IN THE HIGH COURT OF JUSTICE OF THE F.C.T.
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO, ABUJA
ON THURSDAY, THE 12TH DAY OF MARCH, 2022
BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA
JUDGE

SUIT NO.: FCT/HC/CV/3138/2020

BETWEEN:

ISEHUNWA YOMI JACOB **CLAIMANT**

AND

ECOBANK NIGERIA LIMITED **DEFENDANT**

JUDGMENT

By a Writ of Summons dated the 10th of November, 2020 and filed on the 11th of November, 2020, the Claimant brought this action seeking the following reliefs:-

1. A Declaration that the fraudulent withdrawals of a total sum of ₦520,000.00 (Five Hundred and Twenty Thousand Naira) from the Plaintiff's account with the Defendant on the 17th day of July, 2020 without any authorization from the Plaintiff is wrongful, illegal and a clear exhibition of negligence on the part of the Defendant having regard to the fact that the said money was in custody and full control of the Defendant at the time of the illegal withdrawals.
2. AN Order directing the Defendant to refund the total sum of ₦520,000.00 (Five Hundred and Twenty Thousand Naira) to the Plaintiff being the total sum of money withdrawn from the Plaintiff's account.

3. General damages in the sum of N20,000,000.00 (Twenty Million Nara) against the Defendant in favour of the Plaintiff for fraudulent and negligent management of the Plaintiff's account.
4. Cost of this action.

The Writ of Summons is supported by the Statement of Claim, the Claimant's Witness Statement on Oath, Pre-Action Counselling Certificate, List of Witness, five documentary exhibits which are the statement of account of the Claimant domiciled with the Defendant, a letter from Zenith Bank to the Divisional Police Officer, Nigeria Police Force, B Division, Suleja, Niger State dated the 19th of September, 2020 to which were attached account opening form of one Iyere Dennis Blessing as appendix I and the statement of account of the said Iyere Dennis Blessing as appendix II. There was also a letter from the Defendant to the Claimant dated the 9th of October, 2020.

The Claimant opened his case on the 30th of June, 2021. Upon being sworn in, the Claimant, who was the PW1 was led through the preliminaries before he adopted his of his Witness Statement on Oath which he deposed to on the 11th of November, 2020 as his evidence-in-chief in the suit.

In the Witness Statement on Oath, the Claimant, testifying as his own witness, narrated how he had been banking with the Defendant for over ten years until Friday, the 17th of July, 2020 when he received series of debit notifications to the tune of N520,000.00 (Five Hundred and Twenty Thousand Naira) only. He further

stated that he immediately contacted the customer service of the Defendant and lodged a complaint on those illegal and unauthorized withdrawals from his account. It was his case that the customer service of the Defendant advised him to lodge a formal complaint on Monday, the 20th of July, 2020 after informing him that the unlawful withdrawals must have been perpetrated by internet fraudsters. The Defendant also advised him to report the incident to the Police.

Subsequent to the above reports, it was found that the illegal transactions were executed by one Denis Iyere who transferred the said amount to his Zenith Bank and United Bank for Africa accounts. In its response, Zenith Bank availed the Claimant through the Police the account opening forms of the said Denis Iyere where the sum of N200,000.00 (Two Hundred Thousand Naira) only from the said unlawful transaction was lodged. On the other hand, N300,000.00 (Three Hundred Thousand Naira) only was transferred to the United Bank for Africa's account of the said Denis Iyere.

The Claimant averred that in spite of the progress recorded in investigating the unlawful withdrawals from his account, he was shocked when the Defendant, on the 9th of October, 2020, informed him that he compromised his automated teller machine (ATM) card and the personal identification number (PIN) of same and, therefore, was solely responsible for his misfortune. He insisted that the conclusion of the Defendant in this regard was arrived at without any form of investigation, while also maintaining that his monies was in the custody of the Defendant.

In itemizing the particulars of fraud and negligence, the Claimant insisted that he never authorized any transfer of the said sum from his account on the 17th of July, 2020; that he immediately informed the Defendant of the said withdrawals; that the Defendant did not take any step towards warning Zenith Bank and United Bank for Africa where the monies were transferred to freeze the said accounts; that he reported the incident to the Police; that the Defendant was in full custody of his money at the time of the illegal transfers; that he did not disclose his details to any one and that the Defendant had failed to protect his money in its custody.

During cross-examination, the Claimant confirmed that he had banking with the Defendant for over ten years and there had not been any mismanagement of his fund prior to that 17th of July, 2020. He informed the Court that he had been using Defendant's mobile banking application for transaction and that the officials of the Defendant at the Jabi Branch activated the application for him. He confirmed that nobody knew the PIN number of his ATM card; that he made some transfers on that fateful day and that he reported the matter to the Nigeria Police Force, "B" Division, Suleja, Niger State. He stated that none of the members of staff of the Defendant was implicated in the course of the investigation. He also reiterated his earlier averments that the Defendant availed him with an account number into which the fund was transferred and that the beneficiary of the illegal transaction was one Denis Iyere.

There was no re-examination of the Claimant.

On the 9th of November, 2021, the Defendant opened its defence. Its witness, one Ikejiaku Nnamdi was sworn and proceeded to give his evidence. He identified himself as a member of staff of the Defendant who worked as the Relationship Manager of the Defendant and proceeded to adopt his Witness Statement on Oath which he deposed to on the 11th of February, 2021.

In the Witness Statement on Oath, the witness confirmed some of the facts deposed to by the Claimant in his own Witness Statement on Oath but went on to assert threat the Claimant's account was debited via web/online card-not-present transactions made with the Claimant's debit card and PIN details. He further stated that a total of nine (9) transactions were carried out on the Claimant's account number to the tune of N900,000.00 (Nine Hundred Thousand Naira) only out of which four failed and were reversed to the Claimant's account that same day.

