JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2022CV00073

APPLICATION NO COA2022APP00143

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**APPLICANT**
AND	**CHAGOD TOUR JAMAICA LIMITED**	**RESPONDENT**

Mrs Sandra Minott-Phillips QC and Mrs Gina Phillipps Black instructed by Myers, Fletcher & Gordon for the applicant

Mrs M Georgia Gibson Henlin QC and Ms Tamiko Smith instructed by Smith, Afflick, Robinson & Partners for the respondent

26, 27 and 29 July 2022

IN CHAMBERS

LAING JA (AG)

[1] This is an application by National Commercial Bank Jamaica Limited ('NCB'), for a stay of execution of the judgment of Batts J, the learned trial judge ('LTJ'), delivered on 23 June 2022 (neutral citation number [2022] JMCC Comm 20). The stay is sought pending the hearing and determination of the appeal of the said judgment or until further order of the court. The application also requests an order that costs of the application be costs in the appeal. On 4 July 2022 an interim stay of execution of the judgment, was granted by P Williams JA until the *inter partes* hearing of the application on 26 July 2022. On 27 July 2022, I made an order extending that stay to the date of the handing down of my decision.

Background

[2] NCB and the respondent, Chagod Tours Jamaica Limited ('Chagod'), have a contractual relationship of banker and customer. NCB provides banking services pursuant to a banking services contract. NCB also has a Point of Sale ('POS') Merchant Services Agreement with Chagod, pursuant to which credit card transactions billed by Chagod, would be credited to Chagod's accounts at NCB. Between December 2021 and April 2022 there was a significant increase in the number of fraudulent transactions reported by credit card issuers in respect of allegations of fraud perpetrated on their cardholders, connected to Chagod's business. This was effected by the cardholders being billed for services they had not requested or received. This resulted in NCB, on 2 May 2022, suspending the operation of the POS merchant services it had extended to Chagod, and freezing Chagod's bank accounts.

[3] On 16, 20 and 23 June 2022, the LTJ heard an emergency notice of application for interim remedy filed by Chagod seeking, among other things:

> ".. An Order that the Respondent is required to release all sums in the Applicant said bank accounts above and beyond USD $415,540.13."

The court also heard Chagod's notice of application to vary court order and refer the matter to mediation.

[4] Chagod complained of a breach of contract and negligence. In support of its application, it asserted that because NCB had frozen all three of its bank accounts, it could not pay its staff or business expenses. It further averred that the only issue raised by NCB were "chargeback" issues in relation to questioned transactions, in respect of which it had given adequate explanations.

[5] The LTJ made certain orders and NCB is appealing the following order:

> "The Defendant shall forthwith release all sums in the Claimant's accounts No. 305326941, 305326933 and 301463499 which is [sic]

> over and above USD$600,000 until Trial of the action or further Order of the Court."

[6] Ground (1) of NCB's grounds of appeal, set out in the notice of appeal filed 1 July 2022, is as follows:

> "The learned Judge below erred in finding that the first limb for the grant of interlocutory injunctive relief (that there be a serious issue to be tried) was satisfied at a time when the issues were not defined because the Appellant's Defence was not before the court and the time stipulated in the Civil Procedure Rules for the appellant to file its Defence had not run."

[7] Ground (2) of the appeal asserts that the LTJ in addressing his mind to the balance of convenience, and the course likely to cause the least irremediable prejudice to one party or the other, erred in concluding that it favoured Chagod. A number of reasons are proffered, in support of this ground. The essence of these reasons, whether singly or collectively, is that the LTJ failed to appreciate that NCB had a contractual as well as a statutory basis to have frozen the accounts. This ground can also be considered to be relevant to ground (1).

[8] Rule 2.10(1)(b) of the Court of Appeal Rules, 2002 ('CAR') provides that a single judge of this court has the power to grant a stay of execution, pending the determination of an appeal. The applicant for a stay must first establish that his appeal has a real prospect of success and in this case NCB is asserting that the LTJ did not correctly apply the law relating to the grant of an injunction, in arriving at the order he made.

