[2023] JMSC Civ 24

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2023CV01465

BETWEEN	**KAG STOCKPILE & HARDWARE SUPPLIES LIMITED**	**CLAIMANT/APPLICANT**
AND	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**DEFENDANT/RESPONDENT**

Isat Buchanan and Iqbal Cheverria for the Claimant/Applicant.

Litrow Hickson instructed by Myers, Fletcher & Gordon for the Defendant/Respondent.

Application for Interlocutory Injunction – Defendant (Bank) froze Claimant (Customer Business) Account – Breach of Contract - Serious issue to be tried – Adequacy of Damages – Balance of Convenience – Constitution – Right to be heard.

Heard: May 24, June 8, 20 and 21, 2023

IN CHAMBERS (VIDEO CONFERENCE)

M. JACKSON, J (AG.)

INTRODUCTION

[1] On June 8, 2023, this court heard an interlocutory application brought by KAG Stockpile & Hardware Supplies Limited ("KAG Limited") seeking an interim injunction, which would otherwise have lasted until the trial of the claim on its

merits, for the release of the sum of $23,000,000.00 which was frozen in an account held by its banker, the National Commercial Bank ("NCB").

[2] After hearing arguments from the parties, the following orders were made on June 21, 2023, in the final disposition of the application:

(i) The Orders sought in the amended notice of application filed on May 26, 2023, are refused.

(ii) The defendant is to file and serve its Defence in keeping with Part 10 of the **Civil Procedure Rules, 2002**.

(iii) The parties are to proceed to mandatory mediation 90 days after the Defence is filed and served in keeping with the **Civil Procedure Rules, 2002**. The Mediation is to be completed by October 17, 2023.

(iv) The parties are to return to a Case Management Conference on November 15, 2023.

(v) Costs of the Application to NCB to be taxed if not agreed.

(vi) KAG Limited's Attorney at Law is to prepare, file and serve the Order.

[3] Before setting out the details underpinning the orders made, it is necessary to outline the background of the relationship between the parties that gave rise to the application.

THE HISTORY OF THE RELATIONSHIP BETWEEN THE PARTIES

[4] KAG Limited is a limited liability company incorporated under the laws of Jamaica on March 18, 2019. It specialises in selling building materials and importation of equipment required for construction to both our local and international markets.

At the time of the commencement of these proceedings, it is said to have employed over forty-five (45) full-time and five (5) part-time employees.

[5] NCB is a bank licensed under the **Banking Services Act** ("BSA") to transact banking business and is regulated by the Supervisory Committee established under the BSA. It is also a business in the regulated sector in keeping with the definition outlined in the Fourth Schedule of the **Proceeds of Crime Act** ("POCA").

[6] The genesis of the relationship between the parties is keyed to a banker-customer relationship. This relationship commenced on January 13, 2022, following the execution of a Universal Terms and Conditions Merchant Agreement ("the Merchant Agreement") concerning a bank account held by KAG Limited with NCB. The account was KAG Limited's primary account, dealing with point-of-sales purchases from credit or debit cards. It also contains 95% of KAG Limited's income.

[7] Under the Merchant Agreement, a point-of-sale terminal was issued to KAG Limited, and the parties' respective contractual obligations and duties were set out in the agreement. The pertinent clauses relied on by both parties in these proceedings are 2.11, 2.12, 2.22, 2.24, 2.27, 7.32 – 7.36, 7.74, 8.3, 8.4, 8.5, and 12.

[8] On May 3, 2023, just over a year into the relationship, NCB, through its internal monitoring system, was alerted to a series of irregular transactions involving fraudulent codes being carried out on KAG Limited's account. It was discovered that the transactions were carried out without NCB's prior authorisation and thus were in breach of the terms agreed to under the Merchant Agreement. The monetary value of the breach was $43,000,000.00. To safeguard the risk exposed, NCB took immediate action and froze KAG Limited's bank account, which at the material time had $23,000,000.00 in it.

[9] KAG Limited has asserted that its bank account was frozen in breach of the parties' Merchant Agreement and has demanded that the freeze be removed. It further declared that no notice or reason was provided by NCB to outline the basis for freezing its account and that NCB had failed to convene a meeting when a request was made and to have KAG Limited's attorney-at-law present in attendance.

[10] On the other hand, NCB contends that a series of irregular transactions were processed on KAG Limited's account that were in breach of the Merchant Agreement, and the act of freezing the account was a right afforded to it in the Merchant Agreement.

[11] Not being successful in its demands, KAG Limited opted to use this medium for urgent redress.

THE APPLICATION

[12] The Notice of Application for Court Orders was filed on May 8, 2023. The application was fixed to be heard on May 24, 2023. On that date, the court, in keeping with its case management powers under the **Supreme Court of Jamaica Civil Procedure Rules, 2002** (the "CPR"), adjourned the hearing of the application to June 8, 2023, and directed KAG Limited to file a claim form, NCB to file and serve an affidavit in response, KAG Limited to file a further affidavit in response, where necessary, and the parties to exchange and file written submissions and authorities.

[13] On June 8, 2023, the court had before it the claim form as well as an Amended Notice of Application for Court Orders, which was filed on May 26, 2023 (the "amended application"), seeking additional orders for specific disclosure and the removal of all restrictions on the account.

[14] The substratum of the grounds relied on to support the amended application can conveniently be summarised as follows:

1. NCB froze KAG Limited's account on May 3, 2023, and refused to unfreeze it after demands were made;

2. the parties are in a fiduciary relationship of debtor-creditor, and between it and its customers under demand deposit obligation;

3. NCB breached its obligation to produce the customers' monies on demand;

4. there are serious issues to be tried which are not frivolous or vexatious; and

5. the status quo demands the freeze be interrupted until the trial on the claim on the merits.

THE CLAIM

[15] The orders and declaratory reliefs sought in the claim filed by KAG Limited were extracted by the court as follows:

1. An order that NCB has breached the banker and customer relationship regarding the actions it took.

2. A declaration that NCB has breached the Merchant Agreement.

3. A declaration that NCB has violated KAG Limited's constitutional right to be heard contrary to section 16 of the Constitution.

4. An order that NCB acted in bad faith in freezing the assets of KAG Limited.

5. A declaration that NCB is in breach of the **Banking Services Act and (The Banking Services) (Deposit Taking Institutions) (Customer Related Matters) Code of Conduct, 2016**.

