**IN THE SUPREME COURT OF BELIZE, A.D. 2014**

**CLAIM NO: 656 of 2014**

**BETWEEN**

**EVERGREEN E-PAY SOLUTIONS LTD** **CLAIMANT**

**AND**

**BELIZE BANK INTERNATIONAL LTD.** **DEFENDANT**

**Keywords:** Banking; Credit Card payments & processing between a Bank and Merchants; Visa and MasterCard Credit Card Payments; Independent Service Organisation; Internet Payment Service Provider;

Internet Contract; Construction of Automatic Termination & Early Terminate Fee Clauses;

Contractual Terms; Submission of draft Contract for review after negotiations; Pre-conditions of Contract; Contract to be signed but never signed by parties; Parties agreeing to proceed with providing services without signing contract;

Whether an unsigned contract is binding; whether the parties by conduct (including by performance) reached agreement in terms of a draft Agreement; whether an option of Automatic Termination was exercised; Whether an Early Termination Fee clause was exercised and Fee due; whether and Early Termination Fee is a Penalty.

**Before the Honourable** Mr. Justice Courtney A. Abel

**Hearing Dates:** 14th July 2015

15th July 2015

24th July 2015

21st October 1015

15th December 2015

16th December 2015

18th December 2015.

**Appearances:**

Mr. Fred Lumor, S.C., for the Claimant

Mr. E. Andrew Marshalleck S.C., for the Defendant

**WRITTEN JUDGMENT**

**Of an Oral Judgment delivered on the 18th day of December 2015**

## Introduction

[1] This claim concerns the business of credit card payments between a bank and merchants, and involves the complex way in which this process operates via the internet and is managed for the benefit of such persons including the Claimant ("Evergreen") who as an intermediary would refer merchants to the Defendant ('the Bank") carrying on business in Belize.

[2] Evergreen is a company involved in the e-merchant industry as a so-called 'Independent Service Organisation' ("ISO") or Internet Payment Service Provider ('IPSP") and operates as a Broker for financial institutions specifically providing electronic payment processing services, using its electronic gateway, to financial institutions in Belize and particularly the Defendant.

[3] The Bank was at all material times engaged in the business of providing credit card processing services to merchants allowing for the processing of Visa and MasterCard credit card payments by customers and particularly to certain customers introduced by Evergreen.

[4] This is a disputed claim brought by the Claimant against the Bank for liquidated damages in the total sum of US$3,474,842.11 plus interest and costs for early termination of a written but unsigned Internet Payment Services Provider (IPSP) Agreement.

[5] The dispute arises in the situation where the parties agreed that the business relationship between the parties should proceed before the formal

written contract was executed in accordance with the parties' common understanding that a written contract would in due course be executed - which never occurred – but which Evergreen alleges was objectively entered into between it and the Bank on or about 18th February 2012 but which was subsequently terminated by the Bank entitling Evergreen to damages under the termination provisions of the unsigned contract by reason of such termination.

[6] The central issue for determination is the question whether there was an agreement reached between the parties generally on the terms of the draft unsigned written Contract submitted by Evergreen. This involves a consideration of the communications between them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations, and had agreed upon all the terms which they objectively regarded, or the law requires, as essential for the formation of legally binding relations.

[7] In order to resolve the agreed issues between the parties for determination it will be necessary to set out the background facts as found by me.

**Issues**

[8] Though the written Agreement submitted by Evergreen is unsigned, did the parties by conduct (including by performance) reach agreement in terms of the draft IPSP Agreement?

[9] If the unsigned draft IPSP Agreement is a binding though unexecuted agreement made between the parties, did the Bank exercise the option of Automatic Termination of the Agreement?

[10] Did Visa prohibit the Defendant from providing the required services to the Merchants referred to it by the Claimant? If so, is it one of the agreed grounds provided for in the Agreement?

[11] If the draft IPSP Agreement is a binding, though un-executed, Agreement made between the parties, and if it did not automatically terminate, whether the Early Termination Fee claimed in Clause 6.4 of the Agreement is a penalty?

[12] Whether Evergreen has proved any and if so what loss and damages as a result of the early termination fee provision in the Agreement?

**Background**

[13] In or about January, 2012, the Bank received enquiries from a Mr. Alvaro Alamina of Evergreen about establishing an arrangement with the Bank under which Evergreen would introduce e-commerce merchant clients to the Bank and then to use Evergreen's and the Bank's credit card processing platform - in consideration of certain fees – to establish an IPSP relationship.

[14] The Bank decided to pursue the possibility of establishing the proposed arrangement with Evergreen acting as an ISO for an international clientele; and after a number of correspondences and discussions, and the parties entering into a confidentiality agreement, on or about the 15th day of May, 2012, a draft agreement providing for the proposed arrangement on the terms discussed was provided by Evergreen to the Bank for its final review and approval.

[15] Evergreen, by way of email of 15th May, 2012 from Mr. Alamina to the persons within the Bank with whom Evergreen had been in discussions (its Managing Director and a lawyer Mr. Christopher Coye and its Manager of Product Development Ms. Gonzalez), which was accompanied by the draft written agreement, based on the discussions, clearly set forth a proposal outlining the terms under which Evergreen would make referrals while the draft agreement was being considered. Also attached was a written proposal for Evergreen's fees set out in a Schedule which had also been earlier discussed between the parties.