He further averred that the Defendant reported the transactions to Zenith Bank and United Bank for Africa in order to recover the funds only to find that the funds transferred to those accounts with the banks had been withdrawn. He confirmed that though the funds were in the custody of the Defendant, the Defendant was not in control of the funds and, therefore, could not be held liable for negligence. He explained that for the illegal withdrawals to have been possible, the details of the Claimant's debit card, that is the 16-digit Permanent Account Number (PAN), the 3-digit Card Verification Value (CVV) and the expiry date must have been registered on the platform or application and authorized with the Claimant's Personal

Identification Number (PIN). He maintained that these information are within the exclusive knowledge of the Claimant.

It was the case of the Defendant that it was never fraudulent and negligent in the management of the Claimant's account and, therefore, should not be held liable for the calamity that befell the Claimant. Describing the Claimant's claim as "baseless, frivolous, unjustified and vexatious in nature", he concluded that the suit "should be dismissed in its entirety."

In support of its defence, the Defendant tendered through its witness the following documents: the certificate of compliance and the accompanying documents marked as Exhibit B1 – B2; the statement of account of the Claimant marked as Exhibit C1 – C13; the bank correspondences from Ecobank to Zenith Bank and United Bank for Africa marked as Exhibit D1, from Zenith Bank to Ecobank marked as Exhibit E1 and from United Bank for Africa to Ecobank marked as Exhibit F1 – F2.

During his cross-examination, the witness for the Defendant, the witness confirmed that the incident happened on the 17th of July, 2020 and that the Claimant lodged a formal complaint of the incident on the 20th of July, 2020. He stated that the Defendant responded via Exhibit A1 dated 9/10/2020 to the complaint of the Claimant. The witness, upon a question in that regard, insisted that the Claimant compromised his card details. He asserted that the Defendant conducted its investigation after the report was lodged. He revealed that the department of the Defendant which carried out the investigation was domiciled in the head office of

the Defendant, adding that the investigation was carried out on the 20th of July, 2020. He conceded that he did not know the members that investigated the incident and that he merely reported what he received. Though he admitted that it was possible an investigative report existed, he did not see any report. He affirmed that the beneficiary of the incident was one Denis Iyere who had account with Zenith Bank and United Bank for Africa as seen in Exhibit C1 – C13. He confirmed that the fund of the Claimant was in the custody of the Defendant when the incident occurred. He admitted that the Defendant did not report the matter to the Police when the Claimant lodged the complaint on the 20th of July, 2020. He further admitted that the email correspondences from the Defendant to Zenith Bank and United Bank for Africa were sent on the 21st of September, 2020, that is, after sixty-six days of the incident and sixty-three days after it received a formal complaint from the Claimant.

There was no re-examination of the witness.

Upon the conclusion of evidence, the parties filed and exchanged their Final Written Addresses. On the 1st of February, 2022, parties through their respective Counsel adopted their respective Final Written Addresses.

In the Final Written Address filed on behalf of the Defendant on the 30th of November, 2021, a sole issue was formulated, namely: "Whether from the pleadings and evidence before the Court, the Claimant has proved his case to entitle him to the reliefs sought in this suit."

Answering this question in the negative, learned Counsel submitted that the Claimant failed to discharge the burden of proof incumbent on him in this suit. Relying on section 134 of the Evidence Act, 2011 and the cases of Darego v. A.G. Leventis Nigeria Ltd & Others (2015) LPELR-25009 and Governor of Akwa Ibom State v. Akpan (2017) All FWLR (Pt. 874) 1916 at 1946 para G, he maintained that the Claimant failed to minimal standard of proof in civil cases. It was his contention that the pleadings and the evidence adduced by the Claimant in Court did not prove the facts the Claimant alleged against the Defendant.

According to learned Counsel, the Claimant admitted that it was one Denis Iyere who fraudulently withdrew monies from his account and not the Defendant. He relied on Bayelsa State Government & Anor v. Egemze & Ors (2019) LPELR-49088 (CA) to contend that the Claimant did not adduce any oral or documentary evidence to support the averments in the statement of claim and that the claims, therefore, had been abandoned. Particularly, learned Counsel for the Defendant submitted that there was nothing in the evidence of the Claimant that established negligence and fraud. For this, he cited and relied on the cases of Prince Oil Limited v. GTB Plc (2016) LPELR-40206 (CA) and Yakubu v. Jauroyel & Ors (2014) LPELR (SC).

Arguing further, Counsel submitted that the Claimant did not plead the particulars of the fraud alleged, adding that there was nothing that linked the Defendant to the fraud perpetrated on the bank account of the Claimant. He also contended that the Claimant did not discharge the burden of proof placed on him to establish negligence on the part of the Defendant, adding that the Claimant did not plead the

particulars of the negligence. He cited and relied on the case of Maersk v. Winline (Nig) Ltd (2015) All FWLR (Pt. 808) 672 at 672 and Banku v. Sermatech Nigeria Limited (2016) All FWLR (Pt. 34) 179.

Counsel further submitted that the Defendant owed the Claimant a duty of care by virtue of the Banker-Customer relationship between them and that the Defendant successfully discharged this duty for over ten years that the Claimant maintained an account with it. He also maintained that the Defendant diligently followed up on the complaint of the Claimant and investigated same. Since there was no breach of the duty of care owed Claimant by the Defendant, then, according to learned Counsel, then damages could not be established. He cited and relied on the case of Hamza v. Kure (2010) LPELR-1351 (SC). He further pointed out that there was no right of action for nominal damages in the tort of negligence. According to him, "negligence alone does not give rise to a cause of action; damage alone on the other hand does not give rise to a cause of action, the two must co-exist."

