[2024] JMCC Comm 44

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2022CD00309

BETWEEN	**FITZ JACKSON**	**CLAIMANT**
AND	**THE BANK OF NOVA SCOTIA JAMAICA LIMITED**	**DEFENDANT**

IN CHAMBERS IN PERSON

Mr. Anthony Williams, Ms. Annette Henry & Ms. Alea Richards instructed by Usim Williams & Co for the Claimant

Mr. Maurice Manning KC and Ms. Allyandra Thompson instructed by Nunes, Scholefield, Deleon & Co. for the Defendant.

Mr. Sundiata Gibbs & Ms. Timera Mason instructed by Hylton Powell for the Bank of Jamaica

Ms. Nerine Small, Mr. Everol McLeod and Ms. Catherine Williams instructed by the Director of State Proceedings for the Attorney-General of Jamaica

Heard: 28th February and 15th November 2024

Civil Procedure – Civil Procedure Rules - Summary Judgment – Bills of Exchange Act – Whether any branch of a bank may be considered the Drawee Bank – Rights of Payee – Rights of Payee viz Collecting Bank - Banking Services Act/Regulation - Whether Bank may charge fees for services

BROWN BECKFORD J

INTRODUCTION

[1] I shall point out at the beginning that this judgment will not be some grand treatise on the lawfulness of fees charged by the banks for their services offered to their

customers and to the public. The Court is of course aware of the public interest in the outcome of this case. It is understood that the true gravemen of the case lies, not in the return of the relatively paltry sum of Three Hundred and Eighty-Five Jamaican Dollars **(JM $385.00)**, but in the potential impact of the declarations sought on the banking industry, should they be granted.

[2] The Claimant, Mr. Fitz Jackson, is the Member of Parliament for the Saint Catherine South Division. The Court takes judicial notice that Mr. Jackson has been a public advocate against some of the fees charged by the banks. The Defendant, the Bank of Nova Scotia Jamaica Limited **("BNS")**, is one of the largest commercial banks in the country, with a branch network across the island of Jamaica.[1]

[3] Mr. Jackson claimed that BNS, in requiring him to pay a fee for the encashment of a cheque presented for payment at one of its branches, breached the **Bills of Exchange Act ("BEA")**, and is seeking declarations to that effect.[2]

[4] BNS, in response, argued that it was entitled to charge the encashment fee, which was a standard industry practice. Moreover, Mr. Jackson failed to properly present the cheque when he presented it at the Portmore Branch instead of the Half Way Tree Branch on which the cheque was drawn.

[5] Mr. Jackson contended that once BNS admitted to charging the fee, then the cheque became conditional and the sum uncertain. Therefore, there was no valid defence to the claim that it acted in breach of the **Bills of Exchange Act**. This would thus entitle Mr. Jackson to judgment in his favour. Mr. Jackson has therefore made this application for Summary Judgment.

[6] Upon the Application for Court Orders made by BNS, the Court, by Order made on 17th Novemeber 2023, invited the The Bank of Jamaica, **("BOJ")**, a body with supervisory and regulatory oversight of commercial banks in Jamaica, and The Attorney General of

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[1] **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** [2009] UKPC 16
[2] Power of the Court to grant declarations

Jamaica **("AG")**, the legal advisor to the Government of Jamaica, to make submissions in the matter. This was based on the implications that this decision could have on the wider banking industry. The potential for the wider implication of this decision was recognized in **National Westminister Bank v Spectrum Plus Limited and Others** [2005] 2 AC 680 **("NATWEST")**,[3] where the court said:

> *To promote a desirable degree of consistency and certainty about the present state of 'the law', courts in this country have long adopted the practice of treating decisions on a point of law as precedents for the future. If the same point of law arises in another case at a later date a court will treat a previous decision as binding or persuasive, depending upon the well-known hierarchical principles of 'stare decisis'.*

[7] This was also the view of Batts J for the Full Court in **James, Rohan and Murphy, Nigel (on behalf of the members of the Jamaica Police Federation et al v Ministry of Finance and Public Service, Commissioner of Police and the Attorney General** [2022] JMFC Comm 13 **("James")**, where he stated,[4] *"…a declaration, either of law or on the interpretation of an instrument, although unenforceable may have implications for others who are not parties to the proceedings."*

[8] The Parties have all agreed that there is no dispute on the material facts, the overriding issue being a question of legal interpretation which renders this case suitable for Summary Judgment. Counsel for Mr. Jackson is correct in that this Court is venturing into somewhat new territory, there being no decided cases on the specific issue in this claim.

[9] I am grateful for the submissions made, in writing and orally, which have greatly assisted the Court. Failure to refer to any aspect does not negate its importance to the Court in analyzing the issues. After full consideration of the arguments and authorities, the Court is constrained to find that Mr. Jackson's case has no reasonable prospect of success. Pursuant to **Rule 15 (a) of the CPR**, Summary Judgment is granted in favour of BNS.

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[3] [2005] 2 AC 680, para 5
[4] [2022] JMFC Comm 13, para 6

BACKGROUND

[10] The parts of Mr. Jackson's Claim Form and Particulars of Claim material to this Application, are set out below:

Amended Claim Form

> *The Claimant, **Fitz Jackson**, a Member of Parliament, whose address is Naggo Head, Portmore, in the parish of St. Catherine, claims against the Defendant, The Bank of Nova Scotia Jamaica Limited, whose registered office is situate at the Corner of Duke & Port Royal Streets in the parish of Kingston, for failure to negotiate a cheque/negotiable instrument/bill of exchange to wit: a Bank of Nova Scotia Jamaica Limited Cheque bearing **No. 001426** dated the **3rd May 2019** for the sum of **Two Thousand Five Hundred Dollars ($2,500.00)** and drawn by Ms. Delaine Morgan (a customer and account holder of the Defendant Bank) on Chequing Account # 396214 payable to the Claimant but upon the Claimant presenting the said cheque /negotiable instrument/bill of exchange for encashment on the 3rd May 2019 at the Defendant Bank, The Bank of Nova Scotia Portmore Branch for the full sum specified on the said cheque, the Defendant through its servants and/or agents of the said Portmore BNS Branch, informed the Claimant that the policy of the Defendant Bank is that unless and/or until he (the Claimant) pays a bank fee/encashment fee of **Three Hundred and Eighty-Five Dollars ($385.00)** in cash or allow the Defendant Bank to deduct the said bank fee /encashment fee of $385.00 from the amount specified on the said cheque /negotiable instrument/bill of exchange on the Defendant Bank will not encash same.*
>
> *That the Claimant paid the said bank fee/encashment fee of **$385.00** to the Defendant Bank, Portmore Branch under protest to encash the said cheque and was issued a receipt for same and cash in the sum of **Two Thousand One Hundred and Fifteen Dollars ($2,115.00)** which is less than the sum specified on the said cheque/negotiable instrument/bill of exchange to be paid by the Defendant Bank as ordered or instructed by the drawer of the said cheque for the Defendant Bank to pay unconditionally to the order of Mr. Fitz Jackson the specified sum on the said cheque and in contravention of the provisions of the Bills of Exchange Act.*

Amended Particulars of Claim

> *9. PARTICULARS OF BREACH*
>
> *I. Failing and/or refusing and/or neglecting to pay the Claimant the full sum of Two Thousand Five Hundred Dollars ($2,500.00) as specified on the said cheque/negotiable instrument/bill of exchange whereby the Claimant received the net sum of Two Thousand One Hundred and Fifteen Dollars ($2,115.00)*

II. Imposing a bank encashment fee or charge of Three Hundred and Eighty-Five Dollars ($385.00) as a stipulation /requirement to the Claimant in order for the said cheque/negotiable instrument/bill of exchange to be encashed and thereby changing the quality of the said cheque/negotiable instrument/bill of exchange whereby the said cheque became a qualified conditional order instead of an unqualified, unconditional order payable on demand, ordered or instructed by the drawer to the Defendant Bank to pay the full sum specified on the cheque.

