[2026] JMCC Comm 7

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO.SU2022CD00212

BETWEEN **CHAGOD TOURS JAMAICA LIMITED** **CLAIMANT**
(Formerly Shago Tours Jamaica Ltd)

AND **NATIONAL COMMERCIAL BANK JAMAICA LIMITED** **DEFENDANT**

Mrs Georgia Gibson Henlin KC and Ms Tamiko Smith instructed by Smith, Afflick, Robinson & Partners for the claimant

Mrs Sandra Minott-Phillips KC and Mr Jamaiq Charles instructed by Myers Fletcher and Gordon for the defendant

Heard: November 4, 2024, and April 17, 2026

Civil Procedure - Whether to strike out the claimant's statement of case as an abuse of process of the court - Distinction between test for interim injunction and test for summary judgment - Whether a statement of case is an abuse of process given judicial determination that there is no serious issue to be tried - Whether to grant summary judgment in favour of the defendant - Banker / Customer relationship - The contract / tort overlap in commercial contracts - CPR 26. 1(3) (c) and CPR 15

CORAM: JARRETT, J

Introduction

[1] The application currently before the court concerns the question whether the claimant's statement of case, which alleges , among other things, breach of contract and breach of duty and /or negligence, is an abuse of the court's process and ought to be struck out , given an earlier Court of Appeal decision (on an application for interim injunction), that there are no serious issues to be tried on the question of a breach of contract. In the alternative, the defendant seeks summary judgment.

[2] The claimant, Chagod Tours Jamaica Limited ('Chagod') is a company operating in Jamaica since February 11, 2021. It offers tour services, has an affiliate company in Guyana and independent sales contractors in the Dominican Republic, Guyana, Nicaragua, Surinam, Haiti and Cuba. The defendant, National Commercial Bank Jamaica Limited ('NCB') is a bank licenced in Jamaica, under the Banking Services Act 2014, to transact banking business. NCB and Chagod, had a banker – customer relationship since around April 2021. NCB ended that relationship effective October 31, 2022. Chagod and NCB also had a merchant and merchant acquirer relationship which was governed by a contract called the Universal Terms & Conditions Merchant Agreement.

[3] In May 2022, NCB froze all three of Chagod's accounts after an increase in chargeback applications. NCB contends that it felt itself insecure in relation to Chagod's business and therefore in keeping with the terms of the Universal Terms & Conditions Merchant Agreement, it was entitled to freeze the accounts. An urgent interlocutory application by Chagod, made prior to the filing of pleadings, resulted in the release of most of these funds, by way of an order of Batts J on June 23, 2022. NCB appealed that decision. In the interregnum, Chagod filed a claim against NCB, alleging breach of contract, breach of statutory duty, damages for breach of duty of care and/or negligence, damages for wrongful payment of chargeback amounts, and damages for wrongfully freezing its accounts.

[4] Batts J's decision was reversed on appeal, with the Court of Appeal in **National Commercial Bank Jamaica Limited v Chagod Tour Jamaica Limited [2024] JMCA Civ 29,** determining on June 28, 2024, that there was no serious issue to be tried on the question of breach of contract, as NCB was entitled to freeze the funds in Chagod's accounts, by virtue of the Universal Terms & Conditions Merchant Agreement. Prior to the decision of the Court of Appeal, Chagod amended its pleadings on November 3, 2022.

[5] I will summarise the pleadings, set out the orders sought in the application as well as the grounds relied on, outline NCB's affidavit in support of the application and Chagod's response to it, before analysing and discussing the relevant law and its application to the facts. Chagod filed no reply to the defence but filed a reply to amended defence on January 3, 2023. It sought by application, an extension of time to do so, and for that document to stand as properly filed. On January 27, 2023, Barnaby J, in **Chagod Tour Jamaica Limited v National Commercial Bank Jamaica Limited [2022] JMCC Comm 04,** refused the application.

The claim

[6] In its amended particulars of claim, Chagod says that the three bank accounts it had with NCB were a Jamaican Dollar savings account, a United States Dollar savings account and a Jamaican Dollar chequing account. The merchant and merchant acquirer relationship was governed by the Universal Terms & Conditions Merchant Agreement and by the Visa card rules. This relationship facilitated its access to the Visa network. Chagod complains, that the Visa rules, standards and/or regulations were never disclosed to it by NCB.

[7] In February 2022, Chagod received an increased number of requests from NCB to respond to chargeback applications. It responded to each of those requests. Those that were unwarranted, it sent a rebuttal letter along with documentation including a pre-authorization form signed by the credit card holder. Those chargeback applications which were warranted, it offered a refund to the customer and a credit note valid for one year.

[8] Although it responded to NCB's requests, NCB without reasonable justification, wrongfully repaid the credit card holders in relation to every chargeback application, deducted the refunded amount from its bank accounts, with penalties, and failed to explain its actions. In May 2022, Chagod learnt that its three accounts with NCB were frozen or had holds placed on them. It sought information from NCB about this, but there was no response. As a result of NCB's actions, its operations were halted, it could not pay its staff or suppliers or meet certain other obligations and faced legal , financial and reputational risks. By its actions, says Chagod, NCB breached the Universal Terms and Conditions Merchant Agreement.

[9] In its particulars of breach of contract, Chagod alleges that NCB : a) failed, in breach of clause 7.9 of the Universal Terms and Conditions Merchant Agreement, to conduct a proper investigation to determine whether the chargeback applications were legitimate; b) failed to take into account the information Chagod had provided which supports the position that the transactions were legitimate; c) concluded without a valid or legitimate reason that Chagod was in breach of contract sufficient to entitle it to freeze the three accounts; d) did not have sufficient reason to conclude that Chagod was non-compliant with the provisions of the Universal Terms and Conditions Merchant Agreement in relation to *card not present transactions*; e) failed to give Chagod 3 business days to respond to the requests as provided by clause 7.30; and f) failed to allow Chagod to resolve the disputes in accordance with clause 7.50.

[10] Before the occurrence of the events leading to the freezing of the three accounts, NCB did not provide any guidance, instructions, documents or training with respect to the Fygaro system (a software used under the Universal Terms and Conditions Merchant Agreement), despite several requests made by Chagod for NCB to do so.