[16] Because this email is important to this case it will be set almost in its entirety as follows:

> *" … I am attaching a copy of the IPSP agreement for the bank to review and approve in due course. We recognize that there could be areas that require clarification and/or modification*

*and we along with our attorney, stand ready to assist in this regard.*

*You will note that we have attached the schedule of fees as an appendix to the IPSP agreement based in part to [sic] the various discussions which we have had over the past months. It is critical for us to come to full agreement with regard to these fees and we kindly ask that the bank assist by having this aspect confirmed at its earliest convenience. The reason for this is that we would like to commence bringing merchant clients to the bank even before the IPSP agreement is in place as I am well aware that this could take some time to achieve. What we are proposing, and this was discussed briefly with Mr. Coye when we met on a different matter, is that Evergreen would bring in at least three to four merchants (which meet your criteria and approval) without delay, once we have agreed on the bank's fees and obtained confirmation from yourselves that our gateway, Network Merchants Inc (NMI) is integrated with Credomatic. We have already been advised by NMI that they are indeed integrated but your recent communication indicates that this has not been confirmed by Credomatic to the bank. We look forward to your cooperation in pursing this matter for us.*

*Assuming that we have agreement on the fees and the gateway, we will immediately bring in our first merchants, in good faith, while the IPSP agreement is being reviewed and put in place. It is understood that ourselves and the bank will do our due diligence etc together mainly to ensure that we are on the same page and to start testing our system and operations with a few merchants. The merchants to be brought in would naturally form part of Evergreen's merchant clientele and Evergreen would have the right to move these in*

*the event we cannot come to terms on the IPSP agreement. We are anticipating that these initial merchants, en toto, would have volumes in the $2.0M to $3.5M monthly turnover.*

*We reiterate and assure you that our aim is to seek merchants that will fit the bank's criteria and will work closely with our agents to accomplish this. We will also work closely with the bank in this regard.*

*I am copying Mr Coye, as I did discuss our plan briefly with him and trust that you will work with us to put a few merchants in place without further delay. As mentioned before, we are seeking to ensure that we get our systems in full operation and on a good footing early. Therefore, introducing a few merchants will not hurt and in fact, will allow us to build the business and operations in a prudent manner…."*

[17] The email thus clearly stated that Evergreen considered certain terms were of economic or other significance to them and if not finalized and agreed, were essential pre-conditions of entering into the draft agreement. These pre-conditions included that: (a) full agreement on fees due to Evergreen and the Bank be reached, and (b) that there be confirmation that Evergreen's gateway was integrated with the Bank's system.

[18] A Schedule of Fees was also attached to the unsigned IPSP Agreement which had been discussed and was the subject of negotiation over months with Evergreen.

[19] The email thus contained a final proposal of a plan of action moving forward – not necessarily an interim agreement or arrangement – which there is no dispute that if finalized and accepted would clearly have demonstrated that the parties intended to create, and of meeting the conditions of satisfying what the law generally would require as essential for the formation of legally binding relations.

[20] It is worth re-iterating that the draft agreement supplied by Evergreen to the Defendant, had been discussed and negotiated between Evergreen and the Bank for some months and stated, inter alia:-_

> *"**1.1 Solicitation** … Each merchant shall procure the Services pursuant to a merchant agreement between the merchant and the Bank (together with application material submitted by the merchant through the IPSP, the "**Merchant Agreement**"). …"*
>
> *"**1.7 Bank Standard and Rules**. The Services and the Bank are governed by the rules and regulations of the Bank, Visa (available here www.visa.com/rules), Mastercard (available here http://www.mastercard.com) and other payment card associations or brands as well as other industry or government regulations applicable to the Bank (collectively, the "**Rules**"). IPSP and Bank shall both shall comply with the Rules."*
>
> *"**1.10 Compliance.** Both parties hereto shall comply with all applicable laws and all applicable rules and regulations of Visa, MasterCard and other associations having jurisdiction over Transactions."*
>
> *" **2.2 Fees.** Merchants shall be liable for fees to the Bank under Merchant Agreement. Any amounts paid by merchants in excess of the fees set out in Schedule "A" ("Fees") shall be payable to the IPSP. IPSP shall also have the right to levy fees on Merchants related to the services provided by Bank under an agreement with IPSP and the merchant that is separate from the Merchant Agreement … IPSP shall have the right to establish the fees payable under Merchant Agreements by Merchants ("Merchant Fees")…."*

***6.1 Term.*** *The term of this agreement shall be for an initial term of five (5) years commencing on the date signed below (the "initial term"). Thereafter, this Agreement shall automatically renew for successive, additional one (1) year terms (each a "**Renewal Term**") unless otherwise terminated. The initial Term together with each Renewal Term shall be referred to herein as the "**Term**").*

*"6.2(a) Automatic Termination. This Agreement will automatically terminate if : (i) Visa or Mastercard prohibits the bank from providing the services set forth in this Agreement; (ii) bank ceases to be registered as an independent sales organization or member service provider with Visa or mastercard; (iii) Bank stops providing merchant services; or (iv) Bank is no longer a member of Mastercard or Visa."*