Referring to Exhibits C1 – C8, learned Counsel drew the attention of the Court to the nature of the transactions conducted on the Claimant's account. He pointed out that the Claimant in the course of the hearing confirmed that his debit card was with him at all times. Since the evidence was not controverted by the Claimant, learned Counsel contended that the transactions were carried out with the Claimant's imprimatur. He cited the case of Kopek Construction Ltd v. Ekisola (2010) LPELR-1703 (SC) pp. 66 – 67 paras D – A and urged the Court to treat same as an

unchallenged evidence. In conclusion, learned Counsel urged the Court dismiss the claim of the Claimant with substantial cost in favour of the Defendant.

In his response to the Final Written Address of the Claimant filed on his behalf on the 14th of December, 2021, learned Counsel for the Claimant formulated two issues for determination, videlicet, "(1) Whether on the preponderance of evidence, plaintiff has made out a case to entitle him to refund of money fraudulently transferred from his account on the 17th July, 2020 without his authorization. (2) Whether Defnedant herein is negligent or breached the banker/customer relationship duly between it and the plaintiff herein to enable the plaintiff entitled to N20Million damages."

In his argument on Issue One, learned Counsel iterated the case of the Claimant which is to the effect that the sum of N520,000.00 (Five Hundred and Twenty Thousand Naira) only were unlawfully removed from his account and transferred to the accounts of one Denis Iyere domiciled with Zenith Bank and United Bank for Africa. He added that the Defendant did not report the matter to the Police and had to wait for sixty-six days to take positive steps towards resolving his complaint when it wrote Exhibit A1 to him wherein it denied culpability. Counsel quoted the dictum of Ogundare JSC in the case of Haston (Nig) Ltd v. ACB Plc (2002) FWLR (Pt. 119) S.C. 1476 at 1493 paras F-H and submitted that the Defendant failed in its duty to protect the funds of the Claimant. He referred the Court to the following cases: UBA Plc v. NTUK (2004) All FWLR (Pt. 234) 1985 at 2004; Enterprise Bank Ltd v. M.N.L. (2015) All FWLR (Pt. 773) 1995 at 2039 paras G-H; United Bank for Africa Plc v.

Yaro Bakiyawa Yahuza (2004) LPELR-23976 (CA); S.T.B. Ltd v. Anumnu (2008) All FWLR (Pt. 399) 405 at 428 – 429 among other cases to drive home his argument that the relationship between the Claimant and the Defendant is one that is founded on uberrimae fidei and that the Defendant breached that duty when it allowed fraudsters to tamper with the funds in the account of the Claimant domiciled with it and refused to take timeous steps to recover the funds after the Claimant lodged a complaint.

In rounding off his submissions on this issue, learned Counsel noted that the Defendant failed to exercise reasonable care in relation to the funds of the Claimant. He therefore urged the Court to hold that from the evidence before the Court, the Claimant had, indeed, established that he was entitled to the refund of the total sum of N520,000.00 which he asserted was fraudulently withdrawn and transferred from his account on the 17th of July, 2020.

In his submissions on Issue Two, learned Counsel prefaced his submissions by reproducing the averments in paragraph 18 of the Statement of Claim wherein the particulars of fraud and negligence were specifically pleaded and set out. He noted that the Claimant led evidence to establish those particulars. Responding to the Defendant's contention that the Claimant did not establish the allegation of fraud, learned Counsel drew the attention of the Court to the conduct of the Defendant from the 20th of July, 2020 when the Claimant formally lodged his complaint to the 9th of October, 2020 when the Defendant issued Exhibit A1. Learned Counsel adopted the definition of negligence as put out by the Court in the case of Diamond

Bank Ltd v. P.I.C. Ltd (2010) All FWLR (Pt. 512) 1098 at 1117 and maintained that the Defendant did not perform the duty of care imposed on it by virtue of the relationship between it and the Claimant.

Counsel contended that the evidence of the Defendant's witness was unreliable considering what learned Counsel described as inconsistencies in it. He invited the Court to consider the contradictory testimony of the Defendant's witness. Drawing inspiration from judicial authorities such as Olaloye v. Attorney_General and Chief Judge of Osun State (2015) All FWLR (Pt. 774) 37 at 62, Ajide v. Kelani (1985) 5 NWLR (Pt. 12) 248 at 249 and Oluma v. Onyuwa (1996) 4 NWLR (Pt. 443) 449 at 457, he urged the Court to reject the evidence of the Defendant's witness.

Learned Counsel further submitted that since the Claimant had established that the Defendant breached the duty of care it owed him, he is automatically entitled to damages. He added that the Claimant did not need to prove that he is entitled to the damages sought, since general damages flow from the wrong complained of. He relied on the cases of Union Bank of Nigeria Plc v. Ajagbule (2012) All FWLR (Pt. 611) S.C. 1413 at 1431, Balogun v. National Bank of Nigeria Ltd (2009) All FWLR (Pt. 479) 427 at 456, S.T.B. Ltd v. Anumnu (2008) All FWLR (Pt. 399) 405, Onagoruwa v. IGP (1991) 8 NWLR (Pt. 193) 593 at 650-651 and Igheriniovo v. S.C.C. Nig. Ltd. (2013) All NWLR (Pt. 700) S.C. 1240 at 1251 – 1252 among other cases and urged the Court to grant the prayer for the award of N20,000,000.00 (Twenty Million Naira) only sought as damages.