The relevant law related to the grant of injunctions

[9] There is no dispute between counsel for the parties as to the law relating to the granting of an injunction as has been clearly identified in the House of Lords case of **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504 ('**American Cyanamid**') and applied more recently in the case of **National Commercial Bank Jamaica Ltd v Olint Corpn Ltd** [2009] 1 WLR 1405 ('**NCB v Olint**'). The primary issues for consideration can be conveniently summarised as follows:

(a) Whether there is a serious issue to be tried;

(b) Whether damages are an adequate remedy for either party; and

(c) Where does the balance of convenience lie.

As Lord Diplock established in **American Cyanamid**, what the claimant needs to do to in order to show that there is a serious question to be tried, is to establish to the satisfaction of the Court "that the claim is not frivolous or vexatious" (see page 510d).

The submissions on behalf of NCB

[10] Mrs Minott-Phillips QC submitted that it is imperative that the court understands the process which is invoked when a cardholder asserts that his credit card was used in an unauthorized manner by a third party. The term 'chargeback' is relevant to these proceedings and in the Universal Terms and Conditions Merchant Agreement dated 8 April 2021 between NCB and Shago Tours Ltd, a name by which Chagod was previously registered, ('the Agreement') it is defined at clause 1 p) as follows:

> "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."

[11] Learned Queen's Counsel explained that, in practice, the bank that issued that credit card ('the Issuer'), will debit NCB's account with the Issuer. NCB will then in turn recoup that sum from the account of the merchant with NCB, to which that disputed sum was credited. The Issuer has a period of four months from the date of a transaction in respect of which its customer complains that there was unauthorised use of his card, to claim recourse against NCB.

[12] Mrs Minott-Phillips has asserted in her submissions that the final date for chargeback claims relevant in this case, is 3 September 2022 and the sum of all those transactions for which claims may be made, is US$5,063,006.00, which greatly exceeds the US$600,000.00 that the LTJ said should remain in Chagod's account as a hedge in

respect of chargebacks being sought by NCB. It was noted that in the affidavit in support of this application for a stay of execution sworn to by Dane Nicholson, he avers that "[r]ecourse demands continue to be made on NCB on an ongoing basis in respect of transactions done by Chagod through its accounts with NCB".

[13] Mrs Minott- Phillips also submitted that NCB was entitled to treat every transaction which comprises the US$5,063,006.00 as a potential chargeback claim. Additionally, NCB has a contractual right of setoff of whatever portion of the frozen sums would ultimately be found to be owing to it by Chagod as a result of the chargeback claims. Queen's Counsel referred to clause 9 of the Appointment of Bankers - Companies agreement (the Banker's Agreement') which provides that:

> "…AND the Company further agrees that the Bank shall be at liberty without any notice to or further or other consent from the Company to apply or transfer any money now or at any time hereafter standing to the Company's credit upon current account deposit account or savings account as aforesaid in payment or in part payment of any such sums of money as may now be or hereafter may from time to time become due or owing to the Bank from or by the Company as aforesaid and that the Bank may refuse payment of any cheque bill note or order drawn or accepted by the Company or upon which the Company may be otherwise liable and which if paid would reduce the amount of money standing to the Company's credit as aforesaid to less than the amount for the time being so due or owing to the Bank from or by the Company as aforesaid."

[14] Mrs Minott-Phillips submitted that NCB had a contractual right to have frozen Chagod's accounts by virtue of clause 8.5 of the Agreement. Clauses 8.3 and 8.4 of the Agreement are also relevant and are reproduced hereunder along with clause 8.5 as follows:

> "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.

> 8.4 Following termination, the Merchant agrees, where applicable, that it will not represent that it honours any Card Organization's Card through participation in the Bank's card system as Merchant.
>
> 8.5 Upon the occurrence of any circumstance which would enable the Bank pursuant to the terms of this Agreement to terminate this Agreement, 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 it deems necessary."