*"**6.4 Early Termination Fee.** In consideration of the investments that IPSP is making in soliciting Merchants for the benefit of the bank, Bank agrees to pay an early termination fee if this Agreement is terminated by the bank at any time prior to the end of the Initial term (other than for material and uncured default by IPSP). In such case, Bank shall pay a penalty to IPSP in an amount equal to thirty six (36) times the average monthly net revenue to IPSP under Merchant Agreements (being the difference between Merchant Fees collected and Fees paid), measured during the months starting after the first six months of the Term hereof, or the highest single month during the term, whichever is greater."*

*"**9.8 Attorney fees.** As a consequence of any action, suit or proceeding brought under this Agreement, the prevailing party shall be entitled to its costs, expenses, and if the law permits, its reasonable attorneys fees."*

[21] Thereafter it appears the parties did agree on the proposed plan of action, that the system could be tested and that the business relationship should nevertheless proceed while the IPSP Agreement was being reviewed and considered by the Bank; and before the formal written contract was executed in accordance with the parties' common understanding, that the contract would in due course be executed (which in fact never occurred).

[22] In the meantime, while the draft agreement was being reviewed, the systems (NMI and Credomatic) were in fact integrated and in fact confirmed by 12th June 2012, and the Bank's fees had been agreed (which was done by email dated 27th August 2012 or by the latest the 3rd September 2012). Evergreen and the Bank then proceeded with the plan of action which involved testing out the arrangement and implementing the terms of the draft agreement.

[23] The arrangement for the payment for Fees were in fact discussed in late August early September 2012 between the Bank and Evergreen after the first Customer transaction had been processed and had proved problematic to the Bank. An arrangement was then negotiated and settled between the parties, on about 3rd September 2012, for all future transactions based on an agreed formula and arrangement. Under this arrangement Evergreen would be paid as a result of each transaction the difference between what the Bank charged (a rate agreed in the draft Agreement) and what the merchant paid. The mechanism of the payment was further negotiated, refined and agreed by the parties.

[24] Evergreen proceeded over the period running from 15th May, 2012, to 8th January, 2014, to refer and the bank to accept four (4) e-commerce merchants; with the first Merchant being boarded on the 6th August 2012; the second Merchant being boarded on or about the 18th February 2013; the third Merchant being boarded on or about 16th April 2013; and the fourth Merchant being boarded on or about 8th January 2014.

[25] The referrals in fact took place in full knowledge that the draft agreement had not been signed but the parties otherwise working to the terms of this Agreement and seeking to sort out its kinks.

[26] Each of the e-commerce customers referred to the Bank by Evergreen also appointed Evergreen its attorney with authority to manage the merchant account established with the Bank for and on behalf of each customer.

[27] Evergreen in fact managed the accounts of each of the merchant customers referred to the Bank by it under and by virtue of these powers of attorney so that the Bank in fact dealt with Evergreen in relation to the operation of the accounts referred to it by Evergreen.

[28] Apart from the hiccup with the fees, which was resolved to the satisfaction of the parties, the parties then sought to, and did in fact, manage the relationship in accordance (or at least substantially) with the draft Agreement.

[29] The Bank processed the application of the e-commerce merchants referred to it by Evergreen in the usual way, just as it did all merchant customers, and executed the Bank‘s standard documentation, including Merchant Internet Services Agreements (MISAs), with each of the merchants introduced to it, to regulate the relationships between the Bank and each customer. The form of the MISAs’ used was the same as that used for all of the Bank’s merchant customers and were not in any way unique to the e-commerce customers referred to it by Evergreen.

[30] Evergreen in fact also executed MISAs’ on behalf of customers it referred to the Bank.

[31] The relationship between Evergreen and the Bank were in fact also regulated by very complex agreements between the Bank and respectively Visa and MasterCard.

[32] Enquiries in writing as to the approval of the agreement continued to be made by Evergreen up to 21st May, 2013 when Evergreen was clearly informed that the matter required investigation by the Bank.

[33] It appears that there was a change in Managing Directors of the Bank at about the 30th April 2013 and as of this time Mr. Coye ceased to be the Managing Director.

[34] Sometime in June 2013 the Defendant unilaterally increased the chargeback fees charged to Merchants generally, including the Merchants introduced by Evergreen, which was objected to by Evergreen in writing on 10th July 2013. In this email Evergreen stated that "*even though we do not have a signed agreement yet we have been following the agreement together for more than a year now*". Evergreen complained about the Bank seeking to arbitrarily raise the chargebacks rates along with a raise of it to the Bank's other customers and making a case for a special arrangement based on the unsigned agreement.

[35] By email dated 10th of July 2013 Robert Allen on behalf of Evergreen alluded to the parties having followed the unsigned agreement for a year and requesting the Bank to keep the chargeback rates rather than arbitrarily raising them. The Response from Alina Gonzalez was an acknowledgement of the unilateral chargeback fees and the raising of the possibility of changing the arrangement under which the parties had been operating as a result of the change of managing directors of the Bank.

[36] The Defendant expressed the view in an email dated 16th July 2013, that the unsigned Agreement be reviewed or they produce an alternative draft for Evergreen to review.