[11] It is alleged that NCB is in breach of its duty of care, by : a) failing to take reasonable care or skill in processing the chargeback applications; b) failing to take reasonable care or skill in investigating the chargeback applications in light of the information provided by Chagod; c) failing to make adequate enquiries and acting on illegitimate chargeback applications; d) repaying to credit card

customers monies legitimately received by Chagod for services rendered and making such payments when NCB had reasonable grounds for believing that the chargeback applications were illegitimate, and part of a fraudulent scheme and ; e) failing to make reasonable enquiries of the credit card issuing banks concerning Chagod's assertion that it had been the victim of fraud.

[12] By letter dated September 29, 2022, NCB wrote terminating the banking relationship with Chagod effective October 31, 2022. According to Chagod, it subsequently learnt that NCB had suspended its access to the Fygaro system and this resulted in lost sales and the loss of income arising from customer cancellations.

[13] Chagod also pleads that NCB acted in bad faith and caused loss of facility to do business in its handling of the chargeback applications, its suspension of the Fygaro system and its termination of the banking and merchant relationship. The particulars of bad faith are: a) alleging initially that the freezing of the accounts related to the chargebacks; b) subsequently alleging that the accounts were frozen and a report made in accordance with NCB's duties under the Proceeds of Crime Act (POCA); c) later allegedly freezing the accounts on the basis that NCB felt itself insecure pursuant to clause 8.3 of the Universal Terms and Conditions Merchant Agreement; d) failing to acknowledge its duty to provide Chagod with technical guidance in risk and fraud prevention in accordance with the obligations under the Visa Rules and the Universal Terms and Conditions Merchant Agreement ; e) failing to take into account the fact that the alleged fraud took place on the Fygaro platform which NCB recommended; f) failing to advise of the existence of, or act in accordance with the Visa payment system or the facilities it offers for the training of merchants and their staff; g) giving inadequate notice of the termination of the banking relationship when it knew that Chagod was unable to establish alternative banking services during that period and, h) failing to acknowledge or accept information provided by Chagod in relation to those chargeback applications that appeared illegitimate or fraudulent.

[14] There is also the allegation that clause 8.3 of the Universal Terms and Conditions Merchant Agreement, which gives NCB the right to terminate the

banking and merchant relationship is arbitrary and unreasonable and in breach of section 43 of the Consumer Protection Act.

[15] In addition to damages for breach of contract, and breach of duty and/or negligence, the claimant seeks a raft of remedies against NCB. These include: damages for wrongful chargeback payments; interest and penalties which were applied to its accounts; damages for loss of facility to do business; operational disruption and loss of income; damages for loss of potential earnings; damages for wrongfully freezing its account; specific performance; a declaration that NCB failed to provide adequate training or guidance in relation to "card not present" transactions and/or the Fygaro system; a declaration that NCB acted in bad faith when it terminated the banker-customer relationship without reasonable notice; a declaration that NCB wrongfully made chargeback payments to customers in the amount of USD$108,578.20; and a declaration that NCB is in breach of The Banking Services Act (the Banking Services (Deposit Taking Institutions) (Customer Related Matters) Code of Conduct, 2016.

The defence

[16] In its amended defence filed on December 2, 2022, NCB, admits to having entered the Universal Terms and Conditions Merchant Agreement and that it had a banker-client relationship with Chagod. It denies that Chagod did not have disclosure of the relevant rules and standards and says it issued operating guidelines to Chagod and provided the relevant training. It is admitted that in February 2022, Chagod received an increased number of requests to respond to chargeback applications but denies that the chargeback applications it granted were unwarranted. NCB also denies that Chagod provided responses to all the chargeback applications. There were instances where the response from Chagod was not compelling, and where documentation provided by Chagod was rejected by the issuer banks. The reasons for the rejections were that the documentation was non-compelling, the transactions were not authorised by the card holder, and the card holder had not received any credit from Chagod. These rejections led the issuer banks to apply the chargeback process to NCB, and NCB in turn, passed it on to Chagod.

[17] The increasing number of these chargeback applications rendered the transactions suspicious, leading to NCB deeming itself insecure in relation to Chagod's business. An excessive number of Chagod's cross border transactions were the subject of allegations of fraud by the cardholder whose money was being paid into Chagod's account held at NCB. The disputed transactions were mainly challenged because of a) non-authorisation by the cardholder; b) fraud/card absent transactions; c) services not received and d) duplicate processing. A restriction was placed on Chagod's access to its United States Currency account on May 3, 2022, and its point-of-sale terminal was deactivated. All these actions were done by NCB in accordance with the terms of the Universal Terms and Conditions Merchant Agreement and particularly, clause 8.5.

[18] NCB denies that it wrongfully repaid all chargeback applications, that it did so without any reasonable or lawful justification or that it made unlawful deductions from Chagod's account. It says all these allegations are untrue. It says further that the validity of the chargeback applications is not determined by Chagod. Every chargeback application it granted, and which resulted in a deduction from Chagod's bank account was done lawfully and in accordance with the Universal Terms and Conditions Merchant Agreement.

[19] According to NCB it held a telephone conference with Chagod on May 6, 2022, to highlight its concerns, and at all times it kept the lines of communication with Chagod open. Several emails were sent to Chagod regarding the chargeback applications, including one on May 6, 2022 with a list of 109 of such applications. Of seven emails itemised in its defence, NCB says only one was answered by Chagod.