III. Imposing a bank fee/encashment fee for the encashment of the said cheque/bill of exchange so as to cause the provisions of the Bill of Exchange Act to be subordinate to the Defendant Bank's unilateral, arbitrary and capricious policies it imposes for a cheque to be encashed.

IV. Failing and /or refusing and /or neglecting to honor its obligation to settle on demand and unconditionally, the face value of the said cheque/bill of exchange/negotiable instrument by paying the Claimant a lesser sum than that specified on the said cheque.

V. Failing and/or neglecting as a banker and drawee of the said cheque/negotiable instrument to honour a negotiable instrument in contravention of it's obligations under the Bills of Exchange Act.

[11] In its Further Amended Defence, BNS pleaded:

5. In response to paragraph 5 of the Claimant's Amended Particulars of Claim, the Defendant will say as follows:

(a) The Defendant admits that the Claimant presented a cheque for encashment to the Defendant's BNS Portmore Branch .

(b) It is customary for banks in Jamaica and in other jurisdictions to charge a fee for encashment of cheques at the counter.

(c) In accordance with the custom which exists in Jamaica, it was the Defendant's policy to levy a fee where cheques are presented for encashment by a payee at the counter. At that time, the payee could choose to pay the fee to facilitate immediate encashment of the cheque or lodge same with the Defendant bank, if he had an account, or his own bank.

[12] By this Application Mr. Jackson is seeking the following Orders:

1. Summary Judgment in favour of the Claimant, Fitz Jackson, against the Defendant (Bank of Nova Scotia Jamaica Limited) for:

a. A Declaration that the imposition of/levying of a bank fee/encashment fee by the Defendant Bank to encase a cheque/negotiable instrument/Bill of Exchange contravenes the Bill of Exchange Act.

b. A Declaration that the Bank has breached its obligations as a Banker and the drawer of the cheque in respect of the Claimant which contravenes the Bills of Exchange Act by the Defendant Bank by failing to honour a Negotiable Instrument/Bill of Exchange.

2. Further and/or in the alternative, that the Defendant's Statement of Case shall be struck out.

3. Refund the sum of Three Hundred and Eighty Five Jamaican Dollars (JM $385.00).

4. That the Costs of this Application shall be borne by the Defendant Bank.

5. Interest pursuant to the provisions of the Law Reform (Miscellaneous Provisions) Act at such rate as this Honourable Court deems fit, just and expedient.

6. Such further and/or other reliefs as this Honourable Court may deem fit, just and expendient.

[13] The Court had for consideration the following pleadings:

(i) Amended Claim Form;

(ii) Amended Particulars of Claim;

(iii) Further Amended Defence;

(iv) Further Amended Reply to Further Amended Defence;

(v) Affidavit and Supplemental Affidavit of Fitz Jackson in support of the Application for Summary Judgment;

(vi) Affidavit of Maia Wilson in Opposition to the Application; and

(vii) Affidavit Allyandra Thompson in Opposition to the Application

AGREED FACTS

[14] These material facts have been agreed between the parties.

1) On May 3, 2019, Mr. Jackson tendered cheque numbered 001426 at the Portmore Branch of BNS in the amount of Two Thousand Five Hundred Jamaican Dollars **(JM $2,500.00)** to be paid.

2) The cheque was drawn on the account of Mrs. Delaine Morgan and Mr. Earl Morgan held at the Half Way Tree Branch.

3) BNS charged Mr. Jackson an encashment fee of Three Hundred and Eighty-Five Jamaican Dollars **(JM $385.00)**.

4) The encashment fee was deducted from the proceeds of the cheque, and Mr. Jackson was paid Two Thousand One Hundred and Fifteen Jamaican Dollars **(JM $2,115.00)**.

5) The cheque is a negotiable instrument payable on demand governed by the **Bills of Exchange Act**.

6) BNS has sought to refund Mr. Jackson the encashment fee of Three Hundred and Eighty-Five Jamaican Dollars **(JM $385.00)**.

7) BNS has discontinued the practice of charging an encashment fee to pay a cheque drawn on any of its branches.

LAW AND ANALYSIS

SUMMARY JUDGMENT

[15] The starting point for an application for Summary Judgment is **Rule 15 of the CPR** which empowers the court to summarily determine a claim (or a particular issue) where the court is of the view that:

> *(a) the claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or the issue.*

The decision to grant or refuse an application for Summary Judgment is a discretionary one, and one which must be exercised by the Courts in tandem with its overriding objectives. (See: **Sagicor Bank v Marvalyn Taylor Wright** [2018] UKPC 12)

[16] The framework governing the grant of an application for Summary Judgment was elucidated by Brooks P, P (as he then was) in the seminal case **of Somerset Enterprises Limited and anor v National Export Import Bank** [2021] JMCA Civ 12 **("Somerset Enterprises")**. I find the following excerpt particularly instructive and worthy of note:[5]

> *[25] The party that seeks the summary judgment must assert that the respondent's case has no real prospect of success. If that party asserts that belief, on credible grounds, a respondent seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable". In order to successfully resist the other party's assertion, the respondent must prove that its case has "a 'realistic' as opposed to a 'fanciful' prospect of success" (see paragraphs [14] and [15] of* ***ASE Metals NV v Exclusive Holiday of Elegance Limited [2013] JMCA Civ 37). In determining whether there is any real prospect of succeeding, the judge should not conduct a mini-trial.***
>
> *[26] The Privy Council has also offered guidance on the matter, in* ***Sagicor Bank Jamaica Limited v Marvalyn Taylor Wright*** *[2018] UKPC 12. Lord Briggs stated that summary judgment allows the court to determine whether the matter requires a trial.* ***He added that if a trial of the issues between the parties does not affect the claimant's entitlement to the relief sought then the trial is unnecessary*** *(see paragraphs 16-21).*

[5] [2021] JMCA Civ 12, paras 25-27

> *[27] Although the judge considering a summary judgment application is not to conduct a mini-trial, he must carefully examine each party's statement of case and the supporting documents, in order to determine the merits. It is against this background that this matter is to be viewed. (Emphasis mine)*

[17] The Court understands this authority to be reaffirming the legal principle *"he who asserts must prove"* placing the claimant under a burden to prove that the respondent does not have a realistic prospect of success. Likewise, in resisting the application, the respondent must show that their case is more than merely arguable.

Whether the Claimant can be granted declaratory relief?

[18] **Rule 15.6(1) of the CPR** outlines the power of the court on hearing an application for Summary Judgment. It states:

On hearing an application for summary judgment the court may –

a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;

b) strike out or dismiss the claim in whole or in part;

c) dismiss the application;

d) make a conditional order; or

e) make such other order as may seem fit

[19] I repeat and adopt the following statement of Batts J in **James** as guidance for the Court in considering whether to grant declaratory relief.