[15] Queen's Counsel indicated that in submissions to the court on behalf of NCB, the LTJ was given some of the reasons, based on evidence before the judge, why NCB deemed itself insecure with respect to Chagod's business. These included the following reasons and others:

> "a. The abundance of documentary material raising the question whether there may be irregular or improper issues involving transactions being conducted by Chagod through its accounts with NCB;
>
> b. Chagod's affidavit evidence that it was considering calling in the US Federal Bureau of Investigation (FBI) in relation to transactions being run through its accounts;
>
> c. Chagod copying its correspondence with NCB to the Financial Investigations Division of the Ministry of Finance (being the Asset Recovery Agency under the POCA);
>
> d. Evidence of Fraud provided by the Visa Fraud Monitoring Programe [sic];
>
> e. the company changing its name 3 times in just over a year and failing to inform the bank of any of those changes of name;
>
> f. Invoices produced by Chagod as being rendered to it where no legal person's name is set out on the invoice;
>
> g. Chagod's list of 'employees' containing the majority of peoples [sic] employed outside of Jamaica that it asserts it needs to pay in Jamaica."

[16] I enquired, during Mrs Minott-Phillips' presentation, as to whether clause 8.5 of the Agreement on which NCB now relies was brought to the attention of the LTJ. Learned Queen's Counsel admitted that it was not specifically identified in oral arguments on behalf of NCB because she was not given adequate time to prepare her submissions, but that the Agreement containing the clause was before the court. Mrs Minott-Phillips subsequently confirmed that counsel for Chagod in fact expressly referred to the provision in their skeleton arguments. She further emphasised that the LTJ, at paragraph [10] of his judgment, indicated that his decision was made on the affidavit evidence and on the respective submissions, and as a consequence, the LTJ ought to be taken to have read the Agreement including clause 8.5.

[17] Mrs Minott-Phillips also submitted that there was a question as to whose money was in the United States Dollar account of Chagod, and if those sums ended up there unlawfully, it ought not to be released to Chagod. It was highlighted that NCB conducts business in a regulated sector which is statutorily restricted by the Proceeds of Crime Act ('POCA'). Therefore, NCB's obligations under the POCA are triggered upon it "having, from information gleaned in the course of its business, reasonable grounds for believing its customer has engaged in a transaction that could constitute or be related to money laundering". Learned Queen's Counsel argued that the facts of this case gave NCB reasonable grounds for having that belief. She admitted that the POCA does not expressly state that the bank has the right to freeze the accounts of the suspected money launderer, but that the effect of part V of POCA is that NCB was prohibited from paying to Chagod the money in its accounts.

The submissions on behalf of Chagod

[18] Mrs Gibson Henlin QC urged the court to consider the issues that were before the LTJ and commenced by referring the court to the notice of application for a stay of execution and the first ground on which NCB is seeking the orders, which is that:

> "1. In the event a stay is not granted the Appellant will lose its right to a set off given to it by the Respondent of funds in its accounts

> over and above US$600,000 to cover liabilities it incurs to the Appellant."

Mrs Gibson Henlin contended that the primary issue on the evidence filed and which was considered by the LTJ had to do with chargeback, and that the crux of the case did not concern the issue of a set off.

[19] Learned Queen's Counsel directed the court to what she contended were important features of the Agreement and posited that by virtue of the provision in clause 7.74 (which is in the nature of an entire agreement clause), it was intended that the Agreement would capture and constitute the whole agreement between NCB and Chagod, in respect of the subject matters it covered. Following on this, it was argued that as a result, NCB should not have recourse to any set off provision contained in clause 9 of the Banker's Agreement, since any set off should be in accordance with the provisions of the Agreement.

[20] Mrs Gibson Henlin highlighted the provisions for chargebacks in clauses 7.32 to 7.36 of the Agreement and noted that it contemplated the provision of an amount by way of deposit by Chagod, which would be used to satisfy any obligations which arose for settlement of any payments for chargebacks, potential chargebacks and adjustments on any transactions made with Chagod. She stated that it was the absence of any specific sum having been inserted in this clause and agreed between the parties, which prompted Chagod to agree to NCB holding a sum of money in order to satisfy those claims, which at the time stood at US$479,940.13.

[21] It was posited by Mrs Gibson Henlin that when the express provisions in the Agreement related to chargebacks are considered, it is clear that the intent of clause 8.5 was not to provide NCB with the right to freeze Chagod's accounts for the purpose of providing a source of funding to cover chargebacks or potential chargebacks. Having regard to this position advanced on behalf of Chagod, it was submitted that although there was a reference to clause 8.5 in the filed submissions of Chagod, the applicability of that clause was not pursued in oral submissions on its behalf. Neither was there any

evidence in the affidavit of Dane Nicholson filed on behalf of NCB, which suggested that the accounts were being frozen on the basis that NCB deemed itself to be insecure in accordance with clause 8.3, and was acting pursuant to clause 8.5.

