have had to consider the claimant's application for forex in the context of all the applications from its other customers and determine how much forex to sell to the claimant. In that relationship, there was no guarantee that the defendant would sell to the claimant all the forex it had bought from the Reserve Bank.

In the circumstances, I do not see how the claimant, having refused and/or failed to exercise the first option to buy the forex (by failing and/or choosing not to proceed in accordance with the Accounts Agreement, could have had property in the forex which, in all respects, belonged to the defendant. I do not see how the claimant could have had a lien over the forex. I do not see how the claimant could have had the right to control how the defendant was to dispose of the forex. I do not see how and why the defendant would have needed the claimant's consent to the disposal of the forex. It is obvious to me that once the claimant expressly advised the defendant of its decision to breach the Accounts Agreement, the defendant was entitled to accept the breach and treat itself as discharged from the obligations of the Accounts Agreement. The fact that the defendant went ahead to sell the forex to other customers is a clear indication that it accepted the breach and that it treated the Accounts Agreement as repudiated. Thus, I fail to see how, in such a situation, the defendant would then have agreed with the claimant to "refund" the forex at a later date. If that were the case, it would have been tantamount to agreeing to keep the Accounts Agreement open as a subsisting and effective contract despite the claimant's unequivocal breach.

According to the Accounts Agreement, the claimant, the defendant and the PTA Bank agreed that any alterations or changes to the Accounts Agreement

were to be in writing and signed for by all the three parties. This means that the claimant and the defendant on their own could not change the terms of the Accounts Agreement behind the back of the PTA Bank. By necessity, the PTA Bank had to be part and parcel of the decision to change or alter the terms of the Accounts Agreement.

Further, reading through the Accounts Agreement, what comes out clear is that the forex was not supposed or meant to be sold to the claimant. In fact, the claimant was not required to buy any forex. All that the claimant was required to do was to put the proceeds of the sale of fertilizer (money) into the Collection Account in which the PTA Bank was solely and beneficially interested. The task of sourcing forex was the responsibility of the defendant and not the claimant. The defendant was to use the money the claimant deposited in the Collection Account to purchase US Dollars from the local foreign exchange market. On the instructions of the PTA Bank, the defendant was to pay the Dollars so purchased into the PTA Designated Account. The amounts paid into this account were to be credited to the claimant's account with the PTA Bank as repayment of the claimant's debt.

So, with this set up amongst the parties, is it not a misnomer to even say that the defendant was to sell the forex to the claimant? Or that the claimant had a right to buy the forex? Or that the claimant had a beneficial/proprietary interest in the forex? Or indeed that the claimant could offer the forex to the defendant for the defendant to use? Or that the claimant was entitled to a refund of the forex at a later date? In my judgment, it is.

Further, strictly speaking, on the basis of the customer and banker relationship, I do not see how the claimant could have had the legal right to exercise control over money lying in a banker's account, which in essence is the banker's money. (See *Chilala v Republic* (supra)). It would appear to me that the parties and the PTA Bank, or at least one of them, may have been aware of this legal principle. Thus, it is not surprising that the parties and the PTA Bank entered into the Accounts Agreement, which, in a way, seeks to circumvent the full effects of the ordinary customer-banker relationship. But when the claimant failed to pay into the Collection Account the proceeds of the sale of the fertilizer, thus neglecting to discharge its obligation under the Accounts Agreement, it failed to trigger the defendant's obligation to purchase/provide the equivalent amount of forex to be paid into the PTA Bank Designated Account. In other words, the claimant failed to set in motion the process under which it would have 'benefited' from the forex the defendant had bought from the Reserve Bank.

Even if it were accepted that the claimant had a beneficial interest in the forex the question that would arise is what became of that beneficial interest? On

the evidence before me, it is my view that the claimant's beneficial interest in the forex, if any, lapsed when the claimant failed to deposit funds into the Collection Account. I do not think that the beneficial interest could have subsisted for an indefinite period. As already stated above, the evidence before the Court is that the claimant diverted the funds from the sale of fertilizer to other purposes. In other words, the claimant decided to delay the repayment of the PTA Bank facility to a later time. The claimant told the defendant that it was not ready to pay for the forex. In other words, it was not ready to repay the PTA Bank facility.

This decision to breach the Accounts Agreement was unilateral. The defendant and the PTA Bank were not party to it. To me that was an unequivocal waiver of such beneficial interest in the forex. It was a clear indication that the claimant was no longer interested in benefiting from the forex arrangement he had set in motion. In the presence of such waiver, the defendant was left with the full legal rights in the forex. The claimant could not resurrect or claim back its beneficial interest in the forex at a later date. Therefore, the defendant was entitled to sell the forex to other customers. Obviously, this meant that whenever the claimant would be ready to pay the PTA Bank facility it (the claimant) would be treated just like any other customer of the defendant - subject to availability of forex. That is, the claimant would not have recourse to the forex since it would have already been disposed of in line with forex trading rules and business prudence.

Should the defendant have kept the forex for the claimant?

The evidence before this Court is that according to forex trading rules, dealer banks are not allowed to hold on to forex for long periods of time once they buy from the Reserve Bank. They are required to sell the forex as soon as practicable. This is clear from the testimony of Mrs Leah Donga, the Reserve Bank Manager for Financial Markets Operations. Among other things, she told the Court that when the Reserve Bank was selling the USD6.5 million to the defendant to be used for repayment of the claimant's debt with the PTA Bank, the Reserve Bank's understanding or assumption was that the claimant had already deposited with the defendant the local currency equivalent of the forex amount to enable the defendant to do a back to back transaction for remittance of the forex to the PTA Bank. Further, she stated that when Mr. Zameer Karim went to request for forex from the Reserve Bank, again the understanding or assumption was that the payment to PTA Bank was already overdue. Hence, it actually came as a surprise to hear what Mr Zameer Karim is alleging in this action, that the claimant did not need to make the payment to the PTA Bank until 30 April 2012.