[37] As at the 15th September 2013 Christopher Coye, an Attorney who had been the Managing Director of the Bank and dealing with Evergreen on behalf of the Bank, wrote a letter to the Bank in which he stated as follows:

> *"As you are aware, Evergreen E-pay Solutions Limited has had a relationship with the bank since February 2012 when they expressed interest in becoming an Internet Payment Services Provider (IPSP) in partnership with the bank. During the subsequent months and after much discussions and negotiations an IPSP agreement was formulated and*

*submitted in may 2012 to the bank for signing. Notwithstanding that I had perused the document during the course of the following months, we never signed off on the document. I was hoping to get this signed prior to my vacating my position with the bank but unfortunately this was not achieved and at your request, I promised to comment accordingly.*

*Since commencing business with the bank and up to the time of my departure, I can verify that the bank sought to manage the relationship substantially in accordance with the IPSP agreement submitted, during which they developed and grew the business and relationship with the bank. Despite some early teething problems that mainly involved technical and logistical issues, the company seemed to settle in well in their relationship with the bank and became a non-negligible income earner.*

*I trust that the above will be helpful."*

[38] This email is a contemporaneous indication of the Bank's attitude and thinking by a person who had recently been its Managing Director, in relation to the unsigned IPSP Agreement between Evergreen and the Bank, and is an indication, which this court cannot allow its writer, Mr. Christopher Coye, and the bank generally to resile from by Mr. Christopher Coye's subsequent evidence to the court.

[39] Because of excessive chargebacks (unauthorised charges) received and processed by the Bank through Visa, which had been the subject of communication between Evergreen and the Bank, in the February, 2014, program cycle, Visa conducted a review of the Bank's merchant account processing activities in which the Defendant submitted a Statement to Visa.

[40] As a result of the Statement, Visa issued a report on the 19th February 2014 to the Defendant on chargebacks, included to Merchants of Evergreen. Visa in a report on the 26th February 2014 asked the Defendant to submit a

remedial plan to the chargebacks including to Merchants introduced by Evergreen.

[41] On or about the 26th day of February, 2014, Visa charged the Bank US $68,800.00 for program violations in relation to the chargebacks and fined the Bank US$30,000 for using three unregistered third party agents including one from Evergreen or required that the Bank terminate its relationship with any unregistered agents, including Evergreen. The letter from VISA dated February 26, 2014, informed the Bank as follows:

> "*Visa has reviewed your institution's performance in the Visa Risks Programs and is concerned about increasing cross-border fraud and chargeback levels generated by BBI merchants. Three BBI merchants have now been identified under Visa's Global Merchant Chargeback Monitoring Program (GMCMP) for the February 2014 program cycle. BBI has also been identified under the Visa's Acquirer-Level Global Chargeback Monitoring program with 2,480 cross-border chargebacks and a chargeback to sales ratio of 1.8% for the February 2014 report cycle. As a result of these program violations, BBI has a GMCMP fee liability of USD$68,800 (See Appendix A).*
>
> *Visa noted that the merchants generating the excessive chargeback activity are tied to your use of three US- based sales agents that were not properly registered with VISA (Payready a.k.a. Cardready, Evergreen Processing and Paragon Processing). The Visa International Operating regulations (VIOR) ID#: 111011-010100-0025892 requires members register all third party agents with Visa before service provision begins. Third party agents include Independent Sales Organizations (ISO) who solicit merchant acceptance on behalf of the bank. Members that fail to register their agents are eligible for a fine of $10,000.00 per agent which increases each month the agent remains unregistered. The*

*current fine liability associated with the use of the three unregistered agents is USD$30,000.00. …*

*<u>REQUIRED ACTIONS:</u>*

*As a result of the limited capital and excessive chargeback and fraud levels generated by BBI merchants, Visa is imposing the following Corporate Risk Reduction Requirements pursuant to its rights under the Visa International Operating regulations (VIOR):*

***1.*** *…*

***2.*** *…*

***3.*** *…*

***4.*** *…*

***5.*** *BBI must terminate all of its unregistered third party ISOs and PSPs by May 31, 2014. In addition BBI is prohibited from engaging any new third party ISOs through the remainder of the calendar year 2014. BBI may petition Visa in 2015 for the ability to re-engage ISOs. Until BBI satisfies the requirements listed in VIOR ID#: 150413-010711-0026431, it cannot engage any PSPs.*

**6.** *… "*

[42] It is clear that the Defendant had failed to register Evergreen with Visa as an ISO or an IPSP and the Bank had the option to take steps to register Evergreen with Visa.

[43] It is also readily apparent from the above letter from Visa that Visa had not prohibited the Bank from providing credit and debit card processing services for Merchants.

[44] Neither had Visa authorised the Bank to shut down its relationship with the merchants introduced by Evergreen; yet it appears that the Bank opted to do so, and has used this letter as a trigger, or excuse, for the termination of Evergreen. Also, and in any event, a shutdown or freeze of the merchants introduced by Evergreen was not necessary in relation to MasterCard, a separate company, in relation to which there was no similar problem.

[45] On February 28th, 2014, the Bank nevertheless froze all the accounts with it associated with Evergreen in line with the requirements of Visa because, the Defendant claimed, of the financial risk presented to the Bank and Visa by activities of merchants referred to the Bank by Evergreen.

[46] Nevertheless on or about March 25, 2014, the Bank gave notices of termination of the respective MISAs' with merchant customers referred by Evergreen and on or about April 16, 2014, the Bank gave 90 days' notice to Evergreen that it would be terminating all arrangements, including the unsigned IPSP Agreement with Evergreen in accordance with clause 6.2(a)(i) mentioned in this agreement (the automatic termination provision). This included all relationships (including the unsigned IPSP Agreement) with Evergreen and all the Merchants it referred to the Bank.