[22] Mrs Gibson Henlin agreed that the issue of the proceeds of crime was raised before the LTJ but NCB did not expressly state that they had made a report to the appropriate authority and that this was a basis for the accounts being frozen. She submitted that the assertion on behalf of NCB that it could not have confirmed this position with the court because that would have been a breach of the POCA is misconceived, because section 97 of POCA makes a specific exception for communication in legal proceedings. But, in any event, the court must have a supervisory jurisdiction which would entitle it to have access to information which would otherwise not be available to the subject of a report.

[23] Learned Queen's Counsel commended the case of **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 ('**Hadmor Productions**') to the court by way of reminder of the principle that the appellate court should be slow to disturb a judge's exercise of his discretion, save in specified circumstances. She emphasised that it cannot be shown that the LTJ was plainly wrong, and since there is no requirement for leave to appeal the decision of the LTJ, his grant of leave to appeal ought not to be considered in determining whether NCB has a real prospect of success on the appeal.

[24] The gravamen of Mrs Gibson Henlin's submissions was that, if the stay of execution is granted it would cause greater damage to Chagod than will be occasioned to NCB if it is refused, and for that reason the application for a stay of execution should be refused.

Analysis

The defence in contract

[25] NCB argues that it has a real chance of success on its appeal. Ground (1), as previously stated is in the following terms:

> "The learned Judge below erred in finding that the first limb for the grant of interlocutory injunctive relief (that there be a serious issue

> to be tried) was satisfied at a time when the issues were not defined because the Appellant's Defence was not before the court and the time stipulated in the Civil Procedure Rules for the appellant to file its defence had not run."

[26] The LTJ was clear that his decision was made on the affidavit evidence and the respective submissions. He noted that applications for interlocutory relief do not usually require a close of pleadings before being heard and that at no time was any request, for time to respond to affidavit evidence, refused. Even though the defence had not yet been filed, it was quite reasonable for the LTJ to have heard the application. It fell for him to determine firstly, on the evidence before him and in the context of proceedings in which a defence had not yet been filed, whether there was a serious issue to be tried. The LTJ was, therefore, required to have particular regard to the contentions made on behalf of NCB, as to any proper basis or bases on which the accounts had been frozen.

[27] I have noted paragraph [4] of the judgment, where the LTJ stated that:

> "The Defendant for its part does not seriously challenge these assertions [of the claimant]. **The explanation for freezing the Claimant's accounts, does not rely on any alleged breach of contract by the Claimant.** Rather, and I say this respectfully, it relies mostly on unsupported aspersions against the Claimant. Changing the name of a company, having only one US dollar bank account and requesting payment in cash do not together, or separately, amount to evidence of wrongdoing. Defence counsel cited the Proceeds of Crimes Act and relied on sections which impose confidentiality duties and time periods for investigations. The suggestion, not entirely articulated, is that the claimant, or its money, is tainted and that the authorities may have an interest. Alternatively, the suggestion may be, and I put it this way because Queen's Counsel says her client's obligations of confidentiality prevent any clear assertion, that the potential exposure whether to fraudulent claims or otherwise may amount to US$9 million. Hence the need to freeze all the Claimant's accounts." (Emphasis mine)

[28] The LTJ's conclusion, that the explanation by NCB for freezing the accounts does not rely on the alleged breach of contract by Chagod, fails to demonstrate an appreciation that NCB was asserting that it had a contractual right to have frozen the accounts by

virtue of clause 8.5. It is particularly noteworthy, that there is a glaring omission of any reference to clause 8.5 in the judgment.