Lastly, and importantly, Mrs Donga explained that notwithstanding that the Reserve Bank can sell forex to a bank to be applied for a particular purpose,

as was the case here, to repay the PTA Bank facility, that forex becomes property of the purchasing bank and can only be resold to a customer upon the latter paying to the bank the local currency therefor. In the event that, for any reason, the customer is not able to purchase the forex, the bank is at liberty to sell it to other customers. She explained that as a central bank, they do not expect banks to hold large portions of forex because they would be breaching the Foreign Exchange Exposure Practice 2010. She added that at the material time the defendant risked being in breach of the Directive because their Foreign Exchange Risk Exposure exceeded the limit. A copy of the Directive was exhibited and marked as "LD3". Among other things, the Directive provides that the aggregate of a banker's foreign exchange risk exposure should not exceed 35% of the bank's capital base at any time.

The claimant's evidence is that the payments from the Malawi Government for the fertilizer supplied were made on diverse dates between November 2011 and December 2011 through the Astro-Chem and Farm-Chem Wholesalers' bank accounts with the defendant. However, the money was not deposited into the Collection Account as was required under the agreement with PTA Bank. It appears that the claimant put the funds to other uses. In January 2012 when Mr Zameer Karim approached the Reserve Bank to plead for the forex, the money was not in the Collection Account. Mr Zameer Karim did not tell the Court where the money was diverted to. Obviously, at the time he approached the Reserve Bank he knew that the claimant had diverted the money and that there was no money deposited in the Collection Account to meet the purchase of the forex from the defendant. He also knew that the defendant was to use its own money to purchase the forex from the Reserve Bank. He must also have known that the claimant was not ready to buy the forex. In fact, the evidence before this Court is that when the claimant was informed about the defendant's purchase of the forex from Reserve Bank, the claimant advised that it did not have the money to pay for the forex. And according to the claimant, this is when it orally agreed with the defendant that the defendant should use (sell) the forex and refund it later when the claimant is ready to pay for it and remit to the PTA Bank.

In these circumstances, should the defendant have held on to the forex and wait for the claimant to fund the Collection Account? In my judgment, the answer is no. The defendant had no basis for waiting. It was entitled to sell the forex to other customers. In my view, if it were to hold on to the forex it would have meant that the defendant would have deprived itself of the opportunity of re-investing the K1.07 billion used in purchasing the forex since the money would have been locked up in the forex. I do not think that would have been in the best interests of the defendant as a commercial bank. Also, it would have been just as good as the defendant financing the claimant to an amount of not less than K1.07 billion at no cost to the claimant. In my view, that would have been ridiculous in all senses of the word. I have not received

evidence showing that the defendant, despite being a commercial bank, is in the business of providing free finance to its customers. Further, the defendant would have ended up breaching the aforesaid Reserve Bank Directive and would have suffered penalties from the Regulator of Financial Institutions. As such, the defendant was entitled to sell the forex to other customers.

Let me also say that the evidence before me shows that at no point in time between January 2012 and 30 April 2012 did the claimant deposit into the Collection Account money sufficient to buy the USD6.5 million. The evidence also shows that at no point in time did the claimant and or its subsidiaries, Astro-Chem and Farm-Chem Wholesalers, have in their bank accounts funds enough to pay for the forex. In my judgment, this reinforces the fact that at no point in time between January and 30 April 2012 was the claimant ready to pay for the purchase of the USD6.5 million and/or to remit the same to the PTA Bank. So, to allege that it suffered exchange control loses due to the defendant's conduct in relation to the forex is a desperate exaggeration. It is not supported by the evidence on record.

Was the claimant entitled to a refund of the forex?
This question should be answered in the negative. As already stated, the forex was bought by the defendant using its own funds. It belonged to the defendant. The claimant did not pay for the forex. The claimant did not own the forex. The claimant did not deposit funds into the Collection Account to be used to buy the forex. The defendant could not hold on to the forex to wait for the claimant until when it would be ready to pay for the forex as that would have been contrary to forex trading rules and business prudence. On the foregoing, it is clear to me that it is a serious misconception of the facts for one to talk of a refund of the forex. The question of refund does not arise. To talk of a refund suggests that the forex belonged to the claimant. But as I have found, the evidence shows the contrary. The forex belonged to the defendant. Thus, the claimant could not be entitled to a refund of forex which, in the first place, never belonged to it (the claimant) and, secondly, it never paid for.

Could the claimant offer the forex to the defendant for the defendant's own use?
On the findings above, the answer to this question is in the negative. The forex belonged to the defendant thus, I do not envisage how the claimant could have offered to the defendant what already belonged to it (the defendant). In any event, even if it were true that the claimant offered the forex to the defendant, it is clear from the evidence before the Court that such offer must have been premised on a serious misconception of the reality of the situation and the parties' legal rights. There may have been a misconception on the ownership of the forex on the claimant's side. The claimant did not have any legal rights over the forex which could have been ceded to the defendant. In my view, either as a principal or an agent, you can only offer what you have.

The claimant did not have forex which it could have offered to anyone including the defendant. The position would have been different if, for example, the claimant had foreign currency standing to its credit in a Foreign Currency Denominated Account which the claimant intended to use, for example, in settling its foreign liability which had not yet matured. The claimant could have offered the forex to the defendant on the defendant's undertaking to make forex available to the claimant when the foreign invoice becomes due for payment. The defendant having accepted such offer, there would have been an agreement to "refund" the forex. The position in the present case is totally different.

Was there an oral agreement as alleged by the claimant?

On the findings above, it must now be obvious that the answer to this question is in the negative. In my judgment, the evidence before me clearly shows that there was no such agreement between the claimant and the defendant. As already stated, I do not envisage how the defendant as a dealer bank which had bought the forex using its own money could have agreed to "borrow" the forex from the claimant (who did not own the forex and had not paid for it). It sounds very ridiculous to say the least, more especially in the light of the scheme agreed upon by the parties on how the forex was to be acquired and paid over to the PTA Bank which I have outlined earlier on in this judgment.

Further, even Mr Zameer Karim himself was not definite on who he had entered the agreement into with. He said it must have been Mr Aubrey Chalera, or Mr John Bizwick. All these people denied entering into such agreement with him when they testified before this Court. Surely, if there were such an agreement Mr Zameer Karim would have been definite as to who he made the agreement with.