[20] Among the reasons NCB says it deemed itself insecure in respect of Chagod's business include the fact that: a) Chagod's fraud-to-sales ratio had attracted not only NCB's attention but also that of international card organizations and other bodies such as issuer banks involved in the processing of Chagod's transactions; and b) the level of risk to NCB occasioned by the flow of disputed transactions conducted through Chagod's accounts had become unacceptably high by the end of April 2022. By letter dated May 9, 2022, Visa International

Card Organization wrote to NCB and identified Chagod's account as having excessive levels of fraud and advising NCB to investigate the account. NCB also listed the following among the red flags which gave it reasonable grounds for believing that Chagod had engaged in transactions which could constitute or relate to money laundering: -

"i. Its unusually high fraud -to-sales ratio in circumstances where the fraud is not attributed to cardholders and as such raises questions of the claimant's involvement;

ii. Its change of name 3 times in little more than 1 year and failing to notify the defendant of any of those changes of name;

iii. It continuing to operate under a name it no longer has;

iv. Having its POS merchant services used to surreptitiously secure tickets for persons travelling from Cuba to the United States of America (resulting in it having to retain lawyers in the United States to address same);

v. Charging a cardholder's card with US dollars purportedly representing the price of airline tickets for several persons purchased by someone other than the cardholder;

vi. Its request for encashment of cheques by the defendant in excess of Jamaica's statutory threshold for dealings in cash;

vii. Presenting invoices for inter-Caribbean (for airfares) that bear the name of no legal entity;

viii. Presenting the court with a list of employees it alleges it must pay in Jamaica where the majority of the listed persons are employed outside of Jamaica; and,

ix. Its assertion, in spite of the cross border nature of its business of having no bank accounts other than those it maintains in Jamaica with NCB."

[21] NCB denies that it breached any duty owed to Chagod and says nothing it did or did not do amounts to a breach of its duty of care to Chagod. It says that the closing of Chagod's account was a step it deemed necessary. It is also denied that it acted in bad faith and denies that the Universal Terms and Conditions Merchant Agreement is in breach of the Consumer Protection Act.

NCB's application

[22] NCB's application was filed on August 7, 2024. In it, reliance is placed generally on the CPR, and particularly CPR 1,11 15 and 26. The following orders are sought: -

> "1. The Claimant's Statements of Case are struck out and Judgment after striking out is entered on the Claimant's claim in favour of the Defendant for costs to be taxed.
>
> 2. Alternatively, Summary Judgment is entered on the Claimant's claim in favour of the Defendant for costs to be taxed.
>
> 3. Costs of this application are awarded to the Defendant".

[23] The grounds for the application are stated thus:

> "1. Given that the Court of Appeal (in its decision delivered on 28 June 2024 with citation [2024] JMCA Civ 29) allowed NCB's appeal against the injunction granted by this Honourable Court and affirmed that there are no serious issues to be tried, the Claimant's Statements of Case constitute an abuse of process of the court as courts of law do not concern themselves with trifling issues.
>
> 2. For the same reason, the Claimant has no real prospect of succeeding on its claim as the material before the court shows NCB acted at all times within the scope of the bargain made by the parties.
>
> 3. The granting of the orders would be in keeping with the overriding objective of dealing with cases justly".

[24] The affidavit in support of the application is that of Danielle Chai filed on August 7, 2024. In it, she relies on the judgment of the Court of Appeal and its finding that the trial judge was: "wrong to find that there is a serious issue to be tried on the issue of breach of contract and in failing to give proper recognition to NCB's contractual right to freeze Chagod's accounts." She also places reliance on the pleadings and evidence before the court.

Chagod's response

[25] Chagod, in response to NCB's application, filed an affidavit of Guillermo Miguel Torres Ochoa (Mr Ochoa), the Managing Director of Chagod, on October 30, 2024. In this affidavit, Mr Ochoa refers to the banker- customer relationship and the merchant - merchant acquirer relationship between NCB and Chagod and says that the latter is governed by the card organization rules and the Universal Terms and Conditions Merchant Agreement. He exhibits a copy of this agreement to his affidavit. According to Mr Ochoa, the freezing of Chagod's account was done without notice and that the present proceedings were begun in response to NCB's freezing of Chagod's accounts "in the context of the Merchant and Merchant Acquirer relationship".

[26] Reference is made by Mr Ochoa to unsuccessful attempts to resolve the matter before the filing of Chagod's claim, the application for urgent injunctive relief before Batts J, the orders made by the court on that application and the proceedings before the Court of Appeal. He says Batts J had ordered that NCB release the sums in Chagod's accounts which are over USD$600,000.00 until trial. On July 29, 2022, NCB's request for an extension of the 14-day stay of execution granted by Batts J, was refused by the Court of Appeal, and by letter dated September 29, 2022, NCB advised Chagod that it would be releasing all its funds and terminating the banking relationship. He says the claim includes several causes of action including breach of duty/negligence and also seeks declaratory relief.

[27] At paragraph 11 of his affidavit, Mr Ochoa says that the Court of Appeal decision in **National Commercial Bank Jamaica Limited v Chagod Tour Jamaica Limited [2024] JMCA Civ 29: "**does not dispose of the claims in this

matter including the claim for breach of contract." His attorneys-at- law have advised him, and he believes, that the test for summary judgment and that for an interim injunction are not the same.

Analysis and discussion

[28] The primary remedy being sought by NCB is for Chagod's statement of case to be struck out as an abuse of the process of the court. The distinction is often broadly drawn between an application to strike out pleadings under CPR 26 and an application for summary judgment under CPR 15, in that, in the former, the court is limited to the pleadings, while in the latter, the court is entitled to look both at the pleadings and at the evidence before it. However, where an application is made under CPR 26.3 (1)(b), to strike out pleadings as an abuse of the process of the court, the court is not confined to the pleadings (as it is under a CPR 26.3(1) (c) application to strike out on the basis that there are no reasonable grounds to bring or defend the claim), but may also consider evidence placed before it. (See for example **Hunter v Chief Constable of the West Midlands Police and Others [1982] AC 529)**.

[29] In **Hunter**, Lord Diplock at page 536A described the court's power to strike out pleadings as an abuse of process this way:

> "[T]he inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are very varied…It would, in my view be unwise of this House were it to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the words discretion) to exercise this salutary power."