> *[6] …Therefore, before declaratory relief is granted, the court must apply its own mind to the issue even if the parties are agreed. The Court should only grant declaratory relief if satisfied that the construction, of the instrument under consideration, is legally correct and it is appropriate to do so. The declaratory remedy, being discretionary, is to be exercised judicially. Mr Justice David Richards correctly analysed the limits of the Gouriet case in Pavledes and another v Hadjisavva and another [2013]*

> *EWHC 124 (Ch). The learned authors Zamir and Woolf in their text, The Declaratory Judgment, Second Edition, at paragraph 4.001, had this to say about a declaration: "It's flexible and discretionary nature enables the court to exercise precise control over the circumstances and terms in which relief is granted". In Financial Services Authority v Rourke All England Official Transcripts (1997-2008), [2001] Lexis Citation 2268, (unreported judgment dated 19th October 2001) the claimant, a statutory body, sought declaratory relief. The questions before the court inter alia were whether there was jurisdiction and, if so, should the declarations be granted. Justice Neuberger decided that it was in the public interest, and in the interest of third parties, to grant the declarations. He said at page 4 of his judgment: "Accordingly so far as the CPR are concerned, the power to make declarations appears to be unfettered. As between the parties in the section, it seems to me that the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court's satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court has to consider whether, in all the circumstances, it is appropriate to make such an order". And at page 5: "It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration.".*

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[20] Counsel Mr. Anthony Williams submitted that the cheque given to BNS to encash was a valid bill of exchange or negotiable instrument, the sum of which was certain and the full amount of which was not paid out. He argued that the cheque was payable on demand, and the **Bills of Exchange Act** required that the full sum of the cheque be paid out to Mr. Jackson. Therefore, by deducting a fee from the amount, BNS failed to act in accordance with the **Bills of Exchange Act**.

[21] Counsel further submitted that BNS had no legal authority to deduct any money from the cheque as a fee. Additionally, the alleged practice of BNS imposing a fee for the encashment of cheques deviates from the nature of negotiable instruments which represents a form of unconditional credit in commercial transactions. It was argued that the imposition of such fee introduced a contingency, contrary to the principles which govern negotiable instruments and to the provisions of the **Bills of Exchange Act**.

[22] It was also averred that BNS having admitted that a cheque is a negotiable instrument, was thus bound by **S. 3 of the Bills of Exchange Act**. It was further submitted that the imposition of a fee to encash cheques disrupts the straighforwardness of commercial transactions, as it fails to recognize the duty of BNS to pay in full the monies endorsed on the cheque. Counsel relied on the case of **Barclay's Bank Ltd v W.J. Simms Son & Cooke (Southern) Limited** (1980) 2 WR 218 in support of this.

Inapplicability of the proposed defences

[23] Counsel Mr. Williams also maintained that BNS has no defence to justify the deduction of a fee from the amount of the cheque. He argued that in the context of this case, good faith does not arise as it conflicts with the defence of BNS that the fee was imposed per their policy, practice and custom. Hence, the imposition of the encashment fee was deliberate and calculated, and could not fall within the principles of good faith. Further, there were no issues as to the genuineness of the cheque or any impropriety or fraud in respect of BNS, as such, good faith would not arise for consideration. Counsel relied on **S. 82 and 90 of the Bills of Exchange Act**.

[24] It was also submitted that BNS is unable to rely on customs, policies and practice as a defence as it has not provided any evidence in support of this assertion. He argued that he who alleges must prove, and BNS has not proven that the imposition of a fee for cheque encashment is a custom.

[25] It was Counsel's further submission that BNS is attempting to ascribe customary law status to the imposition of a fee to encash a cheque. However, he suggested, a mere assertion of *"a long standing practice"* by BNS does not automatically or *ipso facto* make the practice a customary right. Furthermore, this practice by BNS does not meet the requisite criteria to be found to be a custom, and is therefore inapplicable in this matter. In any event, even if the Court finds that the practice of charging an encashment fee is a custom, it should not prevail over the clear provisions of the **Bills of Exchange Act**. In support of this submission, Counsel cited the case of **Rosehain & Co v Commonwealth of Bank of Austrailia** [1922] VLR 787.

[26] Counsel Mr. Williams also submitted that the circumstances which exist for qualified acceptance do not arise in the instant case pursuant to **Ss. 17, 18 and 39 of the Bills of Exchange Act**. Further, this was not a defence which was pleaded by BNS, and as such they cannot rely on same in their submissions.

Defendant has no real prospect of defending the claim

[27] In light of the submissions on the inapplicability of the defences, it was submitted that BNS has no real prospect of defending the claim against Mr. Jackson. Counsel indicated that this empowers Mr. Jackson to apply for Summary Judgment, and to this end he relied on **Rule 15.2 of the Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020)** and the case of **Swain v Hillman** [2001] All ER 91.

[28] Counsel further submitted that this matter is not apt for trial, given the unequivocal and unambiguous nature of the provisions within the **Bills Exchange Act** pertaining to the issues in question. Consequently, there is no conflict of facts on relevant issues in this case, and there are no issues left to be investigated at trial.

[29] Counsel submitted that as BNS had acknowledged Mr. Jackson's claim, and that *"acknowledge"* means *"admit"* in the ordinary and natural sense of the word. By acknowledging the claim, BNS has therefore admitted Mr. Jackson's claim in keeping with the **CPR**. This means that BNS accepts that the claim is true, leaving it with no reasonable prospect of successfully defending the claim. As such, the Court should reject the round about manner and argument stated at paragraph 9 of the Further Amended Defence. Here, Counsel relied on the case of **Sagicor Bank Jamaica Limited v Marvalyn Taylor Wright** [2018] UKPC 12.

Remedies/Reliefs Sought

[30] Lastly, Counsel submitted that by virtue of the parties having different views in part about the interpretation of the **Bills of Exchange Act**, it is imperative that Declaratory Orders are granted in order to address the interpretation of the Act in relation to the imposition of encashment fees for cheques. Additionally, Counsel concluded that Mr.

Jackson was empowered to apply for declaratory relief by virtue of **Rules 8.6 and 8.7 of the CPR**, and the inherent jurisdiction of the court pursuant to the **Judicature (Supreme Court) Act**. In supporting this submission reliance was placed on **Patten v Burke** [1994] 1 WLR 541, **Financial Services Authority** [2001] EWHC 704, **RBTT Bank Jamaica Limited v YP Seaton and Earthcrane Haulage Limited and Anor** [2014] JMSC Civ 139 and **Doretta May Guthrie v Vincent Lloyd Gutherie** [2022] JMCA App 5.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[31] Counsel for the Defendant, Mr. Maurice Manning KC, indicated that the court is empowered to treat with matters summarily when there is no real prospect of success in either bringing the claim or defending the claim pursuant to **Rule 15.2 of the CPR**. He noted that in order to define and understand *"real prospect of success"* the case of **Swain v Hillman** (*supra)* should be consulted. On this premise, it was submitted that this case is one which ought to be treated with summarily, as Mr. Jackson has failed to establish his claim that BNS has breached the **Bills of Exchange Act**.

[32] Counsel contended that the imposition of the fee by BNS to encash the cheque did not change the nature or quality of the cheque or the amount due on the cheque. It was noted that the choice to have the fee deducted from the amount of the cheque was solely Mr. Jackson's decision. He relied on the case of **Roberts & Co v Marsh** [1915] 1 KB 42.

[33] He argued that if a bank imposes a fee to encash a cheque, and refuses to honour it unless the fee is paid, the cheque should be considered dishonored due to non-acceptance in accordance with **S. 43 of the Bills of Exchange Act**. Consequently, the cheque holder's remedy is to seek recourse against the cheque's drawer, not the bank, as there is no contractual relationship between the bank and the cheque holder that would allow for a legal action or the right to seek declaratory relief. It was further argued that there is no provision of law which prohibits BNS from imposing fees for their services.