Indeed, the above are the cases of the parties before me. I have considered the issues which the parties have formulated in their respective written addresses. For the sake of immediacy, I shall reproduce the issues hereunder. The Defendant had formulated this issue: "Whether from the pleadings and evidence before the Court, the Claimant has proved his case to entitle him to the reliefs sought." On the other hand, the Claimant had formulated the following two issues: "(1) Whether on the preponderance of evidence, plaintiff has made out a case to entitle him to refund of money fraudulently transferred from his account on 17th July, 2020 without his authorization. (2) Whether defendant herein is negligent or breached the banker/customer relationship duty between it and the Plaintiff herein to enable the Plaintiff entitle to N20,000.000.00 damages." In determining this dispute one way or the other, I have taken the liberty to modify these issues and reframe them into these two issues:

i. Whether the Claimant has not established negligence and fraud against the Defendant in relation to the unlawful and unauthorized transactions on his account domiciled with the Defendant.
ii. Whether the Claimant is not entitled to damages sought in this suit.

By way of prefatory remarks on Issue One, I must begin my resolution of the Issue by providing a contextual definition of the tort of negligence. In ***Chevron (Nig.) Ltd. v. Omoregha (2015) 16 NWLR (Pt. 1485) 336 at 350 para A – C***, the Court of Appeal per Saulawa, JCA (as he then was) explained that **"*The term 'negligence' denotes the failure to exercise the standard of care that a reasonably prudent***

person would normally have exercised in a similar situation. That is to say, any conduct falling below the legal standard established to protect others against unreasonable risk of harm, as against conduct that is intentionally, wantonly, or willfully disregardful of other's rights. Negligence in law, ranges from inadvertence that is hardly more than accidental to sinful disregard of the safety of others. Negligence usually includes culpable carelessness, also termed actionable negligence; ordinary negligence and simple negligence."

In ***Access Bank Plc v. Mann (2021) 13 NWLR (Pt. 1792) 160 at p. 177, paras E – F***, the Court of Appeal held that **"*Negligence is a tort that deals with a breach of duty to take care. It is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. It is a conduct which falls below the standard by law for the protection of others against unreasonable risk or harm. Negligence is a breach of duty of care which causes a loss. It is strictly a question of fact which must be decided in the light of its own facts. What amounts to negligence depends on the facts of each case.*"** This definition has been accepted and applied in a plethora of decisions emanating from this jurisdiction. See, for instance, ***Jwan v. Ecobank (Nig.) Plc (2021) 10 NWLR (Pt. 1785) 449 at 482 para D; DHL Int'l Nig. Ltd. v. Eze-Uzoamaka (2020) 16 NWLR (Pt. 1751) 445 491 – 492 paras G – C; Owoyele v. Mobil Prod. (Nig.) Unltd (2021) 5 NWLR (Pt. 1768) 70 at 88 paras D – H*** among other cases.

I hasten to state that the law is settled on what constitute the tort of negligence and how same can be established. In the English *locus classicus* of ***Donoghue v. Stevenson (1932) AC 562 at 580***, the Privy Council of the House of Lords laid down the following principle which remarkably redefined the tort of negligence. Lord Atkins, speaking the mind of the House of Lord, postulated what is today known as the 'neighbor principle'. In what has become one of the most memorable dicta in judicial authorities, Lord Atkin stated that "***The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law 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 acts or omissions which are called in question***."

According to the Neighbour Principle, for the tort of negligence to be established, the following elements must be established: (i) that the Defendant owed the Claimant a duty of care; (ii) that the Defendant breached this duty of care; and, (iii) that the Claimant suffered damages as a result of the breach of this duty of care. Thus, there is the element of proximity, or neighbourliness, between the Defendant and the Claimant in the tort of negligence.

The Neighbor Principle was given further amplification in another *locus classicus* on negligence vis-à-vis economic loss. The House of Lords, in the case of ***Caparo Industries Plc v. Dickman 1990 2 A.C. 605,1990 2 W.L.R. 358*** distilled the Tripartite Test in determining the liability of a Defendant to a Claimant in an action for negligence. The test requires the Court to ask these tripartite questions: (i) was the damage reasonably foreseeable?; (ii) was there a relationship of proximity between the Defendant and the Claimant?; and, (iii) is it just, fair and reasonable to impose a duty in this situation? The underpinning of the Neighbour Principle as modified in the ***Caparo's case*** is the test of foreseeability. This test, it is settled, is objective. Thus, the Court does not ask what the Defendant actually foresaw; it asks what a reasonable person could have been expected to foresee. The ***Caparo's case*** is distinct from the ***Donoghue's case*** in that whereas the latter starts from the assumption that there is a duty of care and that harm was foreseeable unless there is good reason to judge otherwise, the former proceeds from the premises that no duty is owed unless the criteria of the three stage test is satisfied.

In Nigeria, the Courts have applied the principles distilled by the House of Lords in these two *locus classicus* in a number of decisions. In ***Owoyele v. Mobil Prod. (Nig.) Unltd (2021) 5 NWLR (Pt. 1768) 70 at 88 paras D – H***, the Court of Appeal held that "***The essential elements or ingredients of actionable negligence are as follows: (a) The existence of a duty to take care owed to the claimant by the defendant; (b) Failure to attain the standard of care prescribed by law (breach of the duty), and (c) Damages suffered by the claimant, which must be***

connected with the breach of the duty to take care. Once these ingredients are established at a hearing, the defendant will be held liable in negligence." In ***DHL Intl Nig. Ltd. v. Eze-Uzoamaka (2020) 16 NWLR (Pt. 1751) 445 491 – 492 paras G – C***, the Court held established that "***The three ingredients of negligence, which a plaintiff must establish are: (a) that the defendant owed him a duty of care, (b) that there was a breach of the duty, and (c) that the breach caused him injury or damage.***"