6. Damages for breach of contract.

7. Damages for negligence.

8. Damages for loss of the facility to do business, for operational disruption and loss of income.

9. Loss of potential earnings.

10. Aggravated damages.

THE LAW

[16] The basic principles governing the grant of an interim injunction are well settled. It is not a trial on the merits. Accordingly, KAG Limited does not need to show a *prima-face* case. The learned authors, David Bean, Isabel Parry, and Andrew Burns, in their text, **Injunctions Practitioners Series, 14th edition**, aptly described this stage as such:

> *"The hearing of an application for an interim injunction is not a trial on the merits. There is usually no oral evidence and no opportunity for cross-examination. The full pre-trial processes of disclosure and inspection of documents have not occurred; indeed, the statements of each side's case may not yet have been served. An interim hearing is often listed for an hour and rarely lasts longer than one court day. The criteria applied must inevitably be different because neither side's case can be 'proved' as at a final hearing. The function of an interim injunction is often described as a process which is designed to 'hold the ring' (see, e.g.* ***United States of America v Abdcha*** *[2015] 1 WLR 1917) pending final determination of the merits or other disposal of the dispute."*

[17] Section 49(h) of the **Judicature (Supreme Court) Act** provides that:

> *"49. With respect to the law to be administered by the Supreme Court, the following provisions shall apply that is to say –*
>
> *(h) A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just, and if an injunction is asked either before*

> *or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court thinks fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable."*

[18] In determining whether or not to grant an interim injunction, the courts have accepted the guidelines stated in the oft-cited case of **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504 ("**American Cyanamid**"). These guidelines have also been accepted by the Law Lords in **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd** [2009] 1 WLR 1405 ("**NCB v Olint**") and other cases from this jurisdiction.

[19] Mangatal J, in the case of **Michelle Smellie & Ors v National Commercial Bank Jamaica Limited** [2013] JMCC Comm. 1 at paragraph 5 outlined the following considerations which arose in the cases of **American Cyanamid** and **NCB v Olint**:

(a) Is there a serious issue to be tried? If there is a serious question to be tried, and the claim is neither frivolous nor vexatious, the court should then go on to consider the balance of convenience generally.

(b) As part of that consideration, the court will contemplate whether damages are an adequate remedy for the Claimants and, if so, whether the Defendants are in a position to pay those damages.

(c) If, on the other hand, damages would not provide an adequate remedy for the Claimants, the court should then consider whether, if the injunction were to be granted, the Defendants would be adequately compensated by the Claimants' cross-undertaking in damages.

(d) If there is doubt as to the adequacy of the respective remedies in damages, then other aspects of the balance of convenience should be considered.

(e) Where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are designed to preserve the status quo.

(f) If the extent of the uncompensatable damages does not differ greatly, it may become appropriate to take into account the relative strength of each party's case. However, this should only be done where, on the facts upon which there can be no reasonable or credible dispute, the strength of one party's case markedly outweighs that of the other party.

(g) Further, where the case largely involves the construction of legal documents or points of law, depending on their degree of difficulty or need for further exploration, the court may take into account the relative strength of the parties' case and their respective prospects of success. This is so even if all the court can form is a provisional view (see **NCB v Olint** and the well-known case of **Fellowes v Fisher** [1975] 2 All ER 829). This is, of course, completely different from a case involving mainly issues of fact or from deciding difficult points of law.

(h) There may also be other special factors to be taken into account, depending on the particular facts and circumstances of the case.

[20] The court will also bear in mind the sage words of Lord Diplock at page 407 G-H of **American Cyanamid**, that:

> *"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of*

> *either party may ultimately depend nor to decide difficult points of law which call for detailed argument and mature considerations".*

[21] In the **NCB v Olint**, Lord Hoffman, in reiterating the principles in **American Cyanamid**, outlined the purpose of granting the injunction as follows:

> *"16. …It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is, of course, impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result."*

[22] In the case of **Cayne & Another vs Global Natural Resources** (1984) 1 AER 225, it was held that where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the Court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice and to balance the risk of doing an injustice to either party.

[23] In considering whether to grant an interim injunction, I am mindful that the court must consider all the relevant evidence at the time the injunction is sought, including evidence of events following the commission of the wrong by the defendant.

[24] At this juncture, I have also considered it prudent to set out what can now be viewed as the court's settled position regarding the discourse between mandatory and prohibitory injunctions since Mr Cheverria raised it. In **NCB v Olint**, their Lordships gave guidance concerning the consideration of applications for interlocutory injunctions, whether they be mandatory or prohibitory. At paras. [19] and [20], they opined that:

> *"[19] There is however no reason to suppose that in stating these principles [in American Cyanamid], Lord Diplock was intending to confine*

> *them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely,* ***that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other****: see Lord Jauncey in R v Secretary of State for Transport, ex parte Factortame Ltd (No 2) [1991] 1 AC 603, 682-683. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670, 680. But this is no more than a generalisation.* ***What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be.*** *If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in Shepherd Homes Ltd v Sandham [1971] Ch 340, 351, a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted.'*
>
> *[20] For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see the Films Rover case, ibid. What matters is what the practical consequences of the actual injunction are likely to be. It seems to me that both Jones J and the Court of Appeal proceeded by first deciding how the injunction should be classified and then applying a rule that if it was mandatory, a 'high degree of assurance' was required, while if it was prohibitory, all that was needed was a 'serious issue to be tried.' Jones J thought it was mandatory and refused the injunction while the Court of Appeal thought it was prohibitory and granted it."*

[25] From the affidavit evidence and submissions, the court accepts that the dispute between the parties rests heavily on the viewpoint to be taken in relation to the interpretation of the Merchant Agreement and whether NCB was entitled to freeze KAG Limited's bank account. This case, therefore, calls for the court to construe the provisions of the Merchant Agreement and determine whether the position taken by NCB is a construction that can reasonably be applied.

[26] Accordingly, in determining whether to grant the application for an interim injunction, this court is required to scrutinise the Merchant Agreement, which, as

described by Mr Cheverria, on behalf of KAG Limited, is the 'bedroot' of the relationship between the parties and the affidavit evidence. I will also have regard to the strength of the parties' claims and their respective prospect of success in determining whether or not to grant the application.