[29] On urgent applications of this sort, it is very difficult for judges to read through every sentence of every document in order to locate information that may be material in the just disposal of the matter. Although the obligation of counsel arguably is not the same as it is on an *ex parte* application for an injunction, counsel still has a duty to bring to the court's attention important clauses, especially where reliance is being placed on a particular clause. However, ultimately it is the responsibility of the judge to satisfy himself of the legal issues which may be disclosed on written submissions where these are presented to the court and relied upon. Despite the assertion of Mrs Gibson Henlin that clause 8.5 was not highlighted to the LTJ by either counsel in oral arguments, it is undisputed that there was a reference to clause 8.5 in the skeleton argument filed on behalf of Chagod. The failure of the LTJ to make any reference to it, suggests that he either overlooked it, or disregarded it and its possible effect. In either case, the result is that the LTJ failed to properly consider the defence of NCB as raised by clause 8.5 of the Agreement, which was exhibited and comprised a portion of the evidence before him.

[30] *Prima facie*, clauses 8.3, 8.4 and 8.5 are not determinative as to whether NCB was correct in freezing the accounts. The term "deems itself to be insecure with respect to the Merchant's business" is not defined. The question is, therefore, raised as to how that clause is to operate, for example, whether there is a requirement of reasonableness to be imported in its construction. If so, must the insecurity relate to a financial exposure of NCB caused by the merchant's business, or can there be other relevant considerations for example money laundering? To the extent that a financial exposure is contemplated, is there a threshold in terms of a quantum in absolute or relative terms? or is NCB entitled to deem itself insecure with respect to the merchant's business at any level of risk? The scope of the Agreement and in particular the precise meaning of clause 8, will therefore fall for determination by a judge at trial.

[31] However, *prima facie*, the construction placed by NCB as to the effect of clause 8.5 and the right it asserts that this clause has conferred, to freeze the accounts is a construction that can reasonably be applied. At paragraph [6] of his judgment, the LTJ was of the view that on the evidence before him "[Chagod] ha[d] a real prospect of success in its claim that [NCB] is acting in breach of contract when freezing assets worth US$ 3 million, on account of alleged fraudulent activity by a third party, totalling approximately US$400,000". However, had the LTJ considered clause 8 in its entirety, it is possible that it would have affected his conclusion that there is a serious issue to be tried on the claim by Chagod. Clause 8.3 may be relevant in determining whether in the circumstances that existed, NCB was correct in freezing the accounts pursuant to clause 8.5. Accordingly, by extension, it was clearly relevant evidence that the LTJ ought to have considered. This is so particularly when one considers the nature of the claim by Chagod, being breach of contract and negligence.

[32] The appeal of NCB is concerned with the exercise of a LTJ's discretion and the appellate court will only interfere with such as decision where it was based on a misunderstanding of law or evidence; or based on an inference which can be shown to be demonstrably wrong or so aberrant that no judge, mindful of his duty could have reached it (see **Hadmor Productions** at page 1046; **Attorney General v MacKay** [2012] JMCA App 1, at paras [19] and [20]). The failure of the LTJ to have demonstrated that he considered clause 8, and in particular clause 8.5, has led to the reasonable inference that he did not do so, and this has resulted in his decision falling within the exceptions identified in **Hadmor Productions**, more specifically, it suggests that his decision was based on a demonstrable misunderstanding of the defence of NCB. This provides a basis for the Court of Appeal to interfere with the exercise of his discretion, if the position of NCB is accepted on the hearing of the appeal. Accordingly, I have concluded that NCB has a good chance of success on the appeal.

The statutory/regulatory defence

[33] Mrs Minott-Phillips referred to the comments of the LTJ at paragraph [9] of his judgment in support of her submission that he appreciated that NCB may have had a basis for freezing the accounts based on money laundering or the proceeds of crime. The relevant portion is as follows:

> "… If there are circumstances surrounding a transaction, or series of transactions, which justified a report under POCA, the Defendant will have done its duty if it made such a report. Thereafter it is for any relevant third party or agency to act or to intervene. It would be unfair at this interlocutory stage for the court to refuse relief without any evidence of circumstances which would allow for the freezing of the accounts. These circumstances of course could relate to the laundering of money or the proceeds of crime. However, there is no evidence to support such allegations before me. The Claimant has come to this court for relief and relief it shall have. The evidence allows for no other result at this interlocutory stage."

[34] It is patently clear that the LTJ appreciated that there was a defence being asserted which was founded on a statutory/regulatory obligation that extended beyond the mere reporting obligation, but he was unconvinced that there was any evidence to support it before him. The LTJ was also of the view that there was ample time for anyone having an interest in Chagod's funds to articulate that interest. I do not agree that there is a proper basis for a complaint against the decision of the LTJ in this regard.