[34] Counsel's submission is that banks have a duty to exercise good faith when deciding whether to refuse or accept a cheque. Therefore, banks will have their internal processes designed to minimize the risk to its business and customers. He relied on **Ss. 45 and 60 of the Bills of Exchange Act** and the cases of **Prince and others v Oriental Bank Corporation** [1874-80] All ER Rep 769 and **Woodland v Fear** 7 E&B 519.

[35] It was averred further that BNS was entitiled to refuse to honour the cheque on the basis that it was not presented to the specified place of payment, which was the Half Way Tree Branch of BNS. Therefore, there is an increased need for due diligence, and as such, the imposition of the fee to encash the cheque was justified to compensate the bank for cost and/or the additional risk assumed.

[36] Counsel also argued that the provisions of the **Bills of Exchange Act** do not reflect the current economic realities where there is a proliferation of an interconnected banking system, where a customer may transact business at any branch of the bank. The **Bills of Exchange Act** still reflects the position of **Woodland v Fear** *(supra),* where a cheque had to be presented at the branch where the account was maintained. To accommodate the current realities, BNS has had to implement systems for the convenience of customers. To this end, he relied on the Affidavit of Maia Wilson filed on the 3rd day of November 2023.

[37] Counsel Mr. Manning also submitted that Mr. Jackson was entitled to refuse to take the qualified acceptance of the cheque and treat with it as being dishonoured pursuant to **S. 44 of the Bills of Exchange Act**. Instead, Mr. Jackson accepted the terms set out by BNS for the encashment of the cheque. He therefore cannot now claim that he accepted those terms under protest since no relationship existed between himself and BNS to express a protest. Accordingly, Mr. Jackson waived any entitlement he may have had to seek recourse against the drawer or the endorser of the cheque. Reliance was placed upon **S. 19 of the Bills of Exchange Act** and the case of **Meyer & Co v De Croix, Verey et Cie** [1891-94] All ER Rep 927.

SUBMISSION ON BEHALF OF THE BANK OF JAMAICA

[38] Counsel Mr. Sundiata Gibbs identified the issue for the Court's considertaion as, whether the payment of the encashment fee breached the **Bills of Exchange Act** or any other obligation owed by BNS to Mr. Jackson. He submitted that the answer to that question was no, as there was no provision in law prohibiting the drawee from imposing an encashment fee or any other pre-condition for payment. This would be governed by the contractual relationship between the bank and its customer. He also submitted that Mr. Jackson had the right to treat the cheque as dishonoured but chose not to do so.

[39] He rejected Mr. Jackson's submission that **Ss. 3 and 75 of the Bills of Exchange Act** were breached. These sections he submitted were definition sections and did not create or place any obligation on any party.

[40] Lastly, he submitted that banks need to make certain due dilligence checks which incur costs, specifically in terms of labour and man hours. These costs, they note, are applicable regardless of whether the cheque is drawn on the same bank or a different one, the banks have by practice and usage charged a fee for this service.

SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL

[41] Counsel for AG, Ms. Nerine Small, submitted that this was not a matter which is appropriate to be treated with summarily under **Rule 15.2 of the CPR**. It was argued that the Bank may attempt to show:

1. A defence in law;

2. A point of law which destroys the cause of action;

3. A denial of fact which the Claimant relies on; and

4. Further facts which answer the Claimant's cause of action.

[42] This, Counsel argues, has to be done within the context of a trial which surrounds the **Bills of Exchange Act** and meaning and use of the word *"unconditional"* at **S. 3 of the Act**. She noted that the **Bills of Exchange Act** discloses possible defences for BNS,

but such defences were not readily discernable on the BNS' pleadings. Counsel Ms. Small highlighted the defences found at **Ss. 19, 44 and 53 of the Bills of Exchange Act**.

[43] It was further argued that though this is an application for Summary Judgment or Strike Out, BNS, having convinced the Court to accept submissions from BOJ and AG on the issues, may be minded to seek to further amend its defence or make submissions on law which are not properly addressed in its statement of case.

[44] Given the wide significance of the matter, Counsel urged the Court to consider whether the relief sought should be granted in the face of possible defences of a legal nature, which were not raised by the BNS but are apparent in the **Bills of Exchange Act**.

[45] Counsel Mr. Everol McLeod, in oral submissions, argued that Mr. Jackson sought to use the definition section to impose obligations for a duty between the bank as drawer and Mr. Jackson. No such obligation existed, and the bank only owed a duty to its customer. He submitted that the **Bills of Exchange Act** did not allow or disallow an encashment fee. Irrespective of the deficiencies in BNS' case, the charging of the fee is not in contravention of the **Bills of Exchange Act**.

ISSUE

[46] I adopt the pithy statement of the issue for adjudication from the submissions made on behalf of the Attorney General, which was expressed as follows:

(1) Whether the imposition of a fee to encash a cheque is contrary to the provisions of the **Bills of Exchange Act**, thereby entitling the Claimant to the declarations sought through Summary Judgment?

[47] Cheques are old payment instruments used worldwide. Most common law jurisdictions worldwide have enacted legislation dealing with cheque payments based on the **Bills of Exchange Act** passed in the United Kingdom in 1882. Some, including the UK, have updated their law. A treatise by Benjamin Geva on the legal history of the

cheque makes for interesting reading.[6] Jamaica passed the **Bills of Exchange Act** in 1893 with one amendment being made in 1968. The material provisions at this juncture are **Ss. 3 and 73 of the Act** which are reproduced here.

PART II. Bills of Exchange Form and Interpretation

3. *A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a certain sum in money to or to the order of a specified person, or to bearer.*

An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with—

(a) an indication of a particular fund out of which the drawee is to reimburse himself, or a particular account to be debited with the amount; or

(b) a statement of the transaction which gives rise to the bill—

is unconditional

A bill is not invalid by reason—

(c) that it is not dated;

(d) that it does not specify the value given, or that any value has been given therefor;

(e) that it does not specify the place where it is drawn, or the place where it is payable.

PART III. Cheques on a Banker

73. *A cheque is a bill of exchange drawn on a banker payable on demand.*

Except as otherwise provided in this Part, and in section 93, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

[6] **Liability on a Cheque: A Legal History**, Research Paper No.41 Volume 12, Issue 9, 2016

[48] **Keene v Beard** (1860) 141 ER 1210 is regarded as the seminal authority defining the characteristics of a cheque. The oft-cited dicta of Byles J. reads as follows:[7]

> *I conceive that a cheque is in the nature of an inland bill of exchange payable to the bearer on demand. It has nearly all the incidents of an ordinary bill of exchange. In one thing it differs from a bill of exchange : it is an appropriation of so much money of the drawer's in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person ; whereas, it is not necessary that there should be money of the drawer's in the hands of the drawee of-a bill of exchange. There is another difference between the two instruments,— in the ease of a bill of exchange, the drawer is discharged by default of a due presentment to the acceptor; but, in the case of a cheque, the drawer is not discharged by a delay in the presentment, unless it be shewn that he has been prejudiced thereby, for instance, by the failure of the banker on whom it is drawn. In all other respects a cheque is precisely like an inland bill of exchange.*

[49] It is discerned that the characteristics of a cheque are:

- There must be an unconditional order to the drawee to pay.
- The amount to be paid must be specified.
- It is payable on demand to the bearer - no time stipulation for it to be presented for payment (should be presented in a reasonable time and post-dated cheques are not payable prior to date).
- It is for a fixed amount.

[50] The specific question that the Court is required to answer is whether the encashment fee imposed by BNS was a condition, and which rendered the amount to be paid on the cheque uncertain and in breach of the **Bills of Exchange Act**? This requires identifying some key players and terms involved in a transaction relating to a cheque.[8] I have identified these as:

- Drawer - The person who issues the cheque.