THE EVIDENCE

The evidence advanced by KAG Limited

[27] Mr Shamoui Glaves, Director of KAG Limited company, swore to two affidavits supporting the amended application. They were filed on May 8, 2023, and June 6, 2023, respectively.

[28] In relation to his affidavit filed on May 8, 2023, Mr Glaves stated that the company was a loyal customer of NCB and has operated profitably since it was incorporated in March, 2019. He said there were no complaints about the relationship with NCB, except in one instance where KAG Limited's e-commerce account was frozen on or about December, 2021 but was later unfrozen some months later without any explanation.

[29] The other pertinent averments outlined in Mr Glaves' affidavit, which must be highlighted for greater clarity, are as follows:

> "6. On the 3rd of May 2023, when checks were made to the account as described, it was observed that I was barred from accessing the funds that I needed to carry out my lawful business. I know the account was on hold, as when I attempted to transfer or withdraw said monies, I was unable to do so. No notice was sent to me as to the reasons (s) why the account was placed on hold.
>
> 7. On the afternoon of the 3rd of May, 2023, I received a call from a gentleman who introduced himself as Wayne Valentine. He further asserted that he works in the NCB Compliance department and that my account was placed on hold and all I needed to do was to come in and pay a sum to

him. **He scheduled me for a meeting at 12 p.m. at the NCB Towers in New Kingston.**

8. **I was concerned about the series of activities as I was sure I was not involved in any illegal activities I contact (sic) my Attorney to represent me at the meeting** (Emphasis mine). My Attorney-at-law did contact Mr Valentine in my presence, and he informed him of his intention to be present at the meeting with me. Mr Valentine objected to his attendance and stated that I did not do anything wrong; he just simply needed to discuss banking business with me. He further said, "We him need laya fah an ntn nuh wrong with the account.**"**

9. My Attorney informed Mr Valentine in my presence, that I would not be attending the meeting unless he was permitted to be there; this was when Mr Valentine told him that the hold would not be remove (sic) unless I attended a meeting with him alone and honour the obligation that he told me about. I do believe that when Mr Valentine said this, he meant that I had to pay him personally to have the hold on my account removed.

10. I did not attend the meeting as scheduled however my attorney wrote to the bank demanding that my account be unfrozen and the bank investigate its employee for suspicious activities…

11. I am finding it increasingly difficult to meet my financial obligation to my creditors as the account, as frozen, contains the majority of the revenue for the company. It is also the account that I make payroll from, which is, on average, about $800.000.00 fortnightly. If the monies are not released, my business will definitely collapse, and some 50 hardworking Jamaicans will be rendered unemployed.

12. I have spent years working really hard to create this business; I have all my life savings and the savings of my family into it. I really do want to see this business goes (sic) up in flames because the bank froze my account without reason. I am no (sic) opposed to investigation; I just need to

know the case that I am being asked to answer so that I can prepare myself."

NCB's Response

[30] Mr Dane Nicholson, Head of the Fraud Prevention Unit of NCB, in an affidavit in response filed June 2, 2023, highlighted the primary reasons for NCB freezing the account of KAG Limited. The relevant portions are:

> "4. The bank is licensed under the Banking Services Act (BSA) to transact banking business and is regulated by the Supervisory Committee established under the BSA. NCB has a duty to comply with several risk-related directions issued by the Supervisory Committee, including the Guidance Notes on the Prevention of Money Laundering and Countering the Financing of Terrorism, Proliferation and Managing Related Risks, which was promulgated on 14 June 2018 pursuant to section 132 (1) of the BSA. A failure to comply with the Guidance Notes could result in the bank being assessed as operating in an unsafe or unsound manner with respect to inadequate assessment or analysis of risks.
>
> 5. In addition to its designation and duties under the BSA, the bank is a business in the regulated sector, as that term is defined in the Fourth Schedule of the **Proceeds of Crime Act**. It is subject to the duties, obligations and confidentiality required of commercial banks and businesses in the regulated sector.
>
> 6. On 02 May 2023, the bank's internal monitoring systems alerted it to several irregular transactions in the Claimant's account no. 54113134, funds in excess of $43m were processed and credited to the Claimant's account using transaction codes that were not generated by the bank (impugned transactions). The transactions did not, therefore, have the required authorisation.
>
> 7. As part of its Merchant Agreement with NCB, the Claimant agreed that the bank would set a Floor Limit, which is the maximum amount stipulated by the bank for any single

transaction which the Claimant is authorised to enter into without first obtaining specific authorisation for the transaction. The bank maintains Floor Limits for all merchants. Where a merchant wishes to process a transaction in excess of that Floor Limit, it must first request authorisation from the bank, and where the authorisation code is received, it must be recorded on all transaction slips executed in connection with the authorisation.

8. The Claimant also agreed with the bank that if the POS Terminal or the Authorisation System is offline, the Claimant will take an imprint of the card when it contacts the bank for voice authorisation of the transaction ("Off-Line Transactions"). Clause 2.11 of the Merchant Agreement sets the Specific information that the manual imprint of the card taken by the merchant should include. Once the POS terminal is back online, the merchant is required to "key enter" the transaction into the POS Terminal in a manner designated by the bank.

9. The Claimant did not request the authorisation codes from the bank prior to processing the impugned transaction, which were processed as Off line transactions. The transactions were processed using codes which were not generated by the bank and were, therefore, fraudulently produced. No records for the impugned transactions were provided by the Claimant to the bank.

10. Had the Claimant sought authorisation from the bank in relation to the impugned transactions, the bank would have declined to process them because of the size of the transactions and the risk posed to the bank. In Off Line Transactions, the debit is generated against NCB's operating account and, where approved by NCB for processing, requires the provision of a prior specific indemnity from the merchant in the event the credit card issuer does not honour the transaction. No indemnity was provided in relation to the impugned transaction. NCB considered the transactions to be highly risky. It did not authorise them.

11. NCB considers the Claimant to have breached the terms of its Merchant Agreement (including clauses 2.11, 2.22. 2.24 and 2.27) with the bank, and NCB feels unsafe or insecure in the manner in which the Claimant is conducting its business.