Also, it is a bit difficult to appreciate how a commercial bank could enter into an oral agreement with a customer in respect of an amount as big as USD6.5 million (which is not a small amount in our economy). You would expect such an agreement to be documented. Both the claimant's and defendant's witnesses agreed in Court that the only orthodox way in which the defendant and a customer would enter into a contract for future sale of forex was by entering into a written Forward Contract which, amongst other things, fixes the exchange rate to be applied and is entered into with the defendant's Treasury Department. There is evidence that the claimant had entered into a Forward Contract with the defendant in relation to a relatively smaller amount of US$2.5 million on 30th November 2011. (See Exhibit "ZK14"). This Forward Contract was actually exhibited by Mr. Zameer Karim himself. The question that comes to mind is that if the parties found it necessary to enter into a written forward contract in respect of an amount of US$2.5 million, what stopped them from entering into a similar contract for the lager sum of US$6.5 million?

Further, considering that at the material time there was scarcity of forex, is it not more probable than not that the parties, more especially the claimant, would have wanted to enter into such a written contract in order to guarantee the availability of the forex and the certainty of the exchange rate to be applied? There is no explanation from the claimant why the parties decided to deviate from their usual or ordinary way of evincing such forward contracts, and to enter into an oral agreement, and for such a large amount of forex. There is no explanation why two corporate entities could have entered into such an agreement and decide not to record it in writing.

Mr Zameer Karim said that there are emails he exchanged with the defendant which point to the existence of the oral agreement. I have carefully considered the emails and letters cited and in the light of all the evidence before the Court, I am satisfied that they do not support the claimant's allegation. In all the correspondences which Mr Zameer Karim wrote to the defendant on the issue of the forex, he never mentioned the existence of the alleged oral agreement. Even when he felt that the forex situation was desperate and that the claimant needed to remit some money to the PTA Bank but the defendant was failing to meet their request, he never mentioned that the defendant was breaching an agreement they had entered into earlier in the year. If indeed such agreement were entered into, one would have expected Mr Zameer Karim to have referred to it and/or demand the defendant's strict compliance with it.

Clearly, the claimant was concerned that delays in remitting the money to PTA Bank would result in the claimant incurring penalties and loses. Surely, if indeed the alleged agreement existed, why did the claimant not mention in any of the emails and/or letters that such loses would be borne by the defendant since they would be suffered due to the defendant's failure to comply with the agreement? I also fail to see how both parties would have failed to mention the agreement in all the correspondences they exchanged on this matter. In my judgment, all this only shows that there was no such agreement. As already stated above, the circumstances in this matter clearly show that there could not have been such an agreement. The claimant did not have forex which it could have offered or lent to the defendant for the defendant's use. The forex in question was bought by the defendant and it belonged to the defendant. And as earlier stated, the claimant did not have any claim of right in it or any control over it.

Further, for what it is worth, I need to mention that even when the action was commenced in December 2015 the claimant's claim was for breach of the written Accounts Agreement. The claimant applied for summary judgment and/or judgment on admissions and failed. It is only after such failure that the claimant introduced the plea of the oral agreement. During cross-examination Mr. Zameer Karim admitted being solely responsible for giving instructions to

the claimant's lawyers from the beginning of the case in 2015 to the time of the trial. One would wonder why, the claimant, fully aware that there was the alleged oral agreement, would have initially proceeded on a case of breach of a written agreement and revert to a claim for breach of the oral agreement only after its application for summary judgment had failed.

All the same, I must mention that I say all this fully aware that an amended pleading supersedes the original pleading. But am only trying to show that the claimant has not been consistent about the nature of its claim against the defendant. Something I find surprising bearing in mind that the claimant has had the benefit of legal counsel throughout the entire litigation.

Further, if there were such agreement, I do not think that in its letter to the PTA Bank dated 10 October 2012, the claimant would have alleged that the defendant "had utilized the funds allocated to us for their own use without confirming or notifying us. They indicated the funds will be replaced to you as soon as possible". Now, if indeed there were the alleged oral agreement, how did the claimant state that the defendant utilized the funds without the claimant's knowledge and confirmation? In my common-sense world, if the alleged oral agreement were in existence, the claimant would not have told the PTA Bank that the defendant disposed of the forex without its knowledge or confirmation. The claimant would have advised the PTA Bank of the oral agreement. In my considered view, this letter supports the defendant's contention and confirms my finding that there was no agreement between the parties as is alleged by the claimant. All the evidence before the Court leads to the conclusion that the alleged oral agreement was never entered into by the parties.

I need to make special mention of a letter dated 27 June 2012 purportedly written by the defendant to Farm-Chem Wholesalers. The claimant also relies on this letter as evidence of the oral agreement. The relevant parts of the letter read as follows:

> "**RE: PTA BANK LOAN REPAYMENT**
>
> …As indicated in our various email correspondences, we wish to advise you that the Bank would like to resolve this matter as soon as possible to minimize the exchange loss arising from further delays in refunding you part of the US$6,502,500.00 purchased from the Reserve Bank of Malawi.
>
> Kindly be advised that we are in the process of determining the exchange loss incurred on the outstanding amount so far. We will therefore call you for discussion on a possible loss sharing proposal as soon as we have determined the position and obtained management's approval."

The letter purports to have been written and signed by Mr Aubrey Chalera. However, during cross examination by the defendant, he denied ever writing such a letter. To buttress his denial, he pointed out that the letter does not bear one of the pertinent procedural features of letters from the defendant. It does not bear a reference number. No such letter could have been written without indicating the defendant's reference number. A reference number denotes where the letter was written and the procedures involved. Further, the contents of the letter suggest that it was written by someone outside the defendant's Management. He was part of the Management as such he could not have phrased the letter in that manner. He also stated that he could not have talked of a "refund" of the US$6.5 million giving the impression that the forex belonged to Farm-Chem when it belonged to the defendant. Lastly, he stated that the letter was written to Farm-Chem and yet it is the claimant who was dealing with the defendant on this matter. All correspondences were with the claimant and not its sister companies. Fully aware of this fact there is no way he could have addressed the letter to Farm-Chem and not the claimant.

I have already mentioned that initially Mr Aubrey Chalera was called as a witness on subpoena at the instance of the claimant. He filed a witness statement in support of the claimant's case. But when he was joined as a third party and had his own case to defend, he also put in a witness statement in his defence. When called to the witness stand by the claimant, he disowned most of the material paragraphs in his initial witness statement supporting the claimant's case. He said these did not represent his testimony. They were put in by Mr Zameer Karim who had prepared the statement without his knowledge and consent. He was then treated as a hostile witness and the claimant was granted leave to cross examine him. It must also be mentioned that Mr Aubrey Chalera lost his sight since leaving the defendant's employment. All the written material he was referred to during the trial had to be read out to him. Otherwise, his testimony was mainly from memory which at times may have been hazy due to, among other factors, the lapse of time.