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[7] (1860) 141 ER 1210, pg1213, para 381
[8] **Chitty on Contracts** 31st Ed Volume 2, pg 299 para 34-009

- Drawee - The bank named or indicated in the cheque as liable to pay it.
- Payee - The person to whom the cheque is drawn/to be paid.
- Holder - The payee or endorsee or bearer of the cheque.
- Holder in due course - The person, not being the payee, who is in possession of cheque.
- Collecting or Receiving Bank - Bank which receives the cheque for payment which may be the payee's banker. In that case the collecting bank is the agent of the payee/customer.[9]
- Unconditional order in writing - Must not be subject to any qualification.[10]
- A sum certain in money - The order must only stipulate the payment of sum stated or calculable.[11]

[51] The answer to the question lies partly in the determination of who is the *"drawee"*. This is because the obligation of the drawee to pay the drawer's cheque is based on the drawer's contractual arrangement with the drawee in relation to a current/chequing account. This is explained in **The Office of Fair Trading v Abbey National plc and seven others** [2008] EWHC 875 (Comm) in which it was stated:[12]

> *It is a basic characteristic of a customer's current account with a bank that the bank is under an obligation to receive money, cheques and payments by other methods into the customer's account and to effect repayment to the customer* ***and payments to third parties to the customer's order and as the customer's agent.*** *This observation reflects the classic description of the relationship between a bank and a customer with a current account given by Atkin LJ in N Joachimson v Swiss Bank Corp., [1921] 3 KB 110 at p.127 and the description by Lord Atkinson in Westminster Bank Ltd. v Hilton, (1926) 43 TLR 124. (Emphasis mine)*

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[9] Ibid. pg 471 - 472, para 34-364
[10] Ibid. pg 298 para 34-011
[11] Ibid. pg 304 to 305, para 34-019
[12] [2008] EWHC 875 (Comm), para 43 - This case was overturned on appeal to the Supreme Court, however, the tribunal approved this statement.

[52] **Paget's Law of Banking** 13th Ed (2007) is also elucidative. It is explained by the learned authors thus:[13]

> *The relationship of banker to customer consists of a general contract, which is basic to all transactions, together with special contracts which arise only as they are brought into being in relation to specific transactions or banking services. The essential distinction is between obligations which come into existence upon the creation of the banker-customer relationship and obligations which are subsequently assumed by specific agreement; or, from the standpoint of the customer, between services which a bank is obliged to provide if asked, and services which many bankers habitually do, but are not bound to, provide.*

Under this contract, the drawee is obliged to honour the drawer's order to pay to the holder of the cheque the amount stated on the cheque.[14]

[53] The Court has found a number of cases that have alluded to who is the drawee. What is interesting is that in different jurisdictions, the question was answered in the same way. A review of a sample of these cases show that the drawee bank is the branch where the drawer's account is held. The issues being dealt with in the cases were not on all fours with the instant case, and the main issue in most instances were also different. Reference to the facts will therefore be brief.

[54] In **Woodland v Fear,** which was relied upon by Counsel for BNS, it was held that a joint-stock bank was only obligated to honor a customer's cheques at the specific branch where the account is held, and did not breach its contractual obligations by declining to pay cheques at a different branch. This case has been cited in several cases, and by legal scholars and authors, as authority for the position that a bank is not obliged to honour a cheque unless it is presented at the designated branch for payment.[15] The foundation of this principle was based on the risk associated with honouring bills at non-specified branches. In order to ascertain the drawer's financial status, the account records

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[13] Ibid., para 7.1
[14] See infra **Barclays Bank plc and others v Bank of England** 1985 1 ALL ER
[15] See **Chitty on Contracts 31st Ed Volume 2**

had to be physically checked. These records were only available at the branch where the drawee physically held his account.

[55] The position was again addressed in the UK in **Barclays Bank plc and others v Bank of England** 1985 1 ALL ER **("Barclays Bank")** (further dealt with in this judgment), where Bingham J stated:[16]

> *21. The respondent was factually correct in its contention that from the moment of delivery at the clearing house cheques for payment were in the sole custody and control of the paying bank. I do not, however, judge this fact to pose any conceptual obstacle to the claimants' contention that the presenting bank's responsibility to its customer is discharged only when the cheque is presented for payment at the drawee branch. It is only necessary to regard the paying bank as being, from the time of receiving the cheque until the time of presenting it, a sub-agent of the presenting bank, which is itself the agent of the payee. This relationship has been readily accepted in the past: see Bailey v Bodenham (1864) 16 CBNS 288 at 296, 143 ER 1139 at 1142, Prince v Oriental Bank Corp (1878) 3 App Cas 325 at 328, [1874–80] All ER Rep 769 at 771, Bank of British North America v Haslip (1914) 30 OLR 299 at 301–302, opinion of Mr Arthur Cohen QC and Mr Mackenzie Chalmers (1879) 1 Journal of the Institute of Bankers 233–234, Paget's Law of Banking (9th edn, 1982) p 372. This interpretation is consistent with the rule, agreed between the banks, that a cheque lost between the clearing house and the branch is debited to the presenting bank. It may very well be that this rule is underpinned by practical considerations, but the rule would be very hard to reconcile with principle if the presenting bank were understood to have discharged its responsibility by delivering the cheque to the clearing house.*
>
> *…*
>
> *25. These two cases and the statement in Chalmers were relied on by the Irish Supreme Court in Royal Bank of Ireland Ltd v O'Rourke [1962] IR 159. The case is in some ways an odd one since the plaintiff bank alleged presentation to have occurred on the day before the cheque was delivered to the Irish clearing house. It was also the case that both the clearing house and the drawee branch were situated in College Green, Dublin, so that the gap between delivery to the clearing house and delivery to the branch was very slight. Murnaghan J at first instance treated the date of presentation for payment as being that on which a decision was first taken at the branch whether the cheque should be paid or not. The Supreme Court unanimously reversed him, holding (in reliance on the cases quoted but without analysis of them) that the presentation to a clerk or agent of a bank at the clearing house was a presentment to the bank and was sufficient.*

[16] 1985 1 ALL ER, paras 21 & 25

> *Although the case was concerned with the time and not the place of presentation, the questions were very closely connected. In my judgment the approach of the judge below was to be preferred. There are other, more numerous, cases in which cheques have passed through a clearing house but presentation has been treated as taking place in the drawee branch where the effective banking decision was taken: see Hare v Henty (1861) 10 CBNS 65 at 89, 142 ER 374 at 383, Prideaux v Criddle (1869) LR 4 QB 455, Bank of British North America v Haslip (1914) 30 OLR 299; affd 31 OLR 442, Riedell v Commercial Bank of Australia Ltd [1931] VLR 382. It is also of interest to observe that in H H Dimond (Rotorua 1966) Ltd v Australia and New Zealand Banking Group [1979] 2 NZLR 739, where a cheque passed through a centralised data processing system used by all the banks which led to provisional debit and credit entries in customers' accounts but without involving 'any banking decision whatsoever', it was common ground that the delivery of the cheque to the branch was the physical presentment to the banker for his decision whether to honour the cheque or not.*

[56] In a case from South Africa, the position was said to be the same. **Indac Electronics (PTY) Limited v Volkskas Bank Limited** Case No 173/90/MC, a decision from the Supreme Court of South Africa Appellant Division, a cheque was drawn on one branch of a bank, and was presented at another branch for presentation. The issue was whether the collecting bank owed a duty of care to the payee. The distinction was made between the bank as drawee and the bank as the collecting bank.[17]