12. The bank believes that the impugned transactions processed by the Claimant could constitute or be related to, money laundering.

13. Upon discovering the fraud, the bank invited the Claimant's director, Shamoui Glaves, to attend its office to enquire into the irregularity of the transaction. That meeting request was declined by Mr Glaves. The bank specifically denies the allegation contained in paragraph 7 of Mr Glaves's affidavit filed on May 8, 2023, that there was any request from the bank for Mr Glaves to pay any sum of money to unfreeze the Claimant's account no. 54113134. The allegation is not true."

KAG's second Affidavit in response filed June 6, 2023

[31] On June 6, 2023, Mr Shamoui Glaves filed an affidavit responding to the affidavit of Mr Dane Nicholson. The relevant paragraphs of that affidavit are as follows:

"4. To my understanding the relationship that I share between the bank is governed by a contract, the Universal Terms and Conditions Merchant Agreement, this agreement would serve to outline all the requirement and obligation that needs to be performed by both parties. I am of the understanding that this contract serves as the entire agreement, and no further terms and obligations can be read into the contract without my understanding and consent.

5. In response to paragraph 10, I say that the sum of $43 million that were termed "*irregular transactions"* were all legitimate. There was not a single transaction for $43m, but there were some six (6) transactions over the course of four (4) weeks that amounted to the total. All transactions were for items that were legitimate purchases and signed by the cardholders. Attached and marked KAG1, KAG2, KAG 3, KAG 4, KAG5, and KAG 6 are all purchasers invoices for inventory that sold on the diverse days.

6. There was no agreement between the bank and myself as to any amount that is set for a “floor limit” This figure was not stated in the agreement, nor was there any verbal agreement between the bank and myself as to this amount. I was not aware that there was a limit on the amount that can be processed in a single transaction. The bank never placed me on notice at any material time that there was a need for this to be done; my account was just frozen without more.

7. As between the bank and myself, there was never any notice given for the need for any voice identification in instances where certain transactions need authentication. This is news to me. When I was signing the Merchant agreement, I was never given a full opportunity to read and appreciate the contents of the document. The agent at the time just told me to sign it as it was a standard agreement. I was also never provided with a copy of the agreement to take home for my perusal or to have my attorney explain it to me. I would never have entered relations with the bank if I knew that essentially they could just take my money if they feel like without any investigations or complaint from anyone.

8. The Bank at no time before my account were frozen requested any information from me about the ‘impugned transactions” they simple took away my livelihood. It was only on the 30th of May 2023, after this claim was filed that an email was sent from an Agent of the Defendant requesting information attached and marked as KAG-7, which is a copy of the Affidavit from the Defendant. To this, I provided, to the best of my knowledge and the information present on my database, a response –attached and marked KAG-8 in short, setting out who made the purchases and the method of identification that was provided. All of these are in compliance with the requirements of the Merchant agreement.

9. I reject the assertion in paragraph 16 of the affidavit that seems to try and make a link between my business and money laundering. I have operated. I have operated a successful business since 2020 and attached hereto a copy of my financial statement from the year 2021- KAG 9, which shows that the business has been profitable even outside of the monies that deems (sic) “impugned transaction”. Defendant, by its own admission at paragraph 10, stated that there has been no real complaint of fraud from any third

party. It was just their own internal monitoring system that unilaterally deems (sic) the transaction as fraudulent.

10. I reject the categorisation of the Defendant in labelling the transaction as fraudulent at paragraph 17; there has been no determination by anybody that the transactions in question were fraudulent. I put forward evidence proof that I believe is enough to show that the procedures that needed to be followed were indeed followed and that for the Defendant to act without more and freeze, my account is a breach of contract.

11. While the Defendant wait (sic) to give instruction life and business continues to hang in the balance. I am certain that if this justification is refused, my business will cease to exist. Attached and marked KAG 10 is a copy of a loan agreement between the business and Mr. Glenroy Haye. This loan was necessary to make payroll and keep the full compliment (sic) of staff while the account remains frozen. I have not taken any payment since the accounts were frozen. The terms of the loan agreement have the business paying back $920,000.00 at an interest rate of 10%, a balance payable no later than 20th July 2023.

13. I will say that without a doubt, I would have to cut my staff by no less than 80% if this injunction is refused, as I simply will not be able to pay them for the hard work they have put in the business."

THE ISSUES

[32] Both parties agreed that the issues relevant to the final resolution of the amended application are:

a. Whether there is a serious issue to be tried;

b. Whether damages would be an adequate remedy, and

c. Whether the balance of convenience lies in favour of granting the injunction.

Whether there is a serious issue to be tried

[33] As was expected, the parties are on opposite sides on this issue. Mr. Cheverria, on behalf of KAG Limited, asked the court to find that there is a serious issue to be tried. On the other hand, Mr Hickson, on behalf of NCB, argued that there is no serious issue to be tried.

[34] Mr Cheverria argued that NCB was obliged to take a particular course of action before freezing the account. He commenced his submission by relying on clauses 7.32 and 7.33 of the Merchant Agreement. Both clauses deal with the provision for chargebacks. Clause 7.32, he submitted, would require NCB to hold an unspecified sum, which would be used to settle any obligations that arise from chargebacks. He pointed out that no sum was placed in the contract for that purpose, and as such, clause 7.32 did not have an amount listed to be set aside to settle any chargebacks. He submitted that NCB, in those circumstances, should have asked for a deposit from KAG Limited and use that deposit to settle any possible chargebacks. In this regard, he submitted that NCB's initial approach should have been to avoid freezing KAG Limited's account and, thus, acted in breach of its contractual obligation set out in the Merchant Agreement when it froze the bank account of KAG Limited.

[35] He further submitted that by virtue of clause 7.33, NCB may review the agreed minimum amount from time to time. Where it believes that there is a need to increase the amount to set aside for any chargebacks, it must contact KAG Limited of the need to do so. When that contact is made, KAG Limited must be permitted a period of five days to meet the new minimum balance. If KAG Limited fails to meet the balance, it is then, and only then, that its bank account could be suspended, terminated, or frozen.