On how the tort of negligence is proved, the Courts have stated in a plethora of decisions that the facts of negligence must be specifically proved. In other words, the Claimant who prays the Court to hold that the Defendant owes him a duty of care and that he has suffered damages as a result of the breach of that duty must prove these elements strictly. In ***Access Bank Plc v. Mann (2021) 13 NWLR (Pt. 1792) 160 at p. 177, para F***, the Court of Appeal held that "***Where a claimant makes a claim of negligence, the facts of the allegation of negligence must be strictly proved.***" Similarly, in ***Ogbiri v. N.A.O.C. Ltd (2010) 14 NWLR (Pt 1213) 208 at 221 – 222 paras G – A***, the Court of Appeal elaborated on the nature of proof thus "***By the provisions of sections 135, 136 and 137 of the Evidence Act, the plaintiff in an action for negligence has the bounden duty to establish that the defendant was negligent towards him. To succeed in an action for negligence, the plaintiff has to prove three vital ingredients namely: (a) the defendant owed him a duty of care; (b) the defendant breached the duty of care; and (c) as a result of the breach, the plaintiff suffered damage. These***

three factual situations must exist conjunctively to ground the defendant's liability in negligence. Therefore, it is not enough to prove damage or that the plaintiff suffered damage, without proof of the corresponding duty of care and its breach on the part of the defendant."

Adumbrating on the need for the Claimant suing for negligence to provide the particulars of the negligence, the Court further held at page 222 - 223, paras F – B of the report that "***Particulars of negligence are intended to appraise the defendant of what he did or failed to do, in breach of his duty of care to the plaintiff and to demonstrate that a reasonable person in his position ought not to have committed the breach or ought not to have done that which he did or did not do. Pleading particulars of negligence serves the purpose of*** *audi alteram partem* ***or fair hearing. The essence is that the defendant will not be taken by surprise. Therefore, furnishing particulars of negligence is not a mere formality. It is mandatory for the plaintiff to furnish the particulars of negligence…***"

According to the Claimant in the case before me, on the 17th of July, 2020, he received debit notifications of N520,000.00 (Five Hundred and Twenty Thousand Naira) only after banking hours in the following sequence: (i) N10,000.00; (ii) N100,000.00; (iii) 100,000.00; (iv) N100,000.00; (v) N100,000.00; (vi) N100,000.00 and (vii) N10,000.00. see paragraph 6 of the Claimant's Witness Statement on Oath. He immediately called the Defendant's customer service informing them of the unauthorized transactions on his account. The customer service told him that

internet fraudsters were responsible and advised him to lodge an official complaint on Monday, the 20th of July, 2020 which he did. Upon this official complaint, the Defendant advised him to approach the Nigeria Police Force with the same complaint, having furnished him with the account details of the beneficiary account. This, the Claimant did. See paragraphs 8, 9, 10, and 11 of the Claimant's Witness Statement on Oath. Attached to the Witness Statement on Oath were the statement of account of the Claimant, a letter from Zenith Bank to the Nigerian Police Force dated 19th September, 2020 wherein they furnished the Police with the details of the accounts of the beneficiary of the unauthorized transactions and a letter from the Defendant to the Claimant dated 9th October, 2020 where it denied liability.

In paragraph 20 of the Claimant's Witness Statement on Oath, he itemized what he titled "Particulars of Fraud and Negligence". In subparagraphs (iii), (iv), (v), (vi), (vii), (viii) and (ix), he stated that

(iii) "In spite of paragraph (ii) supra, defendant did not take any step whatsoever in contacting the Zenith Bank Plc and United Bank for Africa where the monies were transferred to in order to prevent the fraudster from withdrawing same."

(iv) Rather than reporting the fraudulent withdrawals/transfer to the Police to carry out necessary investigation in this regard, defendant directed the plaintiff to report the matter to the Police and gave him the particulars of Denis Iyere who carried out the fraudulent act when plaintiff visited the defendant's office on Monday, 20th day of July, 2020.

(v) Without waiting for the outcome of the police investigation, defendant vide its letter of 9th October, 2020 addressed to the Plaintiff hurriedly informed the plaintiff that they 'confirmed' that the ATM card and the PIN in custody of the plaintiff were used to carry out the fraudulent act and that the fraudulent withdrawals were successful because plaintiff might have compromised the security details of his ATM Card and PIN.

(vi) At the time of withdrawals of the total sum of N520,000.00 (Five Hundred and Twenty Thousand Naira) from the plaintiff's account, defendant was in custody and full control of the money kept in his account with the defendant.

(vii) No one knows my secret PIN number and my ATM card was not given to anybody till date.

(viii) Defendant did not take any step whatsoever to trace Denis Iyere who carried out the fraudulent act till date.

(ix) I was made to suffer for the defendant's inability to protect the money kept in its custody from 17th July, 2020 till date."

During cross-examination, the Claimant admitted that he made transactions from the Defendant's mobile banking application installed on his mobile device. He also confirmed that he reported the incident to the Police. He admitted that none of the staff of the Defendant was linked to the fraud. The only thing the Defendant did upon being presented with the complaint of the Claimant was to furnish the account details of the beneficiary of the wrong transfers which he took to the Police. He

conceded that Zenith Bank revealed that the beneficiary account was that of one Denis Iyere.