> *It must be accepted that the business of banking has changed substantially in modern times. This has resulted in a change in the banker-customer relationship (see the Jack report, paras 2.16-2.19). In South Africa the formation of the Automated Clearing Bureau has mechanised the collecting process. As a result the collecting bankers, while accepting responsibility for collecting the correct amounts, apparently do not regard it as their function to ensure that cheques are collected for the correct party unless they are put on notice to make enquiries in a specific case. The collecting banker, however, remains the only person who is in a position to know whether or not a cheque is being collected on behalf of a person who is entitled to receive payment, and the drawee bank has to rely on the collecting banker to ascertain this fact. The latter, is fully aware of this position and it might, therefore, well be said that it is his duty to ensure that he only presents a cheque for payment on behalf of a client who is entitled to receive payment of the cheque.*

[17] **Indac Electronics (PTY) Limited v Volkskas Bank Limited** Case No 173/90/MC, pg 46, para 4

[57] In **Smt. Sangita Wd/O Ajay Sha vs Sukrant S/O Harilal Shah, Criminal Writ Petition No. 951 of 2014 ("Smt. Sangita")**, a more recent case decided in 2015 in the Bombay High Court in India, it was identified that the crux of the case was an understanding of the concept of the drawee bank. It had been contended that the concept of the drawee bank had been enlarged with the advent of the **RTGS** system[18]. It was argued that this was a system where payments are made to the payee of a cheque by the branches of the same bank, on one of whose branches the cheque was drawn. Therefore, all or any of the branches for the purposes of **S. 138 of the Negotiable Instruments 1881** could be called the drawee bank. This section made the drawing of the cheque where the drawer had insufficient funds in his account an offence, if the cheque was presented to the bank on which it was drawn. A drawee was defined in the Act as the person directed under the cheque by the maker to pay. This argument was rejected. The Court stated:[19]

> *…At this juncture, it must be understood that there is a difference between processing of cheque for the purpose of making payment and giving nod or approval to the processing branch for payment. The branch which processes the cheque in the sense obtains approval for payment of the branch where funds are actually and physically held and makes the payment can only be called as the processing or facilitator branch. Such branch cannot be called as the "dawee" [sic] within the meaning of Section 7, N. I. Act, which defines the term "drawee" as the person directed under the bill of exchange or cheque by it's maker to pay. Such a direction can be given and is given only to the branch where the account is actually opened and maintained and funds are physically held. If this were not true, there would be no need to seek transfer of funds by processing branch to it from the branch where the drawer of the cheque has maintained a physical account. Therefore, there can be only one drawee bank and not several and when the RTGS cheques bear an endorsement "payable at all our branches" it only means "payment instructions expedited" enabling receipt thereof immediately. Such an endorsement, however, cannot be seen as a direction independently made, de-hors the branch, where funds are physically available, to the processing branch to pay.*

[58] The position in this jurisdiction appears to be the same. In **Bratton Limited, First Caribbean International Bank (JA) Ltd v National Commercial Bank (Ja) Ltd, RBTT**

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[18] Criminal Writ Petition No. 951 of 2014, para 6
[19] Ibid., para 7

Bank Jamaica Ltd et al [Consolidated claims] (unreported), Supreme Court Jamaica, Claim No. 2003HCV0270, judgment delivered 23 July 2009 **("Bratton")**, fraudulently endorsed cheques were presented at the Half Way Tree and Newport West branches of FCIB instead of the Montego Bay branch where the drawer held its account. Brooks J (as he then was) made the distinction between the paying bank and the collecting bank. He stated:[20]

> ***Again, I draw a distinction between First Caribbean in its capacity as paying bank, as opposed to its identity as collecting bank.*** *Although the test for section 80 differs from that of section 60 insofar as negligence is the standard for section 80, I find that in paying through the clearing, First Caribbean has satisfied the required standard. The significance, or lack thereof, of the crossing, for a paying bank, has been discussed above and is also applicable in this context.*
>
> *Insofar as First Caribbean is also the collecting bank, the evidence of Mr. Douglas Cupidon, for First Caribbean, is that 46 cheques are affected. Of these, he says, 31 were drawn on Bratton's account at First Caribbean's Montego Bay branch. These were negotiated at First Caribbean's Half Way Tree Branch. An examination of the SGS cheques revealed that 14 were lodged at the Half Way Tree branch and 1 at First Caribbean's Newport West branch. There was one cheque, #O1268 (page 42 of SGS's documents in Exhibit 3), which bore the crossing stamps of both the Half Way Tree Branch as well as an NCB branch. Without specific evidence on this cheque, I am not prepared to treat it as belonging to one category or the other.*
>
> *Mr. Vassell, Q.C., on behalf of First Caribbean, submitted that there "is no claim against [First Caribbean] as a collecting bank...and there is no claim in the tort of conversion". An examination of paragraph 4 of the respective Particulars of Claim supports this submission. It states:*
>
> > ***4. "...****the Defendant wrongfully and without the Claimant's authority* ***paid the said crossed cheques*** *to personal accounts in the names of one Mr. George and/or Mrs. Madgelin Lee and/or Mr. Andrew Dennis* ***at several financial institutions including the Defendant's and debited the Claimant's account*** *with the amounts thereof." (Emphasis supplied)*
>
> *The stress of the paragraph is on the payment. That payment was to "several financial institutions including" First Caribbean.* ***The dichotomy between the separate identities that a single bank may have, in***

[20] [Consolidated claims] (unreported), Supreme Court Jamaica, Claim No. 2003HCV0270, judgment delivered 23 July 2009, pgs 21-22

> ***respect of a cheque, is recognized in several of the decided cases.*** (Emphasis mine)

[59] One comes to understand that the concepts of a paying bank and a collecting bank referred to in the cases reflect the processes of a cheque payment transaction and the settlement process.[21] It was explained in **Barclays Bank** by Bingham J where he stated:[22]

> *The origins of the clearing house as it exists today can be traced back to a device adopted by bank employees in the eighteenth century, largely (as it would seem) for their own convenience. During the early years of the eighteenth century the banks employed walk clerks whose task it was to call at other banks in the City and the West End of London to present cheques for payment and obtain cash in exchange. As the use of cheques increased so this task became increasingly laborious. As a result a practice grew whereby, instead of visiting other banks on foot, the clerks would meet at a central point, exchange cheques and settle the difference between the total exchanged. To begin with, the meeting place was unofficial and unrecognised, but the advantages of this central exchange were obvious and in due course a room was hired and, in 1833, a building erected on the present site. The respondent entered the clearing house in 1864.*

To that end, various jurisdictions have some sort of clearing system for cheques. The system as it exists in Jamaica was referenced in the case of **Bratton**.[23] The same bank may, through its branch network, be the drawee bank as well as the collecting bank.[24]

[60] The preliminary conclusion of the Court is that the drawee bank is the branch specified on the cheque. If the cheque is presented for payment at any other branch, then that branch acts as the collecting bank.