I find the absence of a reference number in the letter not to be persuasive because I have in evidence other letters which do not bear reference numbers but have not been disowned by the defendant. For instance, a letter dated 10 September 2012 from the defendant's Acting Chief Executive Officer to the claimant (Exhibit BM 19) and a letter dated 12 November 2012 from the defendant to the PTA Bank (Exhibit BM 20). All the same, I am inclined to believe Mr Aubrey Chalera that the letter must have been written by someone else. I do not think he could have written such a letter to Farm-Chem when the issue involved the claimant and it is the claimant that he was dealing with. Mr Aubrey Chalera was at the centre of the issue as such I do not believe he could have made such a mistake.

Further, I do not think that letter can support the claimant in its claim herein. The letter was written to an entity which is a separate legal entity. Farm-Chem and the claimant are two separate entities. So, an 'acknowledgment of debt', as it were, to Farm-Chem cannot suffice as an acknowledgment of a debt owed to the claimant.

Unless I have missed it, I have not found any reference to this letter in the subsequent correspondences from either the claimant or the defendant. looking at the importance of the issue it addresses one would expect it to have featured highly in the subsequent interactions between the parties. Therefore, I am inclined to doubt its authenticity. If it was indeed written by Mr Aubrey Chalera then I would suspect that it must have been written in circumstances which would call for an explanation.

Did the defendant owe the claimant a tortious general duty of care to exercise reasonable care when rendering services to the claimant as its customer?

It is the claimant's contention that the defendant owed it a tortious general duty of care to take reasonable care in rendering services to the claimant as its customer so as to ensure that the customer's banking and related needs/services are not jeopardized or unduly compromised. The claimant avers that this duty of care arises from the following circumstances: -

a. The defendant was fully aware and/or ought to have been aware that due to the acute scarcity of foreign exchange in the country at the material time it was going to be very difficult to make available the said sum of USD6,502,500 or part thereof by 30 April 2012. In the circumstances, the defendant ought not to have used the funds for its own purposes. The defendant breached that duty by proceeding to use the said sum of USD6,502,500 in the circumstances thereby failing to make available the sum of USD4,496,700 within time, that is by 30 April 2012.

b. The defendant ought to have taken due regard to the special arrangement under which the Reserve Bank provided the said sum of USD6,502,500 and ensure that the claimant is not exposed to any uncertainty or loss and damage surrounding the availability of foreign exchange in view of the claimant's obligation to repay its loan with the PTA Bank after the Reserve Bank had provided the funds.

c. Since the claimant would not be in a position to know the defendant's ability to provide the sum of USD6,502,500 or part thereof the claimant's remittance to PTA Bank from other sources other than the provision already made by the Reserve Bank, the defendant proceed to recklessly and/or negligently make

representations to the claimant that it had the capacity to refund the said sum of USD6,502,500 or part thereof.

d. The defendant was fully aware of the claimant's obligations under the Facility Agreement with PTA Bank and the consequences of breach of the same on the claimant. Despite knowledge of the uncertainty on whether it would have enough foreign exchange for the claimant's remittance to the PTA Bank due to the prevailing scarcity of foreign exchange, the defendant proceeded to use the funds for its own purposes.

e. The defendant ought to have known that the claimant's interests would be jeopardized if the defendant took advantage of the fact that the said sum of USD6,502,500 would only be made available for the claimant's PTA Bank remittances through the defendant and it made decisions to put the funds to its own use other than the claimant's remittance to the PTA Bank that would bring uncertainty on the foreign exchange availability for the claimant's remittances.

f. The defendant advised the claimant that it had invested the sum of USD6,502,500 or part thereof with another bank in order to ensure the availability of the same to the claimant for its remittances to PTA Bank when the Letters of Credit would be due but failed to make the total sum of USD4,496,700 available for the claimant's remittances on time. The claimant relied on that advice and believed that the defendant would make the foreign exchange available within time. Consequently, the claimant suffered loss and damage when the defendant failed to make the foreign exchange available as expected.

The claimant avers that as a result of the defendant's breach of the said tortious general duty of care to exercise reasonable care when rendering services to the claimant as its customer by failing to ensure that the foreign exchange was available for the claimant's remittances within the repayment period, the claimant suffered loss and damage as already outlined herein.

The defendant contends that it could not owe the claimant a tortious duty of care when the relationship between the parties was already governed by contractual terms. Common law does not allow the imposition of tortious duties which are identical to contractual duties. The defendant asserts that it is clear that its obligations to act as Agent Bank arise under the Accounts Agreement and not under any other general customer - banker relationship which may have existed between the claimant and the defendant.

The question that arises then is whether the defendant assumed other duties, tortious or otherwise, besides the duties outlined under the Accounts Agreement. A careful reading of the Accounts Agreement seems to show that this was not the intention of the parties. The defendant refers to, for instance Clause 4.8 of the Accounts Agreement which emphasizes the point that the duties under the written Agreement existed independently to any other relationship, and also Clauses 2.2 and 4.2 regarding the defendant's duties, obligations and responsibilities. At common law, there is no reason why the law of tort should impose duties which are identical to the obligations negotiated by the parties. And so a person who assumes a contractual duty of care does not thereby assume an identical duty of care in tort to the other contracting party. The following cases have been cited in support of this proposition, *Robinson v Jones* [2011] EWCA Civ. 9, *Go Dante Yap v Bank Austria Credittanstalt AG* [2011] 4 SLR 559 and *Titan Steel Wheels Limited v The Royal Bank of Scotland plc* [2010] EWHC 211 citing *Henderson v Merret* [1995] 2 AC 145.

Further, it is contended that even statute anticipates the norm that contracts on financial transactions will be in an instrument in writing as is evident from section 28 of the Consumer Protection Act which provides that: -

> "Contracts governing financial transactions…shall be interpreted, implemented and enforced (a) in good faith, (b) consistent with the instrument embodying the contract and (c) in a manner consistent with laws governing or regulating financial transactions."

Thus, within the contractual framework borne out of the tripartite contract for enabling the claimant to meet its obligation to the PTA Bank, the claimant cannot sustain a cause of action in tort for alleged breach of the tortious general duty of care. It is so submitted.