Though the Defendant denied the averments in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18 and 19 of the Claimant's Statement of Claim, making only qualified admissions in the process, it was not able to impeach the evidence of the Claimant during its cross-examination of the Claimant. To side-step the liability for negligence, the Defendant tendered some documents and stated in paragraph 8(a), (e), (f), (g) and (h) of the Defendant's Witness Statement on Oath that

(a) "…the Claimant's account was debited of (sic) the sum of N520,000.00 (Five Hundred Twenty Thousand Naira) only vide web/online card-not-present transactions made with the Claimant's debit card 529751****4388 and PIN.

(e) "…the Defendant took proactive steps to immediately reach out to United Bank for Africa Plc (UBA) and Zenith Bank Plc via email to provide status of the funds for possible recovery."

(f) The aforementioned Banks got back to the Defendant and confirmed that the funds have been withdrawn by the account holder and that they have further placed restriction on the account and have reported the incident to the Law Enforcement Agencies…

(g) That the funds were in the Defendant's custody but the Defendant is not in full control of the funds that goes (sic) in and out of a customer's account and cannot be held liable for the negligence on the part of the Claimant.

(h) That for the transaction that led to the debit of aforementioned funds from the Claimant's account to succeed the Claimant's debit card details (16 digits PAN, 3 digits CVV2 and expiry date) must have been registered on the platform/App and authorized with the Claimant's PIN details. These details are information which only the Claimant can provide."

During the cross-examination of the Defendant's witness, he confirmed that the Defendant received, on the 20th of July, 2020, a formal complaint of the incident which happened on the 17th of July, 2020. He confirmed that the Bank responded to the complaint on the 9th of October, 2020. He insisted that the Claimant possibly compromised the security details of his debit card. Though he claimed that his conclusion was predicated on an investigation report, he was neither a member of the investigation team nor did he see the investigation report. He conceded that the Defendant did not report the incident to the Police though he claimed the Defendant sent emails to Zenith Bank and United Bank for Africa.

I have paid due attention to the documents the Defendant tendered in evidence. Exhibit D1 was the email the Defendant sent to Zenith Bank and United Bank for Africa. It was sent on the 21st of September, 2020. That is, about sixty-six (66) days after the incident complained of and sixty-three (63) days after the Claimant had laid an official complaint. The content of the email was brief: "Our subject customer recently compromised his card and PIN details and funds totaling N500,000 was moved from his account to your respective customer's account, Kindly assist block the account and avail us the salvage balance (if any)" The two banks, via Exhibit E1

and Exhibit F1 replied two days later, that is, on the 23rd of September, 2020 that though the beneficiary accounts had been restricted, the funds had since been withdrawn. The Defendant, on the 9th of October, 2020 sent a letter titled "Re: Complaint in Respect of Withdrawals of the sum of ₦520,000 from account 5752037000" wherein it denied culpability and blamed the Claimant for the wrong withdrawals.

After due consideration of the averments and the evidence led in proof of same, I am of the considered view that the Defendant has been negligent in managing the funds of the Claimant. The Defendant did not act timeously in addressing the complaint of the Claimant. The Claimant officially complained of the unauthorized withdrawals on his account on 20th of July, 2020. The Defendant sent emails to Zenith Bank and United Bank for Africa requesting for assistance in salvaging the funds on 21st of September, 2020. How the Defendant expected the fraudster who tampered with the accounts of the Claimant not to move the funds from the destinations accounts within the sixty-three days of its inertia is unbelievable. It speaks of actionable negligence. The letter of 9th October, 2020 wherein it denied liability is even illogical. Without any form of investigation, it concluded that the Claimant "may have compromised the security details of your ATM card and PIN…" while the letter reeks of a desperate attempt to avoid liability, it also demonstrates lack of confidence in the veracity of the information it purports to convey. In short, the letter lacks credibility. The testimony of the Defendant's witness wherein he could not establish, during his cross-examination, that an investigation was actually

carried out on the Claimant's complaint or, even, provide the details of the said investigation, reinforces my conclusion that the Defendant was negligent in protecting the funds of the Claimant and in addressing his complaint. I am constrained to agree with learned Counsel for the Claimant that the testimony of the witness for the Defendant is patently unreliable. This Court, therefore, cannot accord it any probative value.

I must state, at this juncture, that in this age of supersonic information highway, the least that is expected of a bank who introduces mobile banking and internet banking is to provide adequate firewalls that can protect the banking details of its customers. This is particularly urgent considering that the notorious activities of internet fraudsters have been a source of grave concern to security agencies in particular and Nigerians in general. It is the duty of care the bank owes its customers. If internet fraudsters have found a way of hacking into the databases of banks, it is reasonably expected that the banks should take further steps towards protecting these databases with stronger firewalls and software defenders. This is what is reasonably expected of them; more so, as the risk of hacking is a reasonably foreseeable consequence of protecting customers' details with obsolete firewalls.

The need for the bank to provide these firewalls cannot be overemphasized. The relationship that exists between a bank and its customers is one of utmost good faith, or *uberrimae fidei*. Embedded in this is also the duty of care the bank owes the customers in protecting the monies the customers have entrusted in its custody. I agree wholly with the judicial authorities cited and relied upon by learned Counsel

for the Claimant. Particularly, the case of ***Enterprise Bank Ltd v. M.N.L. (2015) All FWLR (Pt. 773) 1995 at 2039 paras G – H*** where the Court emphasized the existence of a fiduciary relationship between the bank and its customers is quite instructive.