[36] Additionally, counsel submitted that clause 8.5 of the Merchant Agreement does not give NCB the right to freeze and make checks afterwards. Instead, NCB should have provided sufficient evidence to KAG Limited of the circumstances

that made NCB insecure or unsafe before freezing the bank account. Counsel argued that no notice was provided and that for the NCB to proceed to freeze, the entire sum in the account was in breach of the Merchant Agreement. He contended that it was KAG Limited that discovered on its own that its account was frozen and took the initiative to contact NCB. This, he argued, should not be the case.

[37] For clarity, clauses 8.3 and 8.5 of the Merchant Agreement, state that:

> *"8.3. The Bank may terminate this Agreement immediately if the Merchant becomes insolvent or bankrupt, becomes involved in any prohibited activity set out in clause 10, or* ***the Bank deems itself to be insecure with respect to the Merchant's business****.*
>
> *8.5 Upon the occurrence of any circumstances which would enable the Bank pursuant to the terms of this Agreement to terminate, the Bank shall be entitled, in lieu thereof, to suspend this Agreement, list the Merchant on terminated merchant files,* ***freeze the Merchant's accounts with the Bank and take such other steps as is it deems necessary****." (My emphasis)*

[38] With respect to clause 8.3, Mr Cheverria argued that the term "deems itself unsafe or insecure concerning the merchant's business" was not defined in the Merchant Agreement and that that should not have been the case. He went on to submit that a serious issue arises to be determined regarding how this clause should be defined to operate, specifically, whether there is a requirement for reasonableness to be imported into the construction, and if so, whether the insecurity to NCB relates to the financial exposure of NCB as a result of KAG Limited's business, or whether money laundering can be used. It also raises questions as to whether there should be a threshold or quantum to the extent of financial exposure contemplated, or whether NCB can deem itself insecure? These questions, he submitted raise serious issues to be tried concerning clauses 8.3, 8.5 and 8.6 as a tribunal at a trial will need to conclude whether the terms are determinative of NCB's right to freeze the account.

[39] Mr Cheverria relied on the case of **Chagod Tour Jamaica Limited v The National Commercial Bank Limited** [2022] JMCC Comm 20 (**Chagod Tours**

Limited), which he contends is similar to the case at bar and which the Court of Appeal had upheld the trial judge's ruling against the National Commercial Bank.

[40] In stark opposition, Mr Hickson, on behalf of NCB, argued that in determining whether serious issues exist to be tried, an evaluation of clauses 8.3, 8.5, and 8.6 is necessary. These clauses, he outlined, provide a series of circumstances and actions that may be taken where there is a breach of the terms of the Merchant Agreement.

[41] Mr Hickson submitted that clause 8.5 allows NCB to freeze KAG Limited's bank account based on certain defaults in lieu of termination. In this regard, he highlighted clauses 8.6 (b) and 8.6 (d), which set out positions relevant to the matter in case of default. These clauses state that:

> *"8.6 An Event of Default shall occur if:*
>
> *(a) …*
>
> *(b) The Merchant fails to observe or perform any obligation of the terms and obligation contained herein or any rule issued by the Bank from time to time.*
>
> *(c) ...*
>
> *(d) The Bank feels unsafe or insecure in the manner in which the Merchant is conducting its business."*

[42] In relation to the alleged breach, counsel submitted that KAG Limited was in breach of the expressed requirements of clauses 2.11, 2.12, 2.24 and 2.27 of the Merchant Agreement which deal with off-line transactions, making NCB feel unsafe or insecure in the manner in which it was conducting its business.

[43] He argued that the Merchant Agreement provides that if the point-of-sale terminal does not function or the authorisation system is offline, KAG Limited must take an imprint of the customer's bank card when it calls for voice authorisation. Clause 2.11 further requires that the manual imprint includes the customer's bank card number, the expiry date, the cardholder's name, the transaction date,

and the amount. None of this, he said, was done by KAG Limited with respect to the impugned transactions.

[44] Mr Hickson further argued that pursuant to clause 2.12 of the Merchant Agreement, once the point-of-sale terminal is offline, the Merchant (KAG Limited) shall key enter the transaction into the point-of-sale terminal in such a manner as may be designated by NCB. This, too, was never done by KAG Limited.

[45] With respect to clause 2.24 of the Merchant Agreement, counsel submitted that KAG Limited is required to forward information obtained under clause 2.22 to NCB. This includes written approval from NCB, written authorisation from the cardholder in a form acceptable to NCB and bearing the signature of the cardholder, and indemnify NCB for any claim or charge back by the cardholder. This was also never done.

[46] Concerning clause 2.27, counsel argued that KAG Limited was required to establish a Floor Limit from time to time and where a cardholder desires to purchase within a calendar day over that amount, request authorisation from NCB and, if received, record the authorisation code obtained from NCB. Again, he argued that KAG Limited failed to adhere to this clause.

[47] Mr Hickson also contended that transaction codes were fraudulently produced and used to process the transaction. He asked the court to have regard to the affidavit of Mr Glaves dated June 6, 2023, where NCB had highlighted in a letter the relevant transactions which shows that four of the transactions were without authorisation code. Two were termed “fraud card present”.

[48] Counsel argued that on a careful assessment of the Merchant Agreement, in particular clauses 8.3, 8.5 and 8.6, there was nothing to prevent the bank from exercising its contractual right to terminate or freeze the account in circumstances where it would be clear that the manner of how KAG Limited conducted its business, NCB could feel unsafe or insecure mainly due to KAG

Limited's failure to observe or perform the terms and obligations contained in the Merchant Agreement.

[49] Accordingly, Mr Hickson submitted that there is no serious issue to be tried as the contractual obligations and rights contained in the Merchant Agreement expressly permitted the action taken by NCB when it froze the account.

[50] Concerning the issue of chargeback, Mr Hickson argued that this did not arise as there was a clear breach of the contractual obligation by KAG Limited. He further highlighted that the circumstances of **Chagod Tours Ltd** are different. He submitted that **Chagod Tours Ltd** was not a case dealing with a breach of contract as was with the circumstances of the instant case where there was a breach of the terms of the Merchant Agreement by KAG Limited. He further submitted that there was also a significant difference in the monetary sums involved in each case as in the instant case, even with a freeze on the account, there was still a deficit of approximately 20 million dollars.

[51] Regarding whether a floor limit was established, Mr Hickson submitted that it was and directed the court to clause 7.17 of the Merchant Agreement, which states that the floor limit was zero. He further reiterated that KAG Limited must contact NCB before processing the transactions.