[30] As an alternative to striking out the claim as an abuse of process, the defendant seeks summary judgment under CPR 15. It is of course settled, that the

threshold test on such an application, is whether, there is a real prospect of succeeding or defending the claim. In **Easyair Ltd. (t/a Openair) v Opal Telecom Ltd [2009] EWHC 339 (Ch),** Lewison J summarised at paragraph 15, what is the correct approach on such an application, made by a defendant. I gratefully adopt this helpful summary, recognising while doing so, the care, the court must always take, in granting summary judgment: -

> " i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: ***Swain v Hillman*** **[2001] 2 All ER 91;**
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ***ED & F Man Liquid Products v Patel*** **[2003] EWCA Civ 472 at [8]**
>
> iii) In reaching its conclusion the court must not conduct a "mini trial": ***Swain v Hillman***
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ***ED & F Man Liquid Products v Patel*** **at [10]**
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: ***Royal Brompton Hospital NHS Trust v Hammond (No 5)*** **[2001] EWCA Civ 550;**
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where

reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: ***Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd*** **[2007] FSR 63;**

vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ***ICI Chemicals & Polymers Ltd v TTE Training Ltd*** **[2007] EWCA Civ 725."**

[31] Our Court of Appeal, in **Delroy Howell v Royal Bank of Canada et al [2021] JMCA Civ 19,** in considering the parties' respective obligations on an application for summary judgment said this at paragraph 114:

> "[114] It appears to be well settled now that the burden of proof on an application for summary judgment rests on the applicant to prove that the respondent's case has no real prospect of success. However,

> once the applicant asserts their belief on credible grounds, a respondent seeking to resist an application for summary judgment is required to show that he has a case that is better than merely arguable (**ED&F Man Liquid Products Ltd v Patel and another [2003] EWCA Civ 472)**. The defendant must then show that he has a real prospect of success (Swain v Hillman). It is also well settled that "real" means just that, "real" and not "fanciful", but not real and substantial, nor does it mean that the application will only be granted if the claim or defence is bound to be dismissed at trial. The threshold standard of "an arguable case" will definitely be considered too lax or too low (see A Practical Approach to Civil Procedure, 14th Edition, paragraphs 21.17 21.18)."

[32] Mrs Sandra Minott-Phillips KC, counsel for NCB, in her submissions on the application argues that Chagod is seeking relief for breach of contract and/or negligence, in a claim which the Court of Appeal has found is without a triable issue. She argues that the Court of Appeal found that NCB was entitled to freeze Chagod's account and this was the very action alleged by Chagod to be in breach of contract. According to her, the threshold tests for both summary judgment and striking out the claim, have been met.

[33] It is evident that the dispute between NCB and Chagod had its provenance in the chargeback applications. Chargebacks are defined in clause 1.2 (p) of the Universal Terms and Conditions Merchant Agreement as: "a reversal by [NCB] against [Chagod] in whole or in part of the dollar value (financial obligation) represented by a given Transaction whereby liability for such Transaction reverts to [Chagod]." Clause 7.8, gives NCB the contractual right to chargeback once a clause 7.9 event occurs: -

> "7.8 [Chagod] agrees that [NCB] shall be entitled to Chargeback to [Chagod] the dollar amount of any Transaction in the event of the occurrence of any of the events specified in clause 7.9

[34] There are two clause 7.9 events, which are materially relevant to the facts in this case. The first one is clauses 7.9(d):-

> "7.9(d) Where the cardholder disputes sale of goods/or services, execution of the Transaction Slip or in the case of a Telebanking transaction , the whole or any part of any instructions to [NCB] to make any payment to [Chagod] and [NCB] has, if it deems necessary , investigated such dispute and concluded that the claim is legitimate;"

[35] The second, is clause 7.9 (h) : -

> "7.9(h) In the case of a Card-not-present transaction, for any reason deemed sufficient by [NCB], including failure to comply with the terms specified in the Card-not-present Transactions section herein;"

[36] Clause 7.25 is also materially relevant. It states that:

> "[Chagod] agrees to repay to NCB on demand the amount of any Chargebacks. Without prejudice to the foregoing, NCB shall be entitled to debit [Chagod's] account or bill [Chagod] for such Chargebacks."

[37] By virtue of clause 8.3, NCB was entitled to immediately terminate the Universal Terms and Conditions Merchant Agreement, if: -

> **"**[Chagod] becomes insolvent or bankrupt, becomes involved in any prohibited activity set out in clause 10 or [NCB] deems itself to be insecure with respect to [Chagod's] business".

Clause 7.74 is an entire agreement clause by which Chagod and NCB agreed that the Universal Terms and Conditions Merchant Agreement is the complete and only agreement between them. It reads: -

> "The terms of this Agreement form the whole agreement between NCB and Chagod and shall not be removed, or varied in any way , other than as provided for in the Agreement. No other express terms, written or oral shall be incorporated into the Agreement."

[38] Following on clause 8.3, clause 8.5 makes provision for the freezing of Chagod's accounts: -

> "8.5 Upon the occurrence of any circumstance which would enable [NCB] pursuant to the terms of this Agreement to terminate this Agreement, NCB shall be entitled, in lieu thereof, to suspend this Agreement, list Chagod on terminated merchant files, freeze Chagod's accounts with NCB and take such other steps as it deems necessary."

[39] The Court of Appeal[1], in construing clause 8.3 held that the clause is reflective of the bargain made by Chagod and NCB and does not lead to an objective assessment of whether NCB had sufficient basis to deem itself insecure in relation to Chagod's business. Brooks P (with whom the other justices of appeal agreed), in determining that Batts J was wrong to find that there was a serious issue to be tried in relation to Chagod's claim for breach of contract, expressed the court's interpretation of the clause this way at paragraph 38 of the judgment:-

> "[38] Regrettably, it must be said that, in exercising his discretion about the breach of the Merchant Agreement, the learned judge was wrong to find that there was a serious issue to be tried on the issue of breach of contract. A fair reading of clause 8.3 of the Merchant Agreement does not allow for the importation of the concept of objectivity to NCB's position, when it asserts that it "deems itself insecure". The learned judge's lament at para. [5] of his judgment that "[i]t does seem unfair, whether that unfairness is the one required at common law or by the Constitution, for no explanation to be provided to [Chagod for NCB's action]" is entirely understandable but was not open to him to act upon. That was the bargain that the parties made, and Chagod was obliged to accept NCB's reliance on the Merchant Agreement**."**

[1] **National Commercial Bank v Chagod Tours Jamaica Ltd [2024] JMCA Civ 29**

[40] While distinguishing the facts of the present case from those in **David Stewart (t/a Speed and Truck World) v National Commercial Bank Jamaica Limited [2024] JMCC** Comm 25, in which an identical Universal Terms and Conditions Merchant Agreement was in issue (save for differences in the numbering of paragraphs) Brooks P went on to say at paragraph 45, in respect of clause 8.5 that:

> "Notwithstanding the distinction on the facts, NCB was authorised by clause 8.5 of the Merchant Agreement to freeze the account, despite the difficulties with the reasons it proffered."