The defendant also argues that the actions of any of the defendant's officers in the transactions, which are subject matter of this case, must be seen from the prism of the existing tripartite agreement. The defendant's officers' actions should not wrongly be construed outside the tripartite agreement and/or should not be taken as creating a new collateral contract or should not be widened into some limitless common-law-guided transaction or banker - customer relationship. It must be acknowledged that but for the tripartite Accounts Agreement, the defendant would not have been involved in any way with the repayment of the claimant's debt to the PTA Bank - that is why the Accounts Agreement is independent of any banker - customer relations between the claimant and the defendant. In these premises, should the defendant's officers' efforts fail to execute their duty, that would not create obligations in tort for the bank beside the contractual obligations. Any failure, if at all, ought to be assessed against the contractual setting, and because

there is no such failure, the claimant should not be allowed to refer to a different standard having already agreed to a contractual standard. Since the claimant did not satisfy the conditions of the Accounts Agreement and instead schemed to keep away money which was supposed to be used for procurement of US Dollars, it is difficult to see how the defendant would be under a duty of care to the claimant even 'morally'. In the defendant's submission, the claimant was not a 'neighbour' to the defendant in the *Donoghue v Stevenson* sense of that word because the claimant failed to bring about the requisite proximity by keeping away its Malawi Kwacha funds to tuck and secure the forex.

It used to be the case that tortious liability would not be imposed between contractual parties particularly in a commercial relationship (see Lord Scarman in *Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd.* [1986] AC 80; *Simaan v Pilkington, Greater Notts Co-op. v Cementation Piling Foundation Ltd.* [1988] 2 All ER 971. However, the law on the point has since changed. In *Chitty on Contracts* Vol. 1, London, Sweet & Maxwell, 31st Ed. at paragraph 1-157, the learned authors state as follows:

> "In the modern law, it may be stated that a party to a contract may choose to base his claim on an established and independent tort against the other party, but this choice will not be allowed to subvert the contract's express or implied terms nor any legal immunity attaching to the other party *qua* contractor. On the other hand, where the contract is silent as to the issue to which a tort relates, in principle this is no reason for denying the existence of that tort, though an exception may properly be made where the tort is based on the defendant's "assumption of responsibility". In general, though, the choice whether to sue in contract or tort does allow a claimant to gain the benefit of any incidental rules of the regime of liability applicable, though the modern tendency has been to reduce the differences between these two regimes in cases of concurrence."

In *Henderson vs. Merrett Syndicates Ltd.* [1995] 2 AC 145, the House of Lords held that a party to a contract may rely on a tort committed by the other party, as long as doing so is not inconsistent with the express or implied terms of the contract. In that case, the plaintiffs were all Lloyd's "Names" who had agreed to take unlimited liability in respect of certain proportions of risks to be underwritten in the insurance market, but who had done so through different forms of arrangement. In the case of "direct Names", those persons who had acted as their members' agents also acted as their managing agents (being known sometimes as "combined agents", though being termed "managing agents" here) and therefore any claim for negligence in respect of their claims was within privity of contract. The issue which came before the

House of Lords was whether the "direct Names" could opt to sue their managing agents in the tort of negligence in respect of the management of the underwriting, the limitation period for their action for breach of contract having expired. In this respect, Lord Goff of Chieveley, who gave the leading speech and with whom Lords Keith of Kinkel, Browne-Wilkinson, Mustill and Nolan concurred, held that prima facie, the managing agents did owe a duty of care in the tort of negligence to the "Names". Such a duty was, according to Lord Goff, to be based on a broad principle to be found in *Hedley Byrne & Co. Ltd. vs. Heller & Partners Ltd.* [1964] AC 465, according to which a person possessed of special skill or knowledge may owe a duty of care in tort by assuming a responsibility to another person within a relationship (whether special or particular to a transaction and whether contractual or not): the principle was not, therefore, restricted to cases of statements. The House of Lords further held that, on the facts of the case, there was no reason why the "Names" should not opt to sue on the breach of such a duty of care in the tort of negligence rather than for breach of an implied term in their contract with the managing agents. Lord Goff considered that there was "no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy" (at pp. 193-194), though he added that this general right of option was:

> "…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" (at p. 194)

The learned authors of *Chitty On Contracts,* (supra) at paragraph 1-160 state that this decision affirms the general availability of an option to sue in either tort or contract where the constituent elements allow, the exception being where the contract is inconsistent with a claim in tort. Clearly, this shows that, where there is no inconsistency between the claim in tort and the contract, a party can now sue in both tort and contract, taking advantage of whatever rules benefit the claimant to its advantage.

In answering the question whether the defendant owed a tortious duty of care to the claimant or not, I wish to look at it from two perspectives.

First, as I have earlier stated in this judgment, it is imperative that it must always be remembered that the defendant's involvement in the claimant's loan facility from the PTA Bank was by virtue of the Accounts Agreement. Thus, I would agree with the defendant's contention that its obligations to act as Agent Bank arise under the Accounts Agreement and not under any other general customer - banker relationship which may have existed prior to the Accounts Agreement.

It was the parties' agreement that the defendant's duties should be only those contained in the Accounts Agreement. Clause 2.2 states that "Without prejudice to the provisions of Clause 5.2 [should read 4.2] below, the Agent Bank shall have only those duties, obligations and responsibilities expressly referred to in this Agreement." And Clause 4.2 provides:

> "The Agent Bank shall not be bound in any way by the Facility Agreement or by any other Agreement or contract between the Borrower and PTA Bank, it being understood that the Agent Bank's only duties and responsibilities shall be as set forth in this Agreement. The Agent Bank shall have the obligation, as independent principal, to account to PTA Bank or the Borrower for the deposits held hereunder, subject to and in accordance with terms of this Agreement."

The Accounts Agreement then sets out the defendant's duties and responsibilities. The question that arises then is whether the defendant assumed other duties, tortious or otherwise, besides the duties outlined in the Agreement. A reading of the Accounts Agreement seems to show that this was not the intention of the parties. In as far as the parties' relationship *vis a vis* the handling of the claimant's repayment of the PTA Bank facility was concerned, everything was to be done in accordance with the Accounts Agreement. The parties expressly agreed that the defendant's duties and obligations were to be only those outlined in the Accounts Agreement. To me, it would appear, that to conclude that there were no other duties apart from those outlined in the Accounts Agreement would not be off the mark. In my judgment, it was the parties' intention that all other duties, obligations and or responsibilities that the defendant may have as a banker were to be excluded in so far as the repayment of the claimant's debt with the PTA Bank was concerned. Otherwise, I do not see why they would have included such a provision if it were their intention that the common law duties of a banker should be applicable in their relationship.