[47] Evergreen thereafter instituted the instant Claim for payment of the Early Termination Fee pursuant on the terms of the unsigned Agreement it had submitted to Evergreen for review and approval.

[48] The terms of the unsigned written Agreement were in fact never signed and was later terminated by the Bank because of problems which it had with a third party, Visa.

[49] It is now a matter for determination whether by conduct the parties approved the unsigned IPSP written Agreement (including the Bank by its Managing Director acknowledgement such approval and the parties having "*sought to manage the relationship substantially in accordance with the IPSP agreement submitted, during which they steadily developed and grew the business and relationship with the bank*") or entered into any other agreement and if so what are its terms.

**The Court Proceedings**

[50] Evergreen filed a Claim and Statement of Claim on the 13th November 2013 and pleaded its case solely on the basis of the unsigned written Agreement, including the termination clauses therein.

[51] In its Defence of 16th December 2014 the Bank pleaded that such a written agreement was proposed by Evergreen but that no such agreement was in

fact settled, agreed or executed. That the Bank's relationships with merchant customers is governed by standard form 'Merchant's Agreements' and that any such agreements with Evergreen were made independently of the Bank and that it was unaware of the terms of any such arrangement (apart from a power of attorney which was provided to it).

[52] The Bank denied that it had agreed to pay any liquidated damages to Evergreen. Further that it has never paid any revenue to Evergreen under any merchant agreement so that nothing is payable as liquidated damages in terms of any agreement.

[53] The Bank denied there was any agreement with Evergreen and that if there was, then any such agreement was automatically terminated in accordance with clause 6.2(a)(i) when Visa/MasterCard prohibited the Bank from providing the required services to the merchants referred to it by Evergreen, and that any fees, as liquidated damages, is and operates as a penalty and is unenforceable.

[54] In Evergreen's pleaded Reply it pleaded that the Bank had adopted the written unsigned Agreement by performance, conduct and assurance to Evergreen, and that the Bank is estopped, as a result, from denying the existence of an agreement in terms of the unsigned written Agreement, and, that Visa/MasterCard did not prohibit the Bank from providing the required services as alleged, and that any agreement was not terminated in accordance with clause 6.2(a)(i).

[55] Evergreen called Robert Allen (in relation to whose evidence a witness Statement dated 6th July 2015 was submitted) and the expert Adam Atlas (who submitted a so-called Expert Report to the court dated July 2, 2015). In relation to the latter's evidence I must confess that I did not rely on it in any way as the report and its writer had been soundly discredited in cross-examination; and in any event I found it quite unhelpful.

[56] The Defendant called Ms. Alina Gonzalez (in relation to whose evidence a witness Statement dated and filed on 13th July 2015 was submitted); and Mr. Christopher Coye (in relation to whose evidence a witness Statement,

also dated and filed on 13th July 2015, was submitted). Again I must say that in relation to the latter's evidence I must confess that I found it quite unpersuasive insofar as it attempted to reinterpret and resile from his letter of the 15th September 2013 and in this regard I considered he had been wholly discredited.

[57] To Evergreen's written request for information dated 24th June 2015, the Bank by a Response dated 10th July 2015, after Evergreen had in fact filed its witness statements, sought to recraft and recast its case by admitting, for the first time, contrary to its previous case, that there was indeed an agreement reached between Evergreen and the Bank subsequent to the submission of Evergreen of the unsigned IPSP Agreement; but not in terms of this or any other written agreement or arrangement alleged by Evergreen. But that there was instead an agreement based on an '*interim arrangement evidenced in a written email dated May 15, 2012…on terms that the Bank's fees were agreed and that [Evergreen's and the Bank's] software requirements were compatible*'.

[58] The Court had the benefit of a substantial 'Written Submissions of the Claimant'; 'Written Submissions of the Defendant', Claimant's Reply To Defendant's Submissions' (all of which I carefully read) as well as extensive oral arguments, for all of which this court extends its gratitude to both Counsel as it made what might have been a very difficult commercial area and dispute, readily digestible, and able to ruminate on and resolve fairly quickly.

**Though the written Agreement submitted by Evergreen is unsigned, did the parties by conduct, including by performance, reach agreement in terms of the draft IPSP Agreement?**

[59] The parties agree that the applicable law governing contract formation by conduct was succinctly and correctly explained in ***RTS Flexible Systems***

***Ltd v Molkerei Alois muller Gmbh & Co KG (UK Production)*[1]**, in the judgment of Lord Clarke in the following terms:

> *"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.*
>
> *The problems that have arisen in this case are not uncommon, and fall under two heads. Both heads arise out of the parties agreeing that the work should proceed before the formal written contract was executed in accordance with the parties' common understanding. The first concerns the effect of the parties' understanding (here reflected in cl 48 of the draft written contract) that the contract would "not become effective until each party has executed a counterpart and exchanged it with the other" –which never occurred. Is that fatal to a conclusion that the work done was covered by a contract? The second frequently arises in such circumstances and is this. Leaving aside the implications of the parties' failure to execute and exchange any agreement in written form, were the parties*

[1] [2010] UKSC 14.