In ***Haston (Nig.) Ltd. v. A.C.B. Plc (2002) 12 NWLR (Pt. 782) 623 at p. 646, paras B – C***, a case that has all the markings of the case before me, except that the wrong withdrawals were done by means of cheques with the forged signature of the Chairman of the Appellant, as against the present case where the unauthorized withdrawals were executed through hacking of the Claimant's account with the Defendant, the apex Court held that

"***When Victor Ndoma-Egba reported to the defendant that there had been some fraudulent withdrawals from account No. 05604, one would expect the defendant, as banker, to take a serious view of the matter, to report to the police and carry out internal investigation. She did not have to wait for the plaintiff to demand all these.***

This is so because the defendant owed the plaintiff a duty of care. Their relationship is contractual and has been described as that of debtor and creditor and principal and agent…"

In ***Okobiemen v. Union Bank of Nigeria Plc (2019) 4 NWLR (Pt 1662) 265 at 280 paras F – H,*** the Court of Appeal, speaking through Hussaini, JCA, put it beyond all scintilla of dubitation when it explicated that

"***The money in the account of a customer is a contract and money in the hands of the bank is borrowed from the customer. Until it is demanded by the customer, it remains in the custody of the bank for its use; hence a banker has a duty in its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to transaction within its contracts with customers. See Zenith Bank Plc v. Oyenaka & Anor. (2016) LPELR - 403227 (CA); Linton Industry Trading Coy. (Nig.) Ltd. v. C.B.N. (2013) LPELR - 22036 (CA), (2015) 4 NWLR (Pt. 1448) 94.***

"The respondent/bank fell below the standard or conduct expected of it when it acceded to and without the authorization of the appellant, removed or withdrew ₦2,000,000.00 from the account held by the appellant. Unless and until a cheque is drawn on the banker by the customer directing or requesting the bank to pay out of the money held in his account for payment to the payee whose name is endorsed on a cheque, the bank as an agent to the customer, would have been careless, if it did otherwise. See Afribank (Nig.) Plc v. A. I. Investment Ltd (2002) 7 NWLR (Pt. 765) 40.

"The relationship between the bank and its customer is fiduciary. It is, sometimes, called confidential relationship. When the customer chooses to operate an account with a bank, he does so based on the trust and confidence he reposed on that bank. The bank has a duty to exercise a high standard of care in managing the customer's account."

In view of the foregoing, therefore, I find that, indeed, the Defendant is liable to the Claimant for negligence. I so hold.

On the question of fraud, I must state that the burden of proof of fraud in civil cases is the same as the burden of proof in criminal cases. In addition to this, the Claimant who is alleging fraud must explicitly specify the particulars of the fraud and lead cogent and compelling evidence in proof of same in such a way that the Court will be left in no doubt as to the culpability of the Defendant against whom the allegation of fraud is made. To understand why fraud must be proved strictly, there is the need to understand the nature of fraud. In ***Nteile v. Irawaji (2021) 16 NWLR (Pt. 1803) 411 at Pp. 455-456, paras. D-B*** the Supreme Court per Oseji JSC (of blessed memory) explains that "***Fraud includes acts, omissions and concealments by which an undue and unconscientious advantage is taken of another. It implies a wilful act on the part of anyone, whereby another is sought to be deprived by illegal or inequitable means of what he is entitled to. It is a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. It is something dishonest and morally wrong. Fraud in most cases involves dishonesty. Actual fraud takes either the form of statement which is false or a suppression of what is true. The partial statement of fact and the withholding of essential qualifications may make that which is stated absolutely false and fix it under the head of suggestio falsi. Fraud is a false representation of a matter of fact, whether by words or concluded by false or misleading allegations or by concealment of that which***

***should have been disclosed, which deceives and is intended to deceive another so that he will act upon it to his legal injury. [Adimora v. Ajufo (1988) 3 NWLR (Pt. 80) 1; Egbo v. Nwali (1998) 6 NWLR (Pt. 553) 195; A.C.N. v. I.N.E.C. (2013) 13 NWLR (Pt. 1370) 161; Vulcan Gases Ltd. v. G. F. Ind. A.-G. (2001) 9 NWLR (Pt. 719) 610; Ntuks v. N.P.A. (2007) 13 NWLR (Pt.1051) 392; Umanah v. Attah (2006) 17 NWLR (Pt. 1009) 503; Ifegwu v. F.R.N. (2001) 13 NWLR (Pt. 729) 103; Afegbai v. A.-G., Edo State (2001) 14 NWLR (Pt. 733) 425 referred to.]*"**

Speaking further ***at p. 462, paras. C-F*** of the law report on the burden of proving fraud, the apex Court pointedly declared that "***In an allegation of fraud there is a heavy burden of proof on he who asserts the existence of such fraud in any transaction. Hence in Fabunmu v. Aigbe (1985) 1 NWLR (Pt. 2) 299 at319, this court per Obaseki J.S.C. held that fraud is a serious crime and in civil matters, the particulars must be pleaded and strictly proved where there is a denial by the adverse party. See also Ojibah v. Ojibah (1991) 5 NWLR (Pt.191) 296; Ezenwa v. Oko (2008) LPELR (1206) page 1 or (2008) 3 NWLR (Pt. 1075) 610; Otukpo v. John (2012) 7 NWLR (Pt. 1299) 357; Ntuks v. N.P.A.supra.***"

Returning to the pleadings and averments before me, I find that in paragraph 20 of the Claimant's Witness Statement on Oath which I have reproduced above, the Claimant provided what he termed "Particulars of Fraud and Negligence". A careful

perusal of the said particulars discloses that the Claimant succeeded in providing only the particulars of negligence. Not even subparagraph (viii) where the Claimant states that “Defendant did not take any step whatsoever to trace Denis Iyere who carried out the fraudulent act till date.” is sufficient to satisfy the rigorous requirement of the law in the proof of fraud in civil cases. There is nowhere in the entire deposition of the Claimant that he successfully linked the Defendant with the fraud perpetrated on his account. In the case of C.B.N. v. Dinneh (2021) 15 NWLR (Pt. 1798) 91 at P. 127, paras. G-H, the Supreme Court per Okoro, JSC held that “Facts pleaded on which no evidence is led in support are deemed abandoned.”