The language used by the parties is very emphatic on what the duties of the defendant were. In my judgment, the language used shows that the parties intended to exclude the common law duties of a banker. That is why they were very explicit on what the defendant's duties were and that they were to be the *only* duties in their relationship.

On the foregoing, I would agree with the defendant that it would not be proper to impose the common law duties on the defendant when the parties had conscientiously negotiated and agreed what the defendant's duties were to be. To ignore what the parties freely agreed on would be an affront to freedom of contract - which entails two aspects. First, it is the party's choice whether

or not to enter into a contract, and if so with whom – in other words, the freedom to contract, or 'party freedom'. The second is the freedom to decide on the content of the contractual obligations undertaken, or 'term freedom'. This allows parties to make unwise, and even unfair, bargains – it is their decision, and the courts will not generally intervene to protect them from their own foolishness. This is a fundamental principle of contract law which the courts have generally applied over the years. As Sir George Jessel put it in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465:

> "If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice."

In the present case there is no justification why the Court should ignore the duties of the defendant as spelt out in the Accounts Agreement and impose the common law duties. Imposing common law duties would be contrary to the agreed terms of the parties as contained in the contract – the Accounts Agreement. That is something which the court should be slow to do except where there are good grounds to justify it. The principle emanating from case authority is that the "law of tort should not be invoked in a commercial context, at least where there are no gaps, where the parties have contractually provided for a duty, or a chain of duties." (See *Riyad Bank and others v Ahli United Bank* (UK) plc [2006] 2 All ER (Comm) 777 at 792 per Neuberger LJ). The claimant has not pointed out any gaps in the defendant's duties as agreed in the Accounts Agreement which need to be filled. Thus, I do not see any reason for this Court to impose on the defendant the tortious duties as alleged by the claimant.

Further, it must be understood that "the law of tort is the general law out of which parties can contract out". (See *Henderson v Merret Syndicates Ltd* [1994] 3 All ER 506 at 532 per Lord Goff). As already stated herein, the parties agreed to spell out the defendant's duties and went on to state that those were the defendant's *only* duties. In other words, the parties agreed that the duties in tort would not apply to their relationship. Thus, they expressly contracted out of the law of tort. Hence, I do not see why the defendant should be measured on the standard of the duties in tort as the claimant wants this Court to do. Therefore, it is my judgment that the parties herein having agreed on the duties of the defendant, thereby contracting out of the law of tort, and in the absence of any gaps in the agreed duties which need to be filled, the defendant cannot be held to have owed any tortious duties to the claimant. To introduce the common law tortious duties would be inconsistent with what

the parties agreed on in the Accounts Agreement. And as I have outlined above, the law would not allow that. On the evidence before the Court, the parties must be taken to have agreed to exclude the tortious duties and remedies from their relationship. (See *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1985] 2 All ER 947).

Secondly, in case I am wrong in my foregoing finding, I will proceed to consider whether the defendant owed the claimant the tortious duty of care in addition to the contractual duties as alleged by the claimant.

The foundation of the modern law of negligence is the House of Lords decision in *Donoghue v Stevenson* [1932] AC 562, where Lord Atkin said:

> "…who then is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the act or omissions which are called into question."

In *Caparo Industries plc v Dickman* [1990] 1 All ER 568, the House of Lords gave useful guidance on the tort of negligence. Their Lordships held that there are three criteria for the imposition of a duty of care, which are: foreseeability of damage, proximity of relationship, and the reasonableness or otherwise of imposing a duty. Lord Bridge, at pp. 573-574 formulated the current approach as follows:

> "But since Anns's case [*Anns v Merton London Borough* [1977] 2 All ER 492] a series of decisions of the Privy Council and of your Lordships' House, notably in judgments and speeches delivered by Lord Keith, have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope: see *Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529 at 533–534, [1985] AC 210 at 239–241, *Yuen Kun-yeu v A-G of Hong Kong* [1987] 2 All ER 705 at 709–712, [1988] AC 175 at 190–194, *Rowling v Takaro Properties Ltd* [1988] 1 All ER 163 at 172, [1988] AC 473 at 501 and *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238 at 241, [1989] AC 53 at 60. What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other. But it is implicit in the passages referred to that

the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43–44, where he said:

> 'It is preferable in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.'

One of the most important distinctions always to be observed lies in the law's essentially different approach to the different kinds of damage which one party may have suffered in consequence of the acts or omissions of another. It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another to avoid causing others to suffer purely economic loss."

And later in his speech at p. 581, he continued as follows:

> "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless:
>
> > 'The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it.' (See *Sutherland Shire Council v Heyman* (supra) at 48 per Brennan J.)"

In the present case, the claimant argues that the defendant had in reasonable contemplation the damage the claimant suffered at the time of making the alleged oral agreement. Thus, it is not difficult to see that the damage was

reasonably foreseeable. And as per the cases cited, reasonable foreseeability in negligence is more far reaching than reasonable contemplation in contract cases. And since the claimant's damages are encompassed in the narrower category of reasonable contemplation, they are obviously covered by the wider test of reasonable foreseeability. The very facts upon which the claimant based its arguments to show reasonable contemplation equally qualify the damages to be reasonably foreseeable. The claimant has referred the Court to the case of *Overseas Tankship (UK) Ltd. v The Miller Steamship Co. (The Wagon Mound) (No. 2)* [1966] UKPC 10; [1967] AC 388 where the reasonable foreseeability test was laid down.

On the issue of proximity of relationship, it is argued that there is a sufficiently close proximity between the claimant and the defendant as customer and banker, respectively, who are engaged in a contractual relationship for the defendant to use, for its own benefit and profit, the forex procured by the claimant from the Reserve Bank, subject to refunding it later for onward remittance by the defendant as Agent Bank to PTA Bank on behalf of the claimant. Any failure by the defendant to refund the forex would bring serious consequences on the claimant from the PTA Bank. This relationship between the claimant and the defendant was sufficiently proximate to give rise to a duty of care. And, looking at the benefit the defendant derived from using the said forex for its own benefit and profit, and looking at the risk to the claimant in the case of breach by the defendant of the oral agreement, it is only fair and just that a duty of care be cast upon the defendant. A duty of care therefore existed between the claimant and the defendant to found a cause of action in negligence. It is so argued.