[41] The Universal Terms and Conditions Merchant Agreement is a commercial contract by which the allocation of risks was agreed upon by Chagod and NCB. By this contract, Chagod and NCB agreed on whom risks relating to their merchant/merchant acquirer relationship would lie. The Court of Appeal's decision establishes that by clause 8.3, Chagod took the risk of its accounts being frozen if NCB deemed itself insecure in relation to Chagod's business. Likewise, on a true construction of clauses 7.8, 7.9(d) and 7.9(h), respectively, Chagod also took the risk of liability for disputed chargeback applications, once NCB determined that such applications were legitimate; or for any reason that it deemed sufficient, in relation to no card transactions. Clause 7.8 gave NCB the contractual right to reverse disputed transactions, with liability reverting to Chagod, once there is a clause 7.9 chargeback event. It seems to me that like clause 8.3, clause 7.9(d) does not require NCB to apply an objective standard, when determining the legitimacy of disputed chargeback applications. Indeed, based on that clause, NCB was entitled not to investigate at all, if it considered an investigation to be unnecessary. This was the bargain it had with Chagod. NCB is therefore right to say as it does in its amended defence, that whether the chargeback applications were legitimate fell to them to decide and not Chagod.

[42] As to clause 7.50, which allows disputes between Chagod and a cardholder, respecting the sale of goods and/or the provision of services rendered , to be resolved between them, it seems very plain to me, that this clause can have no

applicability to chargeback events, on a true construction of clauses 7.8 and 7.9.

[43] There were over 100 disputed chargeback applications that NCB received in relation to Chagod. In its affidavit filed on June 15, 2022, by Barbara Graciela Ochoa Salazar, its Chief Accounting Officer, Chagod exhibits an excel sheet which it received by email correspondence from NCB, with 109 chargebacks. In its Amended Defence, NCB says that it conducted investigations into these chargeback applications and that there were instances where the issuer banks rejected Chagod's responses for the reasons mentioned earlier. In my view it is clear, that section 7.9(d) chargeback events occurred at least 109 times. There were at least 109 disputed transactions from cardholders, NCB conducted investigations and ultimately concluded that the cardholder claims were legitimate. It was these chargeback applications and the consequences flowing from them, which NCB says led it to deem itself insecure in relation to Chagod's business and which entitled it (as confirmed by the Court of Appeal), to freeze Chagod's accounts.

[44] It seems plain to me therefore, that having regard to the provisions of Universal Terms and Conditions Merchant Agreement, Chagod's particularised allegations of breach of contract, which are all premised on NCB's handling of the chargeback applications and the ultimate freezing of Chagod's accounts, have no real chance of success at trial.

[45] Mrs Gibson Henlin KC, counsel for Chagod, submits however, that NCB's application should be dismissed, based as it does, on the mischaracterization of the Court of Appeal's finding that there is no serious issue to be tried in relation to a breach of contract, as a finding that there are no 'triable issues'. She argues further that the test for an interim injunction, which is a serious issue to be tried, is not the same test for summary judgment, which is, a real prospect of success. Citing the Court of Appeal decision in **Gordon Stewart v Merrick Samuels, Supreme Court Civil Appeal 02/2005, decided November 18, 2005**, Mrs Gibson Henlin said the distinction was made in that appeal, between the two tests. She said that on a summary judgment application, the court is

dealing with the ultimate results of the case whereas, on an application for interim injunction, the court is looking at the preliminary views of the parties.

[46] To support her argument, King's Counsel relied on the following dicta of Harrison JA, at page 7 of the judgment in **Gordon Stewart**: -

> **"**The prime test [for summary judgment] being "no real prospect of success" requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a "real prospect" not a "fanciful" one – Swain v Hillman (supra). The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party. "Real prospect of success" is a straightforward term that needs no refinement of meaning. The latter term should not therefore be equated to the "good and arguable" case concept as required to obtain the issue of an injunction. The "good and arguable case" or a "serious question to be tried" test, in the case of the grant of an injunction, is directed to a preliminary assessment of the party's contention in contrast to an ultimate result."

[47] I fully accept this reasoning of Harrison JA, however, in the present case, the question whether NCB is in breach of contract for concluding that the relevant chargeback applications were legitimate, and in deeming itself insecure in relation to Chagod's business, is a matter of interpretation of the contract. Chagod in its response to NCB's application has not provided any evidence, or telegraphed any likely to come, which could, on a fuller investigation at trial, add or alter the clear meaning of clauses 7.8, 7.9 (d) and 7.9(h) of the Universal Terms and Conditions Merchant Agreement. *A fortiori*, the Court of Appeal, interpreted this very contract and held that Batts J was wrong to find that there was a serious issue to be tried on the question of a breach of contract. This determination by the Court of Appeal on the interpretation of the contract, was not a "preliminary assessment of the party's contention in contrast to an ultimate result". In the absence of an appeal to His Majesty in Council, this determination was "the ultimate result", concerning the proper interpretation of the contract and the question whether NCB is in breach of contract.

[48] In her further challenge to NCB's application, Mrs Gibson Henlin remained focused on clause 8.5 of the Universal Terms and Conditions Merchant Agreement. She argues that since the clause provided NCB with options other than the freezing of Chagod's accounts, the court is entitled to assess all of those options and decide whether NCB acted reasonably in opting to freeze rather than pursue any of the other options that were available to it. The claim should therefore not to be struck out, or summary judgment granted, she submits, as these are issues requiring a determination at trial.