Damages not an adequate remedy

[35] The LTJ cited the case of **NCB v Olint** and was of the view that damages will not be an adequate remedy. He said at paragraph [7]:

> "… Simply put if this injunction is refused, but the Claimant ultimately succeeds at trial, the victory may be entirely pyrrhic as on the evidence the Claimant and its business may by then have collapsed. No money damages, as with Humpty Dumpty, will be able to put that business together again. Even if its business survived, the loss in credibility and good will (due to disgruntled customers or loss of potential customers) will be incalculable. On the other hand, the Defendant will still have the option of reimbursement from sums held

> on account if at trial it ultimately succeeds. To the extent that there is an unexpressed possibility of a liability, to the state or others for releasing the funds at this time, the Defendant will have an absolute defence as it would be acting pursuant to the coercive order of this court. There can be no liability, in contract or by criminal statute, where the conduct is involuntarily [sic] and pursuant to an order of this court. Therefore, there is adequate relief to the Defendant, in the event at this interlocutory stage I am wrong. Furthermore, the Claimant has suggested that I not release the entire account but allow to be frozen an amount which takes into account the disputed credit card transactions. This is a further hedge and is also supportive of the undertaking as to damages against potential exposure."

[36] It seems to me that the analysis of the LTJ on this limb of the test is sound, especially having regard to the facts before him. NCB is a major institution with significant financial resources. However, as the LTJ indicated, if the business of Chagod fails completely, the damages will be incalculable. Damages would, therefore, not be an adequate remedy.

[37] The LTJ went further to examine the balance of convenience. In his view it favoured Chagod whose business was possibly about to collapse. He noted the assertions of Chagod that staff could not be paid, and that customers and potential customers were dissatisfied. NCB complains about the LTJ's analysis of this issue and that forms the basis of ground (2) of its appeal.

Ground (2) of the appeal - The balance of convenience

[38] NCB is asserting that the LTJ erred in concluding that the balance of convenience favoured Chagod. Having regard to my earlier conclusion that the LTJ may have erred in this assessment of the defence of NCB, and that as a result NCB has a good chance of success in its appeal, there is not much to be gained by an analysis of the submissions in respect of this complaint by NCB.

[39] Nevertheless, it is worth noting if for academic interest only, that, in **NCB v Olint**, helpful guidance as to how the court should approach the determination of the balance

of convenience is contained in the judgment of the court delivered by Lord Hoffman in particular at paragraphs [16] – [18] where he said 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. As the House of Lords pointed out in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.
>
> [17] In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in **American Cyanamid** … :
>
> > 'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'
>
> [18] Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice

> actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

[40] The understanding of the LTJ was that NCB was asserting that its maximum potential exposure was capped at a maximum of approximately US$9,000,000.00 (the figure initially advanced). Although he declared that he did not make any findings of fact, it is clear that in permitting the sum of US$600,000.00 to remain frozen, he placed reliance on the evidence of Chagod as to the then current exposure of NCB "not exceeding US$400,000".

[41] In excluding the sum of US$600,000.00 from the amount to be released to Chagod, the LTJ opined that this would be supportive of the undertaking as to damages against potential exposure. This offers a degree of protection to NCB, almost in the nature of a fortification of the undertaking.

[42] Having considered these issues, I find that the analysis of the LTJ, in respect of the balance of convenience was well reasoned, based on the evidence before him, and in keeping with the guidance offered by **NCB v Olint.** He accepted that Chagod faced the risk of ruin if it did not have access to its funds and adopted a course which in his view seemed likely to cause the least irremediable prejudice to one party or the other.

Conclusion on whether a stay should be granted

[43] I have determined that NCB has a real prospect of success on the appeal due to the failure of the LTJ to have appreciated its possible contractual defence and his failure to have considered clause 8.5 in particular.