Presentation

Ss. 45 and 60 of the Bills of Exchange Act deals with presentment. It provides that:

> ***45.*** *Subject to the provisions of this Act, a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.*

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[21] **Liability on a Cheque: A Legal History**, Research Paper No.41 Volume 12, Issue 9, 2016
[22] 1985 1 ALL ER, para 8
[23] See infra **Bratton Limited, First Caribbean International Bank (JA) Ltd v National Commercial Bank (Ja) Ltd, RBTT Bank Jamaica Ltd et al** [Consolidated claims] (unreported), Supreme Court Jamaica, Claim No. 2003HCV0270, judgment delivered 23 July 2009
[24] **Chitty on Contracts** 31st Ed Volume 2, pg 471 para 34-364

> *A bill is duly presented for payment which is presented in accordance with the following rules –*
>
> *…*
>
> *(d) A bill is presented at the proper place –*
>
> *(i) where a place of payment is specified in the bill and the bill is there presented;*
>
> *(ii) where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented;*
>
> *(iii) where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business, if known, and if not, at his ordinary residence, if known;*
>
> *(iv) in any other case, if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.*
>
> *(e) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.*
>
> …
>
> ***60.*** *When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith, and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee, or any subsequent indorsement, was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.*

[61] Similar provisions in the 1882 UK Act were considered in **Barclays Bank**. Bingham J found that the cheque must be presented to the branch on which the cheque is drawn:[25]

> *14. …The respondent contended that 'the duty of a banker entrusted with a* ***cheque for collection is to take reasonable steps to obtain payment*** *of the cheque and credit the proceeds to the customer's account or notify the customer that payment has been refused'. This formulation is in my judgment correct* ***but must be read subject to the overriding statutory rule that the appropriate way to obtain payment under the cheque is***

[25] 1985 1 ALL ER, paras 14 & 16

> ***(subject to any relevant statutory exception) to present it for payment as prescribed by s 45 of the 1882 Act.***.
>
> ….
>
> *16. … The presenting banker's admitted duty is to take reasonable steps to obtain payment. To obtain payment the cheque must be duly presented for payment, otherwise the drawer will be discharged**.** Presentation must be to the drawer or, as is usual, to 'some person authorised to pay or refuse payment on his behalf' **at the place of payment specified in the cheque, which can only mean to the staff of the branch on which the cheque is drawn at the address shown on the face of the cheque.** (Emphasis mine)*

[62] I must here refer to the particular undisputed facts of this case. The cheque was drawn on the BNS Half Way Tree Branch. This was stated on the face of the cheque. This branch was therefore the drawee branch. The Portmore Branch, where the cheque was presented for payment, was the collecting branch. This is therefore a case where BNS operated as both the drawee bank and the collecting bank. The facts as pleaded do not disclose whether Mr. Jackson held an account at the Portmore Branch, though the defence of BNS suggests that he did.

[63] Counsel for BNS, relying on **Ss. 45 and 60 of the Bills of Exchange Act**, in the Court's view correctly argued that the cheque was never in fact presented to the drawee, which was the Half Way Tree Branch on which the cheque was drawn.

Duty of the Bank

[64] It is useful at this time to consider BNS' argument that the Bank was under no obligation to encash the cheque, its responsibility being to the drawer only. The position taken by Counsel for Mr. Jackson was that BNS had a duty to pay the cheque. It is not clear from Counsel's argument whether BNS owed this duty to the drawer or the payee.

[65] The majority of the Supreme Court of Canada, in a judgment delivered by Deschamps J., in **Canada Trustco Mortgage Co v Canada** 2011 SCC 36, made it clear that the payee is not a party to the contractual relationship between the drawer and the drawee (the bank). Referencing the bank's relationship with its customers as pronounced in **Foley v Hill** (1848) 2 H.L.C. 28, 2 E.R. 1002, as that of a debtor/creditor, she went on

to consider the obligation of the collecting bank viz the payee, and concluded there was *" … no contract between a bank and a payee in his or her capacity as payee".*[26]

[66] As to the obligations of a drawee bank to the payee, Deschamps J. referenced **Schroeder v Central Bank of London** (1876) 34 L.T. 735 (C.P. Div.), where it was held that the drawee bank on which a cheque is drawn was under no liability to pay the holder of a cheque, being liable to the drawer only for any breach of contract. Paragraphs 38 to 40 of the judgment of Deschamps J. are instructive. It reads as follows:

> *[38] For the purpose of determining whether, absent any contractual relationship with the payee of a cheque, a drawee bank owes the payee any duty, the definition of a cheque in the BEA is relevant: "A cheque is a bill drawn on a bank, payable on demand" (s. 165(1)). A bill is defined as follows (s. 16(1) BEA):*
>
> ***16.** (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer.*
>
> *[39] In addition, the BEA explicitly states that the mere issuance of a cheque does not operate as an assignment of funds in the hands of the drawee (s. 126 BEA):*
>
> ***126.** A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument.*
>
> *[40] These provisions, read together, mirror the principles stated in Schroeder and incorporate them into the statute. A cheque operates neither as an assignment of funds in the hands of the payee nor as an assignment of funds in the hands of the drawee. It is a document by means of which a customer orders his or her banker to pay funds the banker owes the customer to a person or to the order of that person out of the account specified on it. In and of itself, a cheque imposes no obligation on a drawee bank to the payee. This interpretation is well entrenched in our law and was accepted by Canada at trial: Schroeder; Thomson v. Merchants Bank of Canada (1919), 58 S.C.R. 287, at p. 298; Schimnowski Estate, Re, [1996] 6 W.W.R. 194 (Man. C.A.), at para. 19.*

[26] 1848) 2 H.L.C. 28, 2 E.R. 1002, para 33

[67] The learned judge also referenced the definition of a bill of exchange in the **Bills of Exchange Act S. 16(1)**, similarly worded to Jamaica's **S.3 of the Bills of Exchange Act** which serves as the basis for Mr. Jackson's case. She further went on to make clear, that the statutory duty of a bank to pay a cheque is triggered by presentment to the drawee for payment, which is mandatory. I accept and adopt this exposition as the existing position in this jurisdiction. I therefore accept the submissions made on behalf of BNS as correct. That this is the correct interpretation of the law is, I believe, presumed by Counsel for Mr. Jackson, who in his response to the Defendant's submissions, spoke extensively about BNS' duty to honour the cheque to its customer. (See paragraphs 20-28). I am not sure however that Counsel made the distinction between the drawer, who is the customer of the bank, and the payee.

[68] Considering the rights and obligations of the parties to a cheque, the drawee is obliged to the drawer to pay the amount on the cheque on demand. My own interpretation is that the payee, would be entitled to receive from the drawee, **upon presentation**, the full amount of the cheque subject to the availability of funds or any overdraft arrangement. However, should the drawee fail to pay, any remedy against the drawee would belong to the drawer and not the payee. Any associated charges for this service must be the subject of the contractual arrangements, expressed, and/or implied, between the drawer and his drawee bank.

[69] On the preliminary finding that the drawee is the Half Way Tree Branch, and the Portmore Branch the collecting bank, the cheque was not presented for payment. The branch at Portmore therefore had no obligation to the payee to pay the cheque. In view of these findings, it is not necessary to consider the submissions on waiver, dishonour and good faith.

Unconditionality and certainty

[70] **S. 11 of the Bills of Exchange Act** reads, "*An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect."* In **Roberts & Co v Marsh** [1915] 1 KB 42, as relied upon by Counsel for Mr. Jackson and

BNS, the defendant gave the claimant a cheque which was written on a blank sheet of paper. On the face of the paper, the defendant wrote the words *"to be retained"* and promised to send a cheque on one of his banker's printed forms in substitution for it. Unfortunately, the defendant did not honour that promise. It was held by Buckley L.J. that:[27]

> *… this appeal fails… It is contended by Mr. Matthews that this is not an unconditional order to pay, and that therefore the plaintiffs cannot sue upon it. I do not think that is so. The words "to be retained" are not words which bind the bankers. They import a condition between drawer and payee, but the order to pay addressed to the bankers is unconditional.*

The Court understands this authority to be saying that where a condition is imposed, and that condition is between the drawer (the person writing the cheque) and the payee (the person receiving the money), then it shall not bind the drawee (the bank), and upon presentation of the cheque, it remains an unconditional order to pay.