[49] I reject this argument, given the Court of Appeal's clear pronouncement that clause 8.3 of the Universal Terms and Conditions Merchant Agreement explicitly precludes any requirement for objectivity in NCB's assessment of its insecurity, and that clause 8.5 authorised NCB to freeze the accounts. Since clause 8.3 removes any requirement for objectivity, clause 8.5 must be understood as granting NCB sole discretion to choose to either freeze Chagod's accounts, suspend the contract, or list Chagod on the terminated merchant files. There can therefore be no question whether NCB acted reasonably in freezing the accounts rather than choosing one of the other options given to it by clause 8.5. To question NCB's decision to freeze the accounts, based on "reasonableness", is to introduce objectivity into a contractual term which is purely subjective. In deeming itself insecure in relation to Chagod's business NCB was certainly entitled to decide which of the options in clause 8.5 it considered necessary. That was a choice the contract gave to NCB. That was a choice Chagod agreed that NCB had. To argue otherwise, is to seek to undermine the Court of Appeal's clear guidance, effectively amounting to an impermissible collateral attack on its decision and an abuse of the court's process.

[50] Allied to the claimant's argument that the court at trial is entitled to consider whether NCB acted reasonably in choosing to freeze Chagod's account pursuant to clause 8.5, is the allegation in the amended claim that clause 8.3 offends section 43 of the Consumer Protection Act, as it is arbitrary and unreasonable. This exact allegation was proposed by the claimant in **David Stewart v National Commercial Bank [2025] JMCC Comm 4,** when he

sought to include it in an amendment to his particulars of claim. In refusing to allow the amendment, I referred to my earlier decision in **David Stewart v National Commercial Bank Jamaica Limited [2024] JMCC Comm 25**, and said this at paragraph 37: -

"37. The proposed amendment to the prayer, includes in the declaration sought, language which suggests that the defendant is in breach of section 43 of the Consumer Protection Act (CPA). The pleadings in support of this relief allege that section 8.3 (which I have assumed is a reference to section 9.3)[2] of the Universal Terms and Conditions Merchant Agreement is unreasonable and arbitrary in that it allows the defendant to suspend its banking relationship with the claimant. Section 43 of the CPA provides that the requirement of reasonableness in relation to a term of a contract, means that the term is fair and reasonable, having regard to the circumstances which were known to or in the contemplation of the parties when the contract was made.

38. I refer yet again to **David Stewart v National Commercial Bank,** where I expressed the following view: -

"[25] The defendant falls within the regulated financial sector. The **Guidance Notes on the Prevention of Money Laundering and Countering Financing of Terrorism, Proliferation and Managing Related Risks,** gazetted on June 14, 2018, [3], ("Guidelines), describes protecting the financial system as one of the most critical features of any Anti Money Laundering (AML) regime. Guide note 18 of the Guidelines, advises financial institutions to ensure, among other things that contractual arrangements entered into in the course of the regulated business permits a legal termination of the transaction, arrangement or business relationship if the institution conducting the arrangement or facilitating the commercial arrangement forms the view that

[3] Extraordinary Gazette Vol: CXLI No. 76C

criminal activity is taking place and to continue with the relationship, arrangement or transaction "would expose that institution to legal or reputational risk due to the suspected criminal activity".

[26]. The Agreement was made between the claimant and the defendant on June 24, 2012, and would have predated the Guidelines. However, Jamaica's AML regime began long before 2018. POCA was passed in 2007 and the Money Laundering Act which it repealed was passed in 1996. It is apparent that the termination provisions in clause 9[4] of the Agreement and particularly clauses 9.1, 9.3, 9.5 and 9.6(d), reflect aspects of the pre 2018 AML regime which continue and find expression in the Guidelines".

I remain of this view. In my opinion clause 9.3 of the Universal Terms and Conditions Merchant Agreement is reasonable and justifiable, thus the proposed amendment to contend that it breaches section 43 of the CPA is without any reasonable prospect of success. For these same reasons, I am of the view that the allegation that clause 9.3 is a breach of section 15(1) of the Constitution, which protects property from being compulsorily acquired, also has no reasonable prospect of success."

[51] Subject to the Court of Appeal's pronouncements on the decisions in **David Stewart,** I remain firmly of the views I expressed in those two cases. For the above-mentioned reasons therefore, I find that the allegation contained in paragraph 29 of the Amended Particulars of Claim that clause 8.3 of the Universal Terms and Conditions Merchant Agreement is in breach of section 43 the Consumer Protection Act has no real prospect of success at trial.

[52] As it relates to Chagod's allegation of a breach of duty arising out of the tort of negligence, Mrs Sandra Minott- Phillips relies on my decision in **David Stewart v National Commercial Bank Jamaica Limited [2024] JMCC Comm 25**, to

[4] Clause 9 of the Universal Terms and Conditions Agreement in that case is clause 8 in the agreement in the present case, and clause 8.3 and 8.5 in the latter, are clauses 9.3 and 9.5 in the former.

argue that " the fact that negligence/breach of duty is also pleaded is immaterial as there is no advantage for a liability in tort where the parties are in a contractual relationship, especially of a commercial nature". She then quoted from paragraph 17 of that decision where I said that:-

> "…the claim is one in contract. The pith and substance of which is that the defendant breached the Agreement when it froze the claimant's chequing account as it had no legal justification to do so. Mrs Minott-Phillips also argued, and I agree with her, that the claim for breach of the duty of care really does not take the contract claim any further, as on ordinary principles, tortious duties of care and contractual duties co-exist. (See for example the dicta of Lord Scarman in **Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd. [1985] 2 All ER 947**)"

[53] Mrs Gibson Henlin argues however, that that decision was made *per incuriam* because, according to her: "the argument of NCB that because there is a contract there is no scope for a claim in tort has been rejected by the Court of Appeal in **National Commercial Bank Jamaica Limited v Surrey Hotel Management [2018] JMCA Civ 28**"

[54] I do not accept that **David Stewart v National Commercial Bank Jamaica Limited [2024] JMCC Comm 25** was decided *per incuriam*. That case did not decide that tort claims, and contract claims cannot co-exist. The simple point I was endeavouring to make at paragraph 17 of that judgment was that the pleaded allegations of a breach of a tortious duty of care did not advance the claimant's claim (which was one in contract), since all the tortious allegations harked back to the allegations of breach of contract. My reference to Lord Scarman's dicta in **Tai Hing Cotton Mills Ltd**, was made mindful of the fact that that case also involved a banker– customer dispute , and his lordship's oft-cited statement that: "[t]heir Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort when the parties are in a contractual relationship", was made within the context of a commercial contract, as was the contract in **David Stewart.**

[55] In the present case, I hold the view that the pleaded allegations of breach of duty of care, also hark back to the allegations of breach of contract, and do not advance the claim. Furthermore, given that the contractually agreed allocation of risks permitted NCB to conclude that the chargeback applications were legitimate, and to decide to freeze Chagod's account on deeming itself insecure, Chagod cannot rely on tortious duties which are inconsistent with agreed contractual terms.