[52] Finally, Mr Hickson submitted that in light of NCB exercising a contractual right, KAG Limited's claim for breach of contract and negligence, and its contending that NCB acted in bad faith, does not raise serious issues to be tried.

[53] In determining whether there is a serious issue to be tried, I must consider whether NCB's freezing of KAG Limited's bank account is a construction that can reasonably be applied under the Merchant Agreement. NCB is contending that there was a breach of contract, and KAG Limited has conferred on them a contractual right to either freeze or terminate the account once the default is provided for in the Merchant Agreement.

[54] There is no doubt that NCB has certain statutory obligations that are established under the BSA, the Bank of Jamaica Guidelines ("BOJ Guidelines"), and the POCA, which affects its financial integrity and viability. However, while knowledge of that fact is useful, ultimately, the scope and extent of that obligation may be a necessary determination at the trial of the claim.

[55] At this stage, my focus is whether there is a serious issue to be tried and whether NCB had a proper basis or bases to act in the manner it did and freeze the account. In arriving at a decision, I must have regard to the contractual relationship between the parties as set out in the Merchant Agreement. Therefore, this court must closely examine the Merchant Agreement, described by Mr Cheverria, as the 'bedroot' of the relationship between the parties and which is the source of the complaint that gave birth to this application. The Merchant Agreement has several vital clauses. I have carefully assessed them and paid keen regard to those highlighted by the parties.

[56] I must state, at this juncture, that the relationship between the parties is, without a doubt, purely contractual, being that of a banker and customer relationship governed by the Merchant Agreement. Therefore, no fiduciary duty was owed by NCB to KAG Limited. On this point, I take guidance from the authorities cited by the parties and from Sykes J (as he then was) in **JMMB Merchant Bank Ltd v Winston Finzi and Mahoe Bay Company Ltd [2014] JMCCCD 10**. At paragraph 18 of that case, Sykes J opined that there is no presumption of fiduciary duty in a banker and customer relationship. This was so because a lender and a debtor from the commencement of the relationship have two different interests. Therefore, in the instant case, the action taken by NCB was not intended to be related to such a duty. In this regard, I cannot agree that the parties are in a fiduciary relationship of debtor-creditor and between it and its customers under demand deposit obligation.

[57] This court accepts that it cannot be an issue for serious debate that the agreement between the parties concerning offline transactions is contained in

clauses 2.11, 2.12, 2.24 and 2.27. Equally, clauses 8.3, 8.5 and 8.6 in the Merchant Agreement unambiguously provide an alternative course of action that can be taken instead of resorting to termination when there is a breach or otherwise.

[58] Based on the evidence before me, NCB contends that its internal system alerted it to several irregular transactions concerning KAG's Limited bank account, and that funds in excess of $43 million were processed and credited to KAG's Limited account using transaction codes that were not generated and did not have the required authorisation.

[59] This court observes no direct response from KAG Limited through affidavit evidence to the assertions regarding the use of fraudulent codes, how they were generated and the non-authorisation of these offline transactions by NCB. This is not an act done or alleged to be related to a third party; it is said to be done by KAG Limited. KAG Limited by virtue of clauses 2.11. 2.12, 2.24 and 2.27 of the Merchant Agreement agreed with NCB to follow specific protocols concerning offline transactions. The basis of the complaint regarding these clauses is in the affidavit of Mr Nicholson at paragraphs 11, 12, 13, and 14.

[60] I have looked carefully at clauses 8.3, 8.5 and 8.6. Clause 8.5 sets out the reason for termination, suspension and freezing of the account and other actions that can be taken. There is no utility in repeating those provisions at this time.

[61] I also considered Mr Cheverria's strident submissions concerning clauses 7.32 and 7.33, which deal with chargebacks. I find that the issue relating to chargebacks is distinct and not relevant in the context of the action taken by NCB. Chargeback in the contract is given a meaning. The definition section of the Merchant Agreement states that "Chargeback shall mean a reversal by the bank against the merchant in whole or in part of the dollar value (financial obligation) represented by a given transaction whereby the liability for such transaction reverts to the Merchant."

[62] In this case, the conduct was allegedly directly done by KAG Limited and in circumstances where the contract had clear rules regarding offline transactions. The required activities to be done by NCB included issuing the code and giving prior authorisation. Based on the evidence before this court, KAG Limited did not make contact with NCB before carrying out these transactions. NCB has termed the activities to be fraudulent. There is an allegation of a criminal act committed by KAG Limited, which NCB's internal monitoring system flagged. This monitoring system assists NCB in managing its risks in keeping with the BOJ Guidelines and statutory requirements.

[63] It has been put forward that NCB deemed itself unsafe or insecure. This is based on how KAG Limited was conducting its business, and it is believed that the transactions by KAG Limited could constitute or be related to money laundering. These concerns were fully outlined in Mr Dane Nicholson's affidavit at paragraphs 11 and 12. As observed earlier, no response was provided by KAG Limited concerning the allegations. However, this court finds that even without such a response, the action taken by NCB is conferred by the contractual obligations set out in the Merchant Agreement in clauses 8.3, 8.5 and 8.6.

[64] On the court's evaluation of clause 8.5, it is clear that NCB can proceed to freeze the account instead of acting on its contractual right to terminate. In looking at the Merchant Agreement as a whole, I agree with Mr Hickson that it is reasonable to infer that the Merchant Agreement confers the action taken by NCB.

[65] Additionally, I agree with Mr Hickson that the facts of the case of **Chagod Tours Ltd** are different, so reliance on it must be done with caution and full appreciation of the specific facts of each case. In **Chagod Tours Ltd**, the allegations were that the actions were done by third parties. There was no assertion of a breach of contract. There are also other circumstances in this case that are factually different from **Chagod Tours Ltd**.

[66] I have found clauses 7.32 – 7.36 to be irrelevant. The concern is about business practices intrinsic to KAG Limited and not in relation to chargebacks. This matter goes to the root of the actions or practices by KAG Limited that are not in keeping with the contractual obligations between the parties that could constitute activities that may potentially expose NCB to consequences contrary to its responsibility under the BOJ Guidelines and POCA. Nonetheless, these issues may require exploration at a trial.