Further to the above, during his cross-examination by learned Counsel for the Defendant, he stated thus: “From the investigation carried out by the Police none of the staff of the bank was linked to the said withdrawal. After my complaint to Ecobank they gave me an account number that they alleged my money was transferred to. I, in turn, took same to “D” Division Suleja where I lodged my complaint. From the investigation of the “D” Division Suleja, Zenith Bank wrote to the Police that the beneficiary of the transfer was one Denis Iyere and not the Defendant.” The above evidence elicited from the Claimant during cross-examination is self-evident. I need add nothing more to it. It is my holding, therefore, that the Claimant has not proved fraud against the Defendant.

I shall now turn to the second Issue I formulated, to wit, “Whether the Claimant is not entitled to damages sought in this suit.” In his Final Written Address, the Claimant, through his Counsel, after citing a number of judicial authorities, urged

this Court to hold that the Claimant was entitled to the quantum of damages sought in the suit. He reminded the Court of the depreciation of the Naira and he pointed out to the Court that the Claimant had been deprived of his N520,000.00 since the 17th day of July, 2020. The Defendant, on the other hand, through its Counsel, contended that the Claimant was not entitled to the damages sought or to any damages at all. Learned Counsel reiterated the trite position of the law that the award of damages in an action for negligence is wholly dependent on whether the Claimant has been able to make out a case of negligence against the Defendant.

I have given serious thought to the arguments of Counsel on this issue. It is necessary at this point to state the position of the law on this issue. In ***International Messengers Nig. Ltd. v. Engineer David Nwachukwu (2004) 13 NWLR (Pt. 891) 543 at 565 paras B - E*****,** the Supreme Court per Musdapher, JSC (as he then was) held that

"***It is also obvious that negligence is only actionable if actual damage is proved. There is no right of action for nominal damages in the tort of negligence. In Munday Ltd. v. L.C.C. (1916) 2 KB 331 at 334 Lord Reading, C. J. stated:-***

"Negligence alone does not give a cause of action, damage alone does not give a cause of action; the two must co-exist."

"In negligence actions the measure of damages is that the injured party is to be placed back, so far as money can do it, in the same position as he would

have been in had it not been for the defendant's negligence. This is subject to the rules of remoteness of damages and in cases of personal injuries, a reasonable sum for pain and suffering. The dominant rule of law is the principle of restitutio in integrum. In negligence cases, damages are also divided into general and special damages. General damages are those damages which the law presumes to flow from the negligence of which the plaintiff has complained. These damages must be specifically averred to have been suffered and must be proved. See Admiralty Commissioners v. S. S. Susquehanna (1926) AC 661, Ezeani v. Ejidike (1964) 1 All NLR 402."

Having established negligence, the Claimant is entitled to damages. I so hold. As to the quantum of damages, it must be pointed out that the Claimant has been deprived of the use of his funds since the 17th of July, 2020. This Court must therefore consider the turnover the said N520,000.00 (Five Hundred and Twenty Thousand Naira) only would have yielded if the Claimant had funnel same into an economic activity. This Court must therefore consider the economic loss the Claimant has suffered since the 17th of July, 2020 as a result of the negligence of the Defendant. Added to this is the progressively depreciating value of the Naira. The value of N520,000.00 (Five Hundred and Twenty Thousand Naira) only as at 17th July, 2020 is not the same as at today. This Court must factor these inflationary considerations into its decision with regards to quantum of damages to be awarded in this suit.

In all, the suit of the Claimant succeeds in part, the Claimant having established negligence on the part of the Defendant but having failed to prove the allegation of fraud he made against the Defendant. Accordingly, this Court hereby grants the reliefs sought by the Claimant but with the following modifications:-

1. **THAT the withdrawals of the various sums of money totaling the sum of ₦520,000.00 (Five Hundred and Twenty Thousand Naira) from the Claimant's account with the Defendant on the 17th day of July, 2020 without any authorization from the Plaintiff is wrongful, unlawful, illegal and amounts to negligence on the part of the Defendant was in custody of the Claimant's funds at the time of the wrongful, unlawful, and illegal withdrawals and ought to take reasonable care to protect the said funds.**
2. **THAT the Defendant breached the duty of care and *uberrimae fidei* it owed the Claimant when it failed and/or neglected to take reasonable steps to protect the funds of the Claimant in its custody and is therefore liable to the Claimant.**
3. **THAT AN Order of this Court is hereby made mandating the Defendant to refund the total sum of ₦520,000.00 (Five Hundred and Twenty Thousand Naira) to the Claimant being the total sum of money withdrawn from the Claimant's account domiciled with the Defendant.**
4. **THAT the sum of ₦2,000,000.00 (Two Million Naira) only is hereby awarded against the Defendant for breach of the duty of care it owes the**

Claimant when it failed and/or neglected to protect the Claimant's funds and failed and/or neglected to take timeous steps to recover the said Claimant's funds after the Claimant had complained of the unlawful and unauthorized withdrawals from his account domiciled with the Defendant.

5. **That the cost of ₦200,000 (Two Hundred Thousand Naira Only) is hereby awarded as cost of this action.**

This is the Judgment of this Honourable Court delivered today, the 12of Apil, 2022

HON. JUSTICE A. H. MUSA
JUDGE
13/04/2022

APPEARANCE
For the Claimant:
Waheed Gbadamosi Esq.

For the Defendants:
Oluwatoyin A. Oladejo Esq.
Rita K. Awuru Esq.
Francis Ameh Esq.