*agreed upon all the terms which they objectively regarded or the law required as essential for the formation of legally binding relations? Here, in particular, this relates to the terms on which the work was being carried out. What, if any, price or remuneration was agreed and what were the rights and obligations of the contractor or supplier?*

*We agree with Mr Catchpole's submission that, in a case where a contract is being negotiated subject to a contract and work begins before the formal contract is executed, it cannot be said that there will always or even usually be a contract in the terms that were agreed subject to contract. That would be too simplistic and dogmatic approach. The court should not impose binding contracts on parties which they have not reached. All will depend on the circumstances. This can be seen from a contrast between the approach of Steyn LJ in the Percy Trentham case, which was relied upon by the judge, and that of Robert Goff J in British Steel Corporation v Cleveland Bridge and Engineering Company Limited [1984] 1 ALL ER 504, [1982]Com LR 54, 24 BLR 94, to which the judge was not referred but which was relied upon before the Court of Appeal.*

*These principles apply to all contracts, including both sales contracts and construction contracts, and are clearly stated in Pagnam SPA v Feed Products limited [1987] 2 Lloyd's Rep 601, both by Bingham J at first instance and by the Court of Appeal. In Pagnam it was held that, although certain terms of economic significance to the parties were not agreed, neither party intended agreement of those terms to be a precondition to a concluded agreement. The parties regarded them as relatively minor details which could be sorted out without difficulty once bargain was struck. The parties agreed to bind*

*themselves to agreed terms, leaving certain subsidiary and legally inessential terms to be decided later.*[2]*"*

[60] Evergreen relies on the pleaded terms of the draft written agreement in the Statement of Claim (Clause 13(b)) & (c).

[61] Evergreen submits that the parties generally adopted the draft unsigned Agreement including for the following reasons:

(a) The Defence as pleaded the Bank and its Response to the Request for Information are not consistent and do not present an intelligible defence or case when placed along side of each other, in relation to the question whether the parties were operating under any agreement and if so which agreement.

(b) The letter of 15th September of Christopher Coye to the Bank, admitting that the Bank sought to manage the relationship substantially in accordance with the IPSP agreement, is strong evidence in support of its case that the parties by their conduct was acting in accordance with this agreement.

(c) The Bank and Evergreen in fact acted upon and performed their business relationship for about two (2) years largely or wholly on the basis of the IPSP Agreement though unsigned by the parties.

(d) The only Agreement which the parties acted upon was the written but unsigned agreement as amended; and that the intervention of Visa International was caused by the failure of the Bank to register the Claimant with Visa, which failure Evergreen had nothing to do with, and therefore ought not to take or pay the consequence for such failure; and that but for the failure and Visa's actions the Bank would have continue to act under the written unsigned Agreement which they intended to and may well have signed, and were bound by in any event.

[2] At paragraph 45 of the judgment.

(e) The Bank collected and received the net revenue earned by Evergreen from the Merchants Evergreen referred to the Bank.

(f) All the credit/debit card transactions of the Merchants boarded by Evergreen were processed through the Gateway of the Bank, CREDOMATIC, as the Bank's IPSP. The Bank referred Evergreen to Credomatic as its IPSP.

(g) The Bank admitted to Visa that Evergreen was its IPSP but failed to register Evergreen as required by Visa International Operating Regulations. As a consequence, Visa fined the Bank US$10,000.00 for one month. The Bank paid the fine for the month of February/March, 2014.

(h) In a letter dated 26th February, 2014, the Bank informed Visa it opted to terminate the Merchants instead of the implementation of the corrective actions. As such, the Bank on 28th February, 2014 indeed opted to terminate the IPSP Agreement and the Merchants boarded by Evergreen before the end of the Initial Term (August, 2017).

(i) Visa did not prohibit the Bank from providing card processing services to the Merchants boarded by Evergreen.

[62] The Bank submits that it was not necessary to plead in its Defence the 'interim agreement' and that when it was required to do so it did.

[63] The Bank essentially pleads that if the Bank had indeed intended to be bound by the unsigned written Agreement or that it had in fact reached an agreement with Evergreen on its terms, it would have signed the Agreement as demonstration of such agreement.

[64] The Bank submits that the communications between the parties when reviewed carefully, do not lead objectively to a conclusion that the Bank by words or conduct had in fact or law agreed upon all the terms of unsigned written Agreement. But that rather that there was indeed an interim agreement reached, not on the terms of the unsigned Agreement but on the terms of the email dated 15th May 2012 which terms may objectively be regarded as essential for the formation of legally binding relations.

Determination of the Court

[65] The question relating to the IPSP Agreement being unsigned, and whether the parties nevertheless by conduct substantially performed and adopted it (including the terms relating to the liquidated clause), is not without some difficulty. This difficulty particularly arises as Evergreen chose to, as it were, 'pin its colours on the mast' only, of the written agreement (containing the liquidated damages clause) and not on an alternative possibility.

[66] A possible alternative which Evergreen could have, on the evidence have pleaded, in addition to its claim, was that there was an agreement, but other than the written draft agreement pleaded by it, which the parties may have entered into and by which they were bound, in line with the Bank's case in its response to the request for information. This alternative was not pleaded by the Bank in its Defence but rather in the most favourable view or interpretation to the Bank of its pleaded case in its Defence, pleaded a case that the Bank did not enter into the agreement alleged by the Evergreen. In short this Defendant's defence presented to the court a somewhat pregnant negative, which pregnancy was eventually resolved when the Bank rightly conceded, albeit very late (considerably after the pleadings had closed) and only as a result of, and some might say grudgingly, in a Response to Evergreen's written request for information.