[56] In **Medical and Immuniodiagnostic Laboratory Limited v Dorrett O'Meally Johnson** [2010] JMCA Civ 42 (a decision referred to in **National Commercial Bank Jamaica Limited v Surrey Hotel Management)**, Phillips JA addressed the contract – tort overlap debate, at paragraph 52: -

> "**Tai Hing Cotton Mills**, as I understand it, is not authority for the principle that if there is a contract, a claimant is precluded from bringing a claim in tort where the action in tort is grounded on the same set of facts. It has been pointed out by the House of Lords in **Henderson & Others v Merrett Syndicates Limited** that the oft - cited words of Lord Scarman in that case should be viewed within the context of the issue in that case which was whether a tortious duty of care could be established which was more extensive than that which was provided for under the relevant contract…So unless inconsistent with its terms or specifically excluded , I agree with Lord Goff when he said :
>
> > '…the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy.'"

[57] So, while tortious duties and contractual duties may well co-exist, a claim in tort cannot extend beyond the contractual boundaries established by the parties unless they are consistent with the contract. Put another way, tort claims cannot undermine or contradict the parties' express contractual arrangements, and especially in commercial relations, tortious duties must be reconciled with the

contract's terms and conditions. Courts cannot, in my view, countenance tort claims that seek (like Chagod's present claim), to get around agreed commercial risk allocation.

[58] Mrs Minott- Phillips in her submissions reminded the court that in **National Commercial Bank Jamaica Limited v Surrey Hotel Management,** the Court of Appeal commented that the question of concurrent liability in tort and contract is "not completely settled". In my own research, I could find no subsequent decision of that court or any court in our jurisdiction, which settled the issue. Therefore, as correctly submitted by learned King's Counsel, if a court decides a case, one way, on an issue not yet settled, that decision cannot be said to be *per incuriam*.

[59] I turn now to the allegation made by Chagod, that NCB acted in bad faith. The question whether good faith as an organizing principle in the performance of contracts, was raised by Sykes J (as he then was), in **NCB Staff Association v National Commercial Bank Jamaica Limited, [2017] JMSC Comm 19.** He observed that there is yet no such principle in our jurisprudence but recognised that it exists in other jurisdictions. In the Court of Appeal, Foster Pusey JA, writing for the court in **National Commercial Bank Jamaica Limited v NCB Staff Association, [2020] JMCA Civ 27,** noted Sykes J's observations at first instance, and said at paragraph 99, that to date, based on her research, the English Courts have not adopted a general principle of good faith in commercial contracts. After acknowledging that in Canadian jurisprudence, the principle of good faith in the performance of contracts is recognised as a general organising principle in contract law said:

> "It remains to be seen what decision we will make in this jurisdiction on the issue of good faith as an implied duty or general organizing principle in the performance of contracts".

The court however, did not find it necessary to make a decision on the issue in the circumstances of that case. On further appeal to His Majesty in Council, the Boad was reluctant to address the issue, based on the view that it did not

properly arise in the case, and given what would be significant ramifications of a decision on the issue, for the law of contract in Jamaica.

[60] In the present case, it is also unnecessary, in my view, to decide the issue at a trial due to the reasons that I will now give.

[61] To suggest, as Chagod does, in its particulars of bad faith, that NCB basically changed its tune, concerning the reasons it froze the accounts, is to misunderstand NCB's case. NCB has maintained that the chargeback applications and its conclusions of their legitimacy, led it to deem itself insecure in relation to Chagod's business, and it consequently invoked clause 8.5 of the Universal Terms and Conditions Merchant Agreement and froze Chagod's accounts. NCB has also pleaded in its amended defence that there were several 'red flags' which led to its belief that Chagod was engaged in transactions which could constitute or be related to money laundering. At least 9 such 'red flags' are outlined by NCB in its Amended Defence, none of which have been answered or refuted by Chagod in its affidavit in response to the application. NCB, a bank operating in the regulated financial sector, was obliged to make a report in compliance with its duties under the Proceeds of Crime Act.

[62] In response to the allegations that NCB: a) "recklessly and without regard for its truth", failed to acknowledge that it had a duty to provide technical guidance to Chagod in fraud prevention under the Visa rules , b) failed to acknowledge that the alleged fraud took place on the Fygaro platform which NCB recommended ; and c) failed to inform Chagod about the Visa payment system and the facilities it offers for training; NCB has pleaded that it provided all the training necessary for Chagod to operate effectively under the Universal Terms and Conditions Merchant Agreement, and denies receiving any additional request for training. Chagod in its affidavit in response to NCB's application, relies solely on the very contract itself, and has provided no evidence to challenge NCB's assertion that all necessary training was given to it to effectively operate under the contract. Furthermore, Chagod has not provided in its pleadings or its affidavit in response to the application, any averment or

evidence, suggesting a causal connection or nexus, between the chargeback applications, and its alleged lack of technical guidance and training.

[63] Chagod's complaint that NCB failed to acknowledge or accept information it provided in response to chargeback applications that appeared illegitimate or fraudulent, can have no real prospect of success, given clauses 7.8, 7.9(d) and 7.9(h), of the Universal Terms and Conditions Merchant Agreement, which have earlier been discussed .