[44] Having found that NCB has a real prospect of success on the appeal, it is necessary for me to conduct a balancing exercise to determine the order which best accords with the interests of justice. Phillips JA in **Joycelin Bailey v Durval Bailey** [2016] JMCA App

8 at paragraph [40] considered the principles which a judge should consider in granting a stay as follows:

> "[40] The principles governing the exercise of a judge's discretion to stay the execution of a judgment have been examined in several authorities such as **LinotypeHell Finance Ltd v Baker**, wherein it was stated that two criteria must be satisfied: (i) the applicant must show that she has a good chance of success on appeal, and (ii) that if the stay is not granted she will be finically ruined. That position has been somewhat widened in **Hammond Suddard Solicitors v Agrichem**, where Clarke LJ (as he then was) stated, at paragraph 22:
>
> > '...the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?'"

[45] This court has also repeatedly adopted the observations of Phillips LJ in **Combi (Singapore) Pte Ltd v Sriram and another** [1997] EWCA Civ J0723-9, where, in respect of the balancing exercise which the court has to undertake, he stated the following:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is

> made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice. The starting point must be that the normal rule as indicated by Ord 59, r 13 is that there is no stay but, where the justice of that approach is in doubt, the answer may well depend upon the perceived strength of the appeal."

[46] The principles referred to in these cases have been applied in numerous decisions of this court and learned Queen's Counsel are agreed on the applicable law.

[47] In assessing what order best accords with the interests of justice, I appreciate that there is an obvious risk of harm to NCB if the valid claims by Issuers against it exceeds the sum of US$600,000.00, which the order of the LTJ permits it to continue to hold. If the claims exceed US$600,000.00, NCB would thereby lose any automatic right to a setoff, (whether as provided by clause 9 of the Banker's Agreement or otherwise), and would also lose the right to have recourse to the accounts of Chagod for sums in excess of the frozen amount. NCB would thereby be constrained to pursue other means of recovery which may be difficult, since there is no evidence that Chagod has significant assets in this jurisdiction which could be the subject of enforcement proceedings. The evidence of the extent of its assets outside the jurisdiction is also limited. Furthermore, the undertaking as to damages provided by Chagod is not fortified by a payment into court or otherwise and so there is also a risk that the undertaking, by itself, may not provide adequate protection for NCB if it succeeds on the appeal.

[48] However, NCB's exposure to claims decreases as the deadline of 3 September 2022 for the last of the claims approaches. Its position has been advanced, that its maximum exposure stemming from potential chargeback claims by Issuers, is approximately US$5,063,006. It is significant, however, that this is premised on every single transaction being considered fraudulent and therefore subject to a viable and successful chargeback claim. Based on the historical level of chargeback claims and the commercial realties of an operating business, it appears to be very unlikely that every single transaction will in fact be disputed and become the subject of a chargeback. NCB has asserted that the figure for April which represents the peak month so far is over US$200,000.00.

Accordingly, a figure of approximately US$5,000,000.00 does not appear represent the real level of exposure of NCB. Also noted is that, despite Mr Nicholson's averment that "[r]ecourse demands continue to be made on NCB on an ongoing basis in respect of transactions done by Chagod through its accounts with NCB", this court was not provided with any evidence of the extent of these additional chargeback claims and if they now exceed US$600,000.00.

[49] NCB is a major financial institution which will be able to survive, largely unaffected, even if it turns out that the sum of US$600,000.00 does not cover the chargeback claims arising from transactions processed by Chagod, and if enforcement measures leaves it with a shortfall and a loss which it has to absorb.

[50] On the other hand, there is a real risk that if the stay of execution is granted and the accounts of Chagod remain frozen, the company may face financial ruin arising from its inability to pay its staff, fund its business expenses and generally manage its affairs as a solvent commercial entity, possibilities the LTJ found in paragraph [7] of his judgment to be likely. The reputational damage would also be significant.

[51] Having regard to its right to retain some frozen funds, the refusal of the stay of execution with not result in Chagod receiving the entirety of the primary relief which it has claimed.

[52] If the stay is granted there is a real risk of irremediable harm to Chagod. In assessing what order best accords with the interests of justice, I have arrived at the conclusion that such order is for a refusal of the application for the stay of execution.

Disposal

[53] For the reasons expressed herein I make the following orders:

1. The notice of application for a stay of execution filed 1 July 2022 is refused.

2. Costs of the application are costs in the appeal.

3. The application for a stay of execution until the hearing of an application by the court to vary or discharge the orders herein, is refused.