[67] The eventual pleading of this agreement, as conceded, was in terms that there was indeed a binding agreement between Evergreen and the Bank, but not in terms of the written draft agreement, but that there was instead an agreement based on an 'interim arrangement evidenced in a written email dated May 15, 2012…on terms that the Bank's fees were agreed and that [Evergreen's and the Bank's] software requirements were compatible'.

[68] It is arguable that by this stage Evergreen could not have pleaded its case in the alternative, of an agreement existing between the parties, and that damages are due to it on the basis of wrongful termination and breach of agreement, which would have made determination of the issue easier.

[69] In my view, the Bank could and should have pleaded this case (of an interim agreement), in its Defence, which would have made the evidence before the court, and its case somewhat more intelligible to the court, and fit in with its defence.

[70] Be that as it may, the situation is as it is, for which the Bank has to take a large measure of the responsibility as the way in which it pleaded its case in the end was so confusing and problematic as to create difficulties for Evergreen and, in my view, to cast a spectre of unintelligibility over its entire defence when viewed as a whole.

[71] As a result of the way in which the Bank has conducted its defence it has made it easier for me to resolve the present issue in favour of Evergreen and to find that though the written Agreement submitted by Evergreen is unsigned, the parties by conduct (including by performance) indeed did reach agreement generally in terms of the IPSP Agreement which Evergreen had submitted to it in draft, and which the parties, objectively by words and conduct, eventually settled upon as the operating agreement between them.

[72] I must say that in reaching this conclusion, on balance, I also very much preferred the evidence of Mr. Allen where it conflicts with the evidence of Ms. Alina Gonzalez and Mr. Christopher Coye, although, to be fair to Ms. Gonzalez she very fairly and convincingly (in terms of Evergreen's case) made a number of admissions during her cross-examination. Also generally I also considered that the evidence of Mr. Allen better fit into the objective facts as supported by the contemporaneous evidence and found by me. I also generally find that his version of events to be more persuasive and convincing than the version of events as initially pleaded by the Bank and later presented to the court by the admission (about an 'interim agreement'); and by the witnesses for the Bank.

[73] The sum total of the above is that as a result I have no difficulty finding that Evergreen has thereby proved its case on the balance of probabilities.

[74] Having seen and heard the witnesses, I concluded that the evidence of Mr. Allen generally supported the view that the parties had indeed reached and acted on the terms of the written unsigned Contract on or about 8th February 2013 by which time all the logistical and other issues (including the pre-conditions) had been met and/or resolved, there was no longer any dispute about the terms of the unsigned written Agreement, and the 2nd of Evergreen's Merchants had been boarded, and generally based on a consideration of all that was communicated between them by words or conduct, this court was led to the conclusion, objectively, that they intended to create legal relations on its terms and had agreed upon all such terms, and that the terms, including the termination clauses, together objectively may be regarded, and the law requires, as essential for the formation of legally binding relations.

[75] Indeed although there is no burden on the Bank to generally prove its case, or indeed anything, I consider that in view of the views just expressed and my just made finding, the Bank's defence generally is neither credible nor intelligible and frankly quite unpersuasive and certainly does not cause me to want to waver from my determination and to reconsider the position in its favour.

[76] I have therefore determined, and so find, that I am quite satisfied that though the IPSP Agreement is unsigned, the parties, by conduct did indeed substantially perform and adopt the unsigned Agreement as a binding agreement between them, and that the terms of this agreement, including the penalty clauses, are binding on them.

[77] I will state for the record, based on the evidence and upon my determinations above, that I therefore find myself to be in agreement with Counsel for Evergreen where he states the following:

(a) The IPSP Agreement inclusive of the Schedule of Fees was the subject of negotiations and discussions between the parties over an extended period of time.

(b) Any conditions upon which agreement to the terms of the

unsigned agreement, were fully met by 18th February 2013, when the parties had, by acquiescence, finished negotiating, and had generally settled on the terms of the unsigned written Agreement; were acting substantially in accordance with its terms (based on the evidence of Christopher Coye, the Bank's Managing Director, to the Bank, as contained in the letter of 15th September 2013); and, as a result of the conduct of the Bank in boarding the 2nd of Evergreen's merchants; did and would in fact, objectively have led Evergreen to believe that it had adopted the unsigned Agreement. The Bank as a result, in my view are thereby estopped by their conduct from so denying it. It would in addition, in my view, be inequitable for this court to find otherwise.

(c) The unsigned Agreement was negotiated to take into account and to include any mandatory requirement of Visa International Operating Regulations.

(d) Evergreen and the Bank acted upon and performed their business relationship for about two years on the basis of the unsigned Agreement.

**If the unsigned draft IPSP Agreement is a binding, though unexecuted, agreement made between the parties, did the Bank exercise the option of Automatic Termination of the Agreement?**

[78] The Bank relies on the evidence of Ms. Gonzalez.

[79] The Bank relies on:

(a) The letter dated 26th February 2014 from Visa to the Bank.

(b) The provision in the 6.2(a) (i) draft Agreement itself.

[80] The Bank submits that if the agreement existed in terms of the draft then it was automatically terminated in terms of clause 6.2(a)(i) of the unsigned Agreement on the requirement by Visa that the bank terminates all of its unregistered third party ISO's and PSPs by May 31 20014 and prohibits the

bank from engaging any new third part ISO's thought the remaining calendar year. And there after only on certain defined conditions.