[64] It is undisputed that one month's notice of its intention to terminate the banking relationship, was given by NCB to Chagod. Chagod has, however, not said why one month's notice was inadequate for it to make alternative banking arrangements (in a country where there are multiple commercial banks operating), or why it contends NCB knew that it could not have done so within that period. NCB has denied that it had this knowledge, yet in Chagod's response to the application, it has not provided any evidence to refute this assertion by NCB.

[65] I call to mind the dicta of Moore-Bike LJ at paragraph 14 of his judgment in **Korea National Insurance Corporation v Allianz Global Corporate & Specialty AG [2007] EWCA Civ 1066**, in which the obligations on a respondent to an application for summary judgment to satisfy the court that it has a real prospect of succeeding at trial was underscored:

> "It is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial. If it wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up. It is not sufficient, therefore, for a party simply to say that further evidence will

or may be available, especially when that evidence is, or can be expected to be, already within its possession…".

[66] The declaration sought in Chagod's claim form and in the prayer for relief, that NCB is in breach of The Banking Services Act (The Banking Service Deposit Taking Institutions) (Customer Related Matters) Code of Conduct, 2016, has no averments to support it in the particulars of claim. Put another way, there are no allegations contained in the pleadings which either refer to this legislation or outline the basis on which Chagod claims that NCB is in breach of its obligations under it. In the absence of pleadings to support it, this relief is one that Chagod has no real chance of succeeding on at a trial.

Summary and Conclusion

[67] The Court of Appeal having interpreted the Universal Terms and Conditions Merchant Agreement and determined that clause 8.5 entitled NCB to freeze Chagod's account, Chagod's claim for breach of contract premised on NCB freezing its account is an abuse of process and an impermissible collateral attack on the Court of Appeal's decision. In addition to being an abuse of process, such a claim has no real prospect of succeeding at trial, as the Court of Appeal's determination was not a preliminary assessment of the parties' contentions in relation to the interpretation of clauses 8.3 and 8.5, but was that court's definitive pronouncement.

[68] Clause 7.8 of the Universal Terms and Conditions Merchant Agreement gave NCB the contractual right to reverse disputed transactions, with liability reverting to Chagod, once there was a clause 7.9 chargeback event. By clauses 7.8, 7.9(d) and 7.9(h), respectively, Chagod took the risk of liability for disputed chargeback applications, once NCB determined that such applications were legitimate; and in relation to no card transactions, for any reason that NCB deemed sufficient. As is the case with clause 8.3, clauses 7.9(d) and 7.9 (h) do not require NCB to apply an objective standard, when determining the legitimacy of disputed chargeback applications. Consequently, Chagod's pleadings which attack NCB's handling of the chargeback applications have no real prospect of success.

[69] The allegation contained in paragraph 29 of the amended particulars of claim that clause 8.3 of the Universal Terms and Conditions Merchant Agreement is in breach of section 43 of the Consumer Protection Act, also has no real prospect of success at trial. NCB falls within the regulated financial sector, and as found in **David Stewart**, where similar clauses were in issue, I find that clause 8.3 is reasonable and not arbitrary. Furthermore, the Court of Appeal has determined that clause 8.3 removes any requirement for objectivity.

[70] Chagod's claim in tort for breach of duty and/or negligence also has no real prospect of success. Tortious duties and contractual duties may well co-exist, but especially in a commercial context, a claim in tort cannot extend beyond the contractual boundaries established by the parties unless they are consistent with the contract. Chagod's allegations of breach of duty, are inconsistent with the parties agreed commercial risk allocation.

[71] In relation to the particulars of bad faith, none of them have a real prospect of success at trial. It is evident from these allegations that Chagod has misunderstood NCB's case. NCB has maintained that in accordance with the Universal Terms and Conditions Merchant Agreement, it determined that the chargeback applications were legitimate, it deemed itself insecure in relation to Chagod's business and it was obliged to make a report under the Proceeds of Crime Act given the red flags which led it to believe Chagod was engaged in transactions which could constitute or be related to money laundering. These actions on NCB's part, are not inconsistent with each other.

[72] As for the allegation of lack of training and technical support, which Chagod links to bad faith on NCB's part, Chagod has failed to plead or provide any evidence suggesting a causal connection between that allegation, and the chargeback applications. Furthermore, NCB has contended in its pleadings, that it issued operating guidelines and provided the necessary training, yet Chagod in its response to NCB's application, has not provided any evidence refuting NCB's position on this issue. The complaint that NCB failed to acknowledge or accept information provided in response to chargeback applications that appeared illegitimate or fraudulent, can also have no real

prospect of success, given clauses 7.8, 7.9(d) and 7.9(h), of the Universal Terms and Conditions Merchant Agreement.

[73] It is not in dispute that NCB gave Chagod one month's notice of its intention to terminate the Bank - Customer relationship. Chagod in response to NCB's application has not provided any evidence why one month's notice was inadequate for it to make alternative banking arrangements, or why it contends NCB knew that it could not have done so within that period. With NCB refuting that it had such knowledge, Chagod was obliged, in its response to NCB's application, to provide evidence to satisfy the court that it has a real prospect of success on this aspect of its claim. It has failed to do so.

[74] There are no averments or particulars pleaded to support or provide a basis for the declaration sought that NCB is in breach of **The Banking Services Act (The Banking Services (Deposit Taking Institutions) (Customer Related Matters) Code of Conduct, 2016,** therefore Chagod has no real prospect of succeeding in obtaining this relief at trial.

[75] NCB has provided a credible basis for its belief that Chagod has no real prospect of succeeding on its claim. It was consequently Chagod's obligation, in resisting NCB's application, to show otherwise. It has failed to do so.

[76] Having carefully considered the pleadings, the evidence and the parties' respective submissions, I am satisfied that the most appropriate order to make in the circumstances, is an order for summary judgment in NCB's favour.

[77] I regret the delay in delivering this judgment. Although the circumstances were outside of my control, I nevertheless take responsibility for the delay and sincerely apologise to the parties and counsel.

Orders

[78] In the result, I make the following orders: -

i. Summary judgment is entered for the defendant against the claimant, with costs to the defendant to be agreed or taxed.

ii. Costs to the defendant on the application to be agreed or taxed.

iii. Leave to appeal granted.

A Jarrett
Puisne Judge