I have already found in this judgment that there was no contract between the claimant and the defendant under which the defendant was to use the forex and refund it to the claimant at a later date. So, any arguments founded on the existence of the alleged oral contract cannot stand - their foundation having collapsed. Thus, the argument that there was proximity of relationship because of the alleged oral agreement cannot hold water.

In *National Bank of Malawi v Right Price Wholesalers Ltd* [2013] MLR 276 the Supreme Court of Appeal summarized the law on the duties of a banker *vis a vis* a customer. It stated that generally, negligence on the part of a banker means falling below the standard of reasonable care expected of a bank. A banker must exercise due care and diligence in the management of the customer's account. On the question of what is the degree of care and diligence expected of a banker, the Supreme Court of Appeal quoted with approval the following passage from Ross Cranston, *Principles of Banking Law*, 3rd ed. Oxford University Press, P272-273. At p283:

> "Whatever be its conceptual base, what does the duty of reasonable care and skill of a bank encompass? It is easy enough to state in theory. The duty is to exercise the care and skill of a reasonable bank in carrying out the particular activity concerned. The law does not impose liability for what turns out to be an error of judgment, unless the error was such that no reasonably well informed and competent bank would have made it…
>
> A bank can be in breach of its duty of reasonable care and skill in failing to make inquiries. Certain transactions are so out of the ordinary course that they ought to arouse doubts and put the bank on inquiry."

The banker's duty of reasonable care and skill subsists throughout the entire customer - banker relationship regardless of the nature or type of transaction involved. It is a duty which must be discharged at all times in the course of the relationship. (See *Ruth A. Lemani (as Administratix of Estate of Reverend Dr Dumbo K. Lemani (Deceased) v NBS Bank Ltd.* Commercial Case Number 271 of 2015 (unreported)).

The evidence before this Court is that when the forex was purchased by the defendant (using its own money) from the Reserve Bank, Mr Zameer Karim expressly informed the defendant that the claimant was not ready to buy and remit the forex to the PTA Bank. And, as has already been stated, as a manifestation of the claimant's decision not to buy the forex, the claimant did not deposit money into the Collection Account which could have been used by the defendant to buy the forex. The claimant made a conscious decision to divert the proceeds from the sale of the fertilizer to purposes other than buying the forex for remittance to the PTA Bank. Obviously, the claimant must have invested the money in other business ventures from which it expected to reap better financial benefits. The defendant proceeded to sell the forex to other customers as it was entitled to do. And as things turned out, the Kwacha was later devalued and the claimant suffered foreign exchange losses. Now, the question is, can one say that in these circumstances the defendant breached its duty of care it owed to the claimant? I do not think so.

At the material time there was a shortage of forex in the country. The claimant was well aware of this fact and that is why it approached the Reserve Bank to guarantee that it would make forex available to the agent bank to enable the claimant to pay off the PTA Bank facility. By approaching the Reserve Bank, the claimant knew that chances were that due to the acute shortage of forex no commercial bank would have been able to sell foreign currency to any single customer an amount as huge as that required by the claimant. The claimant also knew or ought to have known that in view of the shortage, the price of forex was bound to go up due to market forces – which in essence

would mean the inevitable diminishing in the value of the Kwacha. As a business entity engaged in international trade and especially being fully aware that its liability to the PTA Bank was denominated in United States Dollars, the claimant knew or ought to have known that it was more likely than not that it would have to pay more local currency for the forex if it delayed the settlement of its liability. But despite all this, the claimant chose not to 'buy' and remit the forex to the PTA Bank. In the circumstances, I find it absurd to think that the defendant was under a duty to warn or alert the claimant of the risks involved in its decision to delay the settlement of the PTA Bank facility. The claimant was a well-informed customer in the nature of the transaction at hand and never required any advice from the defendant as a banker.

Further, the evidence shows that the claimant made the decision to postpone the purchase of the forex on its own volition – freely and voluntarily. It was not made out of advice from the defendant. The defendant did not have any input in the decision. The claimant made the decision out of its own business prudence and acumen. It is only the claimant who knew what benefit it was to derive from the decision. That information was not shared with the defendant. As already stated herein, up to date, the claimant has not disclosed where the proceeds from the sale of the fertilizer were diverted to. That is confidential information which the claimant has kept to its chest. In these circumstances, I fail to see how the defendant can be held responsible for the claimant's decision and its attendant consequences.

The claimant has failed to show that the defendant in fact gave advice about the suitability of the delay in buying the forex and/or that the interaction between the defendant and the claimant gave rise to a special relationship or an assumption of responsibility so as to give rise to a duty to use reasonable skill and care in giving advice or making recommendation on the suitability of the claimant's decision. As already mentioned, the claimant was not an unsophisticated customer with no knowledge of the nature of the transaction at hand. The claimant was a well-informed customer in as far as the situation it was in was concerned.

In my judgment, the claimant voluntarily incurred the whole risk entailed by its decision to defer the purchase of the forex. The law is that where a claimant's case is based on the breach of duty to take care owed by the defendant to him, it is a good defence that the claimant consented to the breach of duty or knowing of it, voluntarily incurred the whole risk entailed by it. (See *Dann v Hamilton* [1939] 1 All ER 59).

The evidence before the Court is that at the material time, there was an acute shortage of forex in the country. Forex was so scarce that it had to take an "arrangement under the Farm Input Subsidy Program for the Malawi

Government through the Reserve Bank…to make available foreign currency for the claimant to repay its debt under the Facility Agreement" (as alleged in the claimant's statement of claim). Thus, the claimant perceived or should have easily perceived the danger of postponing the purchase of the forex. Running the risk of repeating what has already been stated in this judgment, let me recap that witnesses from both sides told the Court that the only conventional way in which the defendant and a customer would agree on a future sale of forex was by entering into a written Forward Contract which, amongst other things, fixes the exchange rate, the amount, etc. And that such contract is entered into between the customer and the defendant's Treasury Department. There is also evidence before this Court that the claimant had entered into a Forward Contract with the defendant in relation to a relatively smaller amount of US$2.5 million on 30th November 2011. (Exhibit "ZK14"). The claimant, whilst knowing of arrangements like Forward Contracts, proceeded to postpone the purchase of the forex to a future date(s) without fixing the rates, etc. Surely, any losses arising therefrom are entirely due to the claimant's own recklessness or business foolishness as opposed to any breach of duty of care on the part of the defendant. So, in the absence of evidence showing the existence of any circumstance impairing the claimant's free will in its dealings with the defendant, I find that the claimant must have fully known and appreciated the danger involved in its decision and fully and voluntarily accepted and or assumed the risk. (See Halsbury Laws of England 5th Ed. Vol 78 para. 69 p 78).