[67] There were lengthy and detailed submissions regarding the meaning and importance of the term "deemed insecure or unsafe" in relation to NCB. Mr Cheverria vehemently submitted that the terms were not defined and, in those circumstances, raised a serious issue to be tried. I can't entirely agree with that submission. This court accepts that the terms are not defined. However, on a careful assessment of the clause, the terms insecure or unsafe must be given their ordinary dictionary meaning and must be read and looked at in the context of the alleged conduct of KAG Limited and the manner in which it was conducting its business in light of their contractual obligation as laid out in the Merchant Agreement. This court finds that it can be reasonably inferred as a breach of contract, and the action taken to freeze the account can be reasonably construed from the contract.

[68] KAG Limited also expressly agreed with NCB in clause 8.5 that NCB may terminate or, instead of termination, suspend or freeze upon the occurrence of an event of default, which includes where the bank deems itself insecure concerning KAG Limited's business or if it fails to observe or perform any of the terms and obligations contained in the Merchant Agreement or any of the rules issued by NCB from time to time.

[69] The actions taken by NCB are ones which KAG Limited has authorised once there is a breach of the Merchant Agreement or when NCB deems itself insecure or unsafe as to any risk it is exposed to by KAG Limited's conduct of its business,

in light of its contractual agreement, which is likely to jeopardise NCB's regulatory obligations**.**

[70] Additionally, Mr Cheverria has submitted that there is nothing in the evidence to show that NCB has deemed itself insecure or unsafe. Mr Hickson, in submitting on this issue, stated that it is evident in the mathematical calculation. He further submitted that the amount in the account accepted by KAG Limited is $23 million dollars, and the total fraudulent transaction is $43 million dollars. Mr Hickson asked the court to have regard to clauses 7.8 and 7.9, which I did. He further submitted that if NCB applied the chargebacks, it would be in a deficit of $20,000,000.00. He noted that there are not enough funds in KAG Limited's bank account to satisfy a chargeback. He submitted this is a crucial distinction between KAG Limited's case and **Chagod's Tours Ltd**. He contends that NCB would be insecure in relation to those transactions amounting to $43 million dollars. On this point, this court is in agreement.

[71] Based on the foregoing, I do not find that there is a serious issue to be tried.

The Constitutional and POCA Point

[72] Mr. Cheverria submitted that KAG Limited's right to be heard was denied when NCB acted the way it did and froze KAG Limited's account. He argued that the Constitution guarantees natural and juristic persons this fundamental right. He further argued that this breach of KAG Limited's constitutional right is a fundamental rule of law in sections 13(2),15(2),16(5), and 16(3) in the Charter of Fundamental Rights and Freedom (the "**Charter**"). The guarantee of this right means that KAG Limited ought to know the case against it and be allowed to respond to the allegations. In this regard, he said, it raises a serious issue to be tried.

[73] He further contended that NCB breached KAG Limited's right to be heard by not giving it notice of the allegations against it. Counsel contended that notices were only given after the matter was placed before the court. He noted that section

97.2(1)(c) of the POCA would have allowed them to be protected. They could have provided disclosure to the attorney-at-law for seeking legal advice and would not be in breach of the POCA.

[74] Mr. Hickson submitted that an alternate remedy in damages is available if there was a breach of KAG constitutional rights. He pointed to section 19(4) of the **Charter**. He further argued that a case of constitutional breach could not be made out against NCB as the case for both parties is that KAG Limited had been invited to a meeting and denied that invitation. He relied on Clause 12 of the Merchant Agreement, which expressly stated that it would first submit itself to any dispute arising out of the agreement to mediation. Having not exhausted the remedy provided for in the contract, Mr Hickson submitted that KAG Limited cannot now allege that there was a breach of its right to be heard by NCB. He, therefore, contended that there is no serious issue to be tried regarding the constitutional point.

[75] The Merchant Agreement conferred the right to be heard whenever a dispute arises pertaining to any dispute or breach of it. The provision is found at clause 12. KAG Limited did not use it. Clause 12 states that:

> *"12. Dispute Resolution*
>
> *The parties will use their best efforts to negotiate in faith and settle any dispute arising out of or relating to this Agreement or any breach of it. If such dispute cannot be settled amicably through direct discussions with the parties, it is agreed that the parties will endeavour in faith to settle such dispute by mediation conducted by the Dispute Resolution Foundation or any other mediation referral body provided by the rules of the Supreme Court of Jamaica, in accordance with, to the extent that same is not in conflict with the provision of this clause 12, rules, regulations and or Practice Directions of the Supreme Court of Jamaica in relation to mediation, subject to any replacement or amendment thereof.*
>
> *…*
>
> *If the parties fail to reach agreement at such mediation, such failure shall be without prejudice to the rights of any party subsequently to refer any dispute or difference to litigation but the parties agree that before resorting to litigation mediation in accordance with this clause 12 shall have taken place."*

[76] The Merchant Agreement confers a right for the parties to meet outside court proceedings. Mr Glaves was called to a meeting within 24 hours. Equally, the Merchant Agreement has another layer to settle any dispute by mediation conducted by the Dispute Resolution Foundation or any other mediation referral body provided by the rules of the Supreme Court of Jamaica. KAG Limited has not exercised the right. Having failed to exercise such a right, KAG Limited cannot now come and complain.

[77] Further, the introduction of section 97.2(1)(c) is extraneous to these proceedings. The interpretation, as advanced by Mr. Cheverria, is misconceived and irrelevant with respect to my determination at this stage. The above provision is a defence to tipping-off allegations made under the POCA. The action by NCB was taken purely on the premise that the Merchant Agreement was breached. It, therefore, has its foundation in breach of contract and not a criminal investigation. Even so, if this matter were a criminal investigation, the obligation to disclose under section 97.2(1)(c) of the POCA would not be KAG Limited's or its attorney-at-law.

[78] Therefore, I do not find that there is any serious issue to be tried with respect to the provisions of the Constitution or the provisions under the POCA.

The Banking Services Act (BSA)

[79] With respect to the **BSA**, Mr Hickson has contended that KAG Limited has failed to identify or establish the basis of its assertion that NCB breached any provision of the **BSA**. He argues that NCB acted entirely consistent with its duties and obligations under the BSA and the Merchant Agreement and, thus, there is no serious issue to be tried with respect to its obligations under the BSA. I agree.