Determination

[81] It is clear from the findings of fact which this court has made, that it was the Defendant's failure to register Evergreen with Visa (as an ISO or an IPSP) that resulted in Visa requiring the Bank to terminate its unregistered ISO and not any prohibition on the Bank to provide any merchants which Evergreen's had referred to the Bank. It is also clear from such findings that that Visa had not prohibited the Bank from providing credit and debit card processing services for Merchants, but that the Bank opted, and were not required, to shut down its relationship with the merchants introduced by Evergreen, etc. That the Bank opted not to take steps to register Evergreen with Visa.

[82] As a result that this court is not persuaded, and does not accept, that the Bank's agreement with Evergreen was automatically terminated in terms of clause 6.2(a) (i).

[83] It is also clear from my findings of fact that this court does not find in favour of the Bank in relation to this issue, whether on the main issue or the alternative.

**Did Visa prohibit the Defendant from providing the required services to the Merchants referred to it by the Claimant? If so, is it one of the agreed grounds of the termination of the Agreement?**

[84] As a result of all that has been said by this court so far, the answer to this question is simple and flows from previous determinations made.

[85] The case as pleaded in paragraph 10 of the Defence is contradicted by the evidence of Alina Gonzalez under cross-examination where she denied that neither Visa nor Mastercard prohibited the Bank from providing credit and debit card processing services for Merchants. This evidence I accept and consider to be determinative of the issue.

[86] Further, a careful reading of the letter dated 16th April 2014, the Bank denies that Visa had the Bank shut down the Merchants. Visa had in fact given the Bank an option of registering the Merchants or shutting them down and the Bank opted to shut them down. There was no clear prohibition given by Visa but an option of which the Bank chose to take one course which was to shut down Evergreen and the merchants it had referred to the Bank.

**If the draft IPSP Agreement is a binding though un-executed Agreement made between the parties, and if it did not automatically terminate, whether the Early Termination Fee claimed in Clause 6.4 of the Agreement a penalty?**

[87] This Court expressed the view that, as a matter of principle, it is disingenuous for Counsel for the Bank to submit one and at the same time, that if any fee is due to Evergreen that it is nil, and at the same time, that it is a penalty. This court had difficulty accepting the cogency of any submission that would accept that a nil amount can be a penalty. This court, therefore, does not consider that it lies in the mouth of Counsel to assert that nothing is due and at the same time the clause functions as a penalty clause.

[88] Further this court considers that the early termination fee provision, provides for 36 times the net revenue. This is less than the possible five (5) years of the fixed term which potentially could have been claimed for as damages. Thus the fee cannot, as a matter of principle, be said to be a penalty.

[89] I have carefully considered the argument that Net revenue is not the same as income; that three years income is excessive as it provides for the payment of income as distinct from profits; that three years is excessive as the law would provide for a reasonable period for an alternative services provider to be found; that three (3) month is a reasonable period of time and that is why the Bank gave a period of three months' notice; and, that a genuine pre-estimate of loss would have been three months loss as against three years of income.

[90] Counsel for Evergreen is submitting that even though the clause is expressed as a penalty, based on authority submitted and submissions

contained and presented orally, that penalties only apply to breaches but that this early termination fee is not a payment for breach of contract but in the nature of the parties having agreed to fix an amount, by way of a fee which would be paid to compensate Evergreen for the investment which it has made and in lieu of early termination by the Bank, an is a payment other than for a breach; that there is nothing to provide for termination within the initial term and so any termination other than for cause does not amount to a payment for breach, so that the clause is not a penalty as payment in breach.

[91] After careful consideration, I have preferred the argument of Counsel for the Claimant in the absence of any persuasive argument, or legal authority, presented by Counsel for the Bank.

**Whether the Bank has proved any and if so what loss and damages as a result of the early termination fee provision in the draft Agreement?**

[92] The Bank relies on same clause 2.2 of the Agreement.

[93] I accept the submissions of Counsel for Evergreen that Alina Gonzalez confirmed in her evidence that there was revenues paid to Evergreen under the unsinged Agreement and therefore that liquidated damages is payable in accordance with this Agreement.

[94] In the absence of any assistance provided by Counsel for the Bank and any alternative reasonable basis which this court can use to calculate the basis of assessing the early termination fee, I accept the calculation of Early Termination Fee which is set out in Tab H of the Claimant's Reply to Defence Submissions filed on the 1st December 2015. I also accept the arguments which Counsel for Evergreen submitted as to why this does not present a windfall to Evergreen and is otherwise reasonable to use as a basis of assessing the early termination fee due Evergreen for the early termination of the Agreement which it had with the Bank.

**Costs**

[95] Because Evergreen has wholly succeeded it is entitled to its cost on the basis prescribed by the rules.

**[Disposition**

[96] This court will therefore grant judgment to the Claimant for liquidated damages for early termination of a written though unsigned Internet Payment Services Provider (IPSP) Agreement in the total sum of US$3,309,373.44 plus interest at the rate of 8% from the date of filing of the Claim until Judgment together with costs to be agreed or on the prescribed basis under the rules.

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**The Hon. Mr. Justice Courtney A. Abel**

**21st December 2015**