Even if the defendant, as a banker knew or ought to have known that the claimant, by postponing the purchase of the forex was running the risk of foreign exchange losses, I would hold that the defendant was under no duty to advise the claimant of such dangers or on how best to proceed in the circumstances. There are two reasons why I say so. First, I do not think that in the ordinary customer – banker relationship, the banker is the customer's financial adviser. Generally, a banker does not owe his customer any duty to advise him on the merits of investments the customer may be proposing to make. Unless the banker chooses to do so in the course of business then he owes a duty to advise with reasonable skill and care. (See *Woods v Martins Bank Ltd* [1958] 3 All ER 166 which was expressly approved in *Hedley Byrne* [1963] 2 All ER 757 at 598). So, it was not incumbent upon the defendant as a banker to advise the claimant on how to handle its monetary issues. Nor was it the defendant's duty to advise the claimant on what would be the most prudent thing to do with its money and/or about the forex in the prevailing circumstances. The defendant's mandate as a banker did not extend that far. So, any suggestion that the defendant was under a duty to advise the claimant on the dangers and/or risk of foreign exchange losses is misconceived and has no legal support. In the absence of evidence showing that the defendant offered any advice to the claimant on the transaction at hand I find it difficult

to say how the defendant may have assumed responsibility so as to give rise to a duty to use reasonable skill and care in giving advice. (See *Crestsign Ltd v National Westminster Bank plc and another* [2015] 2 All ER (Comm) 133).

Second, under Clause 4.3 (b) of the Accounts Agreement the defendant was under no duty or responsibility to enquire or ascertain as to the performance or observance by any other party of the obligations under the Accounts Agreement (or the Facility Agreement) or the existence of a Default. So, when the claimant advised that it was not ready to purchase the forex, the defendant was under no duty to force or plead with the claimant to deposit money into the Collection Account for the buying of the forex. It was not incumbent upon the defendant to advise the claimant to desist from not complying with its obligations under the Accounts Agreement. Any attempt at dissuading the claimant from deferring the depositing of money into the Collection Account for the purchase of the forex would have been an over step of its responsibilities and would have offended the terms of the Accounts Agreement. I find that just as it was not the defendant's duty to ensure that the claimant complied with its obligations under the Accounts Agreement, it was not the defendant's duty to ensure that the claimant did not suffer financial losses due to its (claimant's) failure to comply with the contractual obligations.

I wish to agree with the defendant that the contractual matrix is of fundamental importance in determining the existence and scope of any duty of care because the contractual documentation can define the relationship between the parties so as to exclude any parallel or free-standing common law duties of care. (See *IFE Fund SA v Goldman Sachs International* [2007] EWCA Civ 811). In this respect, I would agree with the sentiments of Males J in *Golden Belt 1 Sukuk Co BSC(c) v BNP Paribas* [2018] 1 All ER (Comm) 1126 at 1161 that:

> "…the existence of carefully drafted and interlocking contractual relationships means that the court should be slow to superimpose a tortious duty of care on those relationships. It should not do so if that would contradict or unbalance the allocation of risks and responsibilities which the parties have defined."

In the present case, as already stated, the parties entered into an agreement which was to regulate their relationship. The agreement expressly charted the defendant's obligations and responsibilities. It also stated that those were to be the defendant's only obligations and responsibilities. In other words, there were to be no other responsibilities or obligations outside the agreement. How else could the parties have expressed their consensus on the limitation of the defendant's duties in as far as their relationship was concerned? They could

not have done any better. Therefore, I find it difficult to hold that despite this unequivocal declaration of the defendant's duties there were other duties outside the agreement – the common law duties. In my judgment, to hold that the common law duty of care as alleged by the claimant was in play would contradict or unbalance the parties' agreed allocation of duties and responsibilities. And on the case authorities available, this is something everyone in their right mind should be slow to do.

Conclusion and disposal

In the premises, I find that the evidence before the Court does not support the claimant's case. It does not support the contention that the parties entered into an oral agreement that the defendant should use the forex and refund it to the claimant on or by 30 April 2012. Nor does it support the contention that the defendant owed it a duty of care as alleged in the statement of claim. There is no evidence before this Court showing that the defendant even failed to discharge its ordinary duties as a banker. The evidence shows that the claimant freely, voluntarily and fully aware of the risks involved decided to defer the purchase and remittance of the forex. The claimant voluntarily decided to divert the funds which would have been used to buy the forex to other uses known to itself and not disclosed to the defendant. The defendant did not have any input or influence in the claimant's decision not to comply with the terms of the Accounts Agreement. It was entirely the claimant's decision made out of its own volition and prudence. I am not satisfied that the alleged common law duty of care came into play in the present case. The claimant has failed to prove that the circumstances in this case gave rise to a duty of care on the part of the defendant as is pleaded.

On the foregoing, it is my judgment that on the evidence before this Court the claimant has failed to prove its case to the requisite standard of proof on a balance of probabilities. The claimant has failed to prove that an oral agreement was concluded between itself and the defendant under which the defendant agreed to use the forex and refund it to the claimant by 30 April 2012. The claimant has also failed to prove its alternative claim that the defendant owed it a tortious duty of care and that the defendant breached the duty. In the circumstances, the claimant's case must fail in its entirety and it is dismissed.

Third party action

Coming to the third party action it is obvious that following the failure of the claimant's claim the defendant's claim for indemnity from the third parties does not arise. I do not find it necessary to spend any time discussing it. Suffice to say that in the circumstances, the claim against the third parties automatically fails. It is dismissed.

Costs
The claimant will bear the defendant's costs of the main action. The defendant will bear the third parties' costs of the third party action. I so order.

Pronounced at Blantyre this 25th day of July 2019.

J N KATSALA
JUDGE