Whether damages would be an adequate remedy

[80] If I am wrong in concluding that there is no serious issue to be tried, I will briefly deal with this second issue for completeness.

[81] Mr Cheverria contends that damage would not be an adequate remedy and would be pyrrhic to KAG Limited if he succeeds at trial and the court did not grant the injunction. He asks the court to have regard to paragraphs 11 and 12 of Mr Glaves' affidavit filed on May 8, 2023, and paragraph 11 of the affidavit filed on June 6, 2023. In relying on Batt J's pronouncement in **Chagod Tours Limited**, he argued that "no *money damages, as with Humpty Dumpty, will be able to put this business back together again."*

[82] Counsel went on to submit that if KAG Limited business survives, the lost credibility and goodwill from disgruntled customers and creditors would be incalculable. On the other hand, he further submitted that if NCB is successful, they will still have the option of reimbursement from money held for these purposes.

[83] Mr Hickson pointed out that KAG Limited has not placed before this court any evidence that it would be in a financial position to satisfy an undertaking in damages should it ultimately be proved that the injunction ought not to have been granted. He relied on the **American Cyanamid,** page 510, to support his point. He further submitted that in none of the affidavits or the amended application was it disclosed. In this regard, he submitted that, procedurally, the application is defective and would not be in keeping with rule 17.4(2) of the CPR.

[84] Mr Hickson further contended that KAG Limited case is weak in light of the contractual obligation entered into, its failure to provide evidence of an undertaking as to damages, and the fact that there is evidence that it can obtain alternative banking services. The proof of this, he argued, was seen in their financial statement, which showed that they had banking relations with other banks.

[85] KAG Limited has quantified its operational cost for approximately $800,000.00 and has stated that it obtained a loan for $950,000.00 at 10% to offset its

expenses. This is adequate evidence that it can obtain financing to cover its operational costs pending the trial of this matter.

[86] In this court's view, any financial loss to be suffered by KAG Limited is quantifiable, and damages would be an adequate remedy if KAG Limited were to succeed at trial. It is also not lost on this court that, to date, KAG Limited has not demonstrated to the court that it is able to pay damages to NCB if the application for an interim injunction were to be granted and NCB was the successful party at trial. Rule 17.4(2) of the CPR is clear that unless the court otherwise directs, a party applying for an interim order under rule 17.4 must undertake to abide by any order as to damages caused by the granting or extension of the order. This court did not waive such a requirement. Mr. Buchanan, for KAG Limited, said that it was an oversight. The authorities are clear, and in light of the contractual obligations between the parties, I do not form the view that KAG Limited has a strong case in its favour. Therefore, proof of an undertaking as to damages is necessary.

[87] I further find that, if NCB's allegations against KAG Limited are true, the reputational damage to NCB could be significant. This means that KAG Limited would need to show that it is able to compensate NCB adequately, should NCB succeed at trial. Therefore, damages would be an adequate remedy in this regard.

Whether the balance of convenience lies in favour of granting the injunction

[88] Even if damages would not be an adequate remedy for KAG Limited, which I believe in this case it is, for completeness, I will also go on to examine the balance of convenience to determine in whose favour the granting or refusing of the application for an interim injunction should lie. I must consider the overall justice of the case and take the course that would result in the least irreparable prejudice or harm to one party or the other.

[89] Mr Cheverria contends that if KAG Limited continues to be unable to access to its bank account, it will be unable to cover its bills and pay its employees.

[90] Mr Hickson argued that having considered the questionable circumstances that led to KAG Limited's account being frozen, NCB is at risk of being exposed to legal actions from its regulatory bodies and damages to its reputation. He also submitted that imposing an interim injunction would expose NCB's reputational risks vis-á-vis its regulator, corresponding banking partners and the wider public. He further contended that as a business in the regulated sector, NCB would be exposed to legal action under section 94 of the POCA, where it failed to take steps in circumstances where it believes that KAG Limited has engaged in transactions that could constitute money laundering.

[91] At this juncture, I remind myself of the decision of **NCB v Olint**, where at paragraph 21, which was also relied on by Mr Hickson, the Board held that:

> *"Their Lordships consider that this type of box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction. Factors which the court might have taken into account in this case if there had been a triable issue were, first, that the injunction required the bank to continue against its will to provide confidential services for the plaintiffs; secondly, that the injunction would require the bank to continue to incur reputational risks and possible exposure to legal action; thirdly, that it was by no means clear that the plaintiffs would be able to satisfy a claim under the cross-undertaking in damages; fourthly, that the plaintiffs' case was, even if not (as their Lordships think) hopeless, certainly very weak, and fifthly, that the plaintiffs could no doubt have obtained alternative banking services from any bank, they could persuade that they were not running a fraudulent scheme. It is unnecessary to say what should have been the outcome of a weighing of these factors because that was a matter for the discretion of the judge, but they suggest that, even if there had been a serious issue to be tried, it is by no means obvious that Jones J was wrong to refuse an injunction.*

[92] It is necessary to consider which party stands to suffer the greater prejudice if this injunction is granted or refused. When viewed as a whole, the balance of convenience rests in favour of NCB, which has a greater responsibility to oversee

suspicious transactions and its statutory obligations as a business in the regulated sector.

[93] I find that it would be easier for KAG Limited to avoid injustice if it complies, meets with NCB, and provides information and explanations as asked. NCB did not terminate the service; instead, it froze the account in keeping with the Merchant Agreement and sought to discuss actions that make it insecure and unsafe in light of KAG Limited's manner of conducting its business.

[94] I find KAG Limited's case not to be a strong one in light of its contractual obligation as contained in the Merchant Agreement, which underpins its relationship with NCB and how the business was being conducted.

[95] Equally important, KAG Limited has yet to place before this court clear evidence that it will be able to satisfy a claim under the cross-undertaking in damages.

[96] Finally, based on the evidence before me, KAG Limited has shown that it can obtain alternative banking services from another bank. It has exhibited a financial statement which shows that it has a banking relationship with two other banks.

DISPOSITION

[97] Accordingly, in exercising my discretion concerning this application, I made the orders as outlined in paragraph 2 in the final disposition of it.

Maxine Jackson
Puisne Judge (Ag)