[71] This decision reaffirmed the principles established in the case of **Nathan v Ogdens Limited** (1905) 94 LT 126, as relied upon by Counsel for Mr. Jackson. In that case a cheque was drawn for the distributive share of a customer in a certain fund, and was sent with a cover letter. At the foot of the cheque the words "*the receipt at back hereof must be signed, which signature will be taken as an indorsement of the cheque"* were printed. This imposed a condition that the receipt must be signed for the cheque to be cashed. It was held that this condition was only between the drawer and the payee and not binding on the drawee. It should be then clear that as between the drawer and the drawee, to whom the order to pay the cheque was made, the cheque remained unconditional and certain.

[72] Counsel for Mr. Jackson argued that the provision in **S. 3 of the Bills of Exchange Act**, that the amount on the cheque should be certain, would be ludicrous if BNS had the authority to change the amount of the cheque by the imposition of fees. BNS in turn argued that the fee imposition is an extraneous matter that does not impact the cheque's

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[27] [1915] 1 KB 42, pg 43

unconditional nature. BNS also argued that the imposition of the fee and/or deduction from the cheque amount did not make the sum uncertain. This is supported by Counsel for the BOJ who argued that the cheque was complete once it left the hand of the drawer.

[73] The authorities discussed above deal with conditions as between the drawer and payee but do not address whether conditions imposed by the drawee on the payee would alter the cheque's unconditional nature. The dearth of cases on the point may be due to the fact that taken to its logical conclusion, Mr. Jackson's contention would lead the Court to decide, absurdly, that in prescribing a fee, the cheque became conditional and uncertain, and was therefore no longer a bill of exchange. I agree with the views expressed by Counsel for BOJ that **S.3 of the Bills of Exchange Act** is a definition section. It creates no rights or obligations. Certainly there are no consequences prescribed anywhere in the Act for a failure to comply with **S. 3**.

[74] It would seem to the Court that Mr. Jackson's claim would have been more properly grounded in a claim for breach by BNS, of its statutory duties to the payee (assuming it had any such) than on the present argument. This is not an issue that it is necessary to determine having regard to my other findings.

CLAIMANT'S PRELIMINARY POINTS

[75] It is apropos now to consider Counsel for Mr. Jackson's submission, as a preliminary point, that BNS' submissions on presentment, waiver and dishonour were new averments which were not pleaded in the defence, and as such, amounted to substantially new defences without any factual basis in the pleadings. He argued that this should not be allowed as they were not foreshadowed to Mr. Jackson, who did not have the opportunity to counterplead. As such, Mr. Jackson would be prejudiced, not being in a position to make full answer to these claims. Counsel has a valid point. It is a fundamental principle of fairness that each party should have the opportunity to respond to the points raised by the other. Waiver and dishonour, as has been said, are not matters which the Court needs to address. I will address the question of presentment.

[76] Mr. Jackson's claim, impliedly, is that he was in full compliance with the **Bills of Exchange Act** and entitled to the benefit/protection of the Act. Presentation is a requirement for the cheque to be paid. The onus is on Mr. Jackson to prove his case on a balance of probabilities. Mr. Jackson contended, albeit by implication, that the cheque was duly presented at the Portmore Branch. In examining Mr. Jackson's case, it was definitely in order for the Court to examine whether the cheque had been presented in keeping with the **Bills of Exchange Act**, so as to determine whether he is entitled to judgment on his pleaded case. BNS, in the Court's view, was entitled to point out this, as it turns out, fatal flaw in Mr. Jackson's case. There were sufficient facts pleaded to support BNS' submissions on this issue.

[77] Further, to contend with the issue whether BNS had breached the **Bills of Exchange Act**, the law has to be interpreted. This, as seen, requires the Court to consider the meaning of 'presentation' as used in the Act.

Whether the law has evolved with advances in technology?

[78] Mr. Jackson's case is based on BNS being the drawee. More particularly that BNS, with its complement of branches, constitutes the drawee. The cheque therefore was presented when tendered for payment at any of its branches. This submission was grounded in the **Banking Services Act ("BSA")**, which Counsel pointed out provided for one license for the licensee Bank which could be conducted at multiple branches. Counsel submitted, without authority, that a transaction at any of its branches is deemed to be that as at its central location. This argument also assumed that Mr. Jackson as payee had the same rights as against the drawee as the drawer of the cheque.

[79] It was conceded that in earlier times, the particular branch of the bank constituted the drawee.[28] It is the contention of Counsel for Mr. Jackson that with the advances in technology, and in practice, this is no longer the case as the bank's branch system is

[28] **Stair Memorial Encyclopaedia, European Law and Institutions** (Reissue): Contributor - Lorne D Crerar LLB (Hons), NP, FCIBS, Partner in Harper Macleod; Professor of Banking Law, University of Glasgow

interconnected, and each branch would have access to all the relevant information regarding a customer's account. He distinguished **Woodland v Fear**, which he submitted was inapplicable as the branches in that case operated independently.

[80] The Court, I believe, is in a position to take judicial notice that the banking industry and practices have changed with the advancements in technology. We may now bank online and by telephone, use automated teller machines to retrieve cash and to deposit cash and cheques, make payments using virtual and physical electronic cards instead of cash, among other things. All these services make personal visits to the bank less necessary, and are actively encouraged by the banks that have been reducing in branch services to their customers. These out of branch services are underpinned by the connectivity of the banking systems, interbranch and interbank.

[81] This argument therefore has some sympathy when one considers the observation of the learned authors of **Chitty on Contracts 31st Ed Volume 2**, where it was stated:

> *The rule that repayment must be demanded at the branch of the bank that holds the account is ripe for review in the light of modern technology and business practices when customers can now access their accounts remotely, via cash machines and through EFTPOS, debit cards and where some banks operate over the internet and through telephone banking services with no branches at all. The courts in one overseeas jurisdiction seem prepared to jettison the rule. (Damayanti Tantilal Doshi v Indian Bank 1999 4 SLR 1, 11 Sing CA)*

[82] The same observations were made in **Paget's Law of Banking 16th Edition** which stated:

> *(i) Place of repayment*
>
> *22.39 As noted in Chapter 4, according to the classic description of the relationship between banker and customer in Joachimson v Swiss Bank Corpn, the bank's obligation is to repay at the branch of the bank where the account is kept. Whilst this technically remains good law, it is likely to have little or no application in the context of modern banking practice. The judgments in Joachimson and other cases of the same era reflected the banking practice of the time and particularly the fact that banks had localised operations (for example, officials at one branch would not know what the state of a customer's account at another branch was). Given the advent of computer systems streamlining communications within banks*

> *(including between bank branches) and the increasing delocalisation of banking operations and services (through non-branch-based accounts and the operation of banking facilities via ATMs, telephone, internet and smartphones), there should no longer in principle be any such limitation as to the place of repayment in the context of withdrawals and other repayments to customers in the modern banking world, albeit that there is not yet English authority to that effect.*

[83] Bank of Baroda Limited Appellants; And Punjab National Bank, Limited and Others Respondents [1944] A.C. 176, on appeal from the High Court of Calcutta, suggests that the court may have the latitude to engage in such a correction. It was said there that:[29]

> *But the law merchant is not a closed book, nor is it fixed or stereotyped. This was explained by Cockburn C.J. in Goodwin v. Robarts (1). Practices of business men change, and courts of law in giving effect to the dealings of the parties will assume that they have dealt with one another on the footing of any relevant custom or usage prevailing at the time in the particular trade or class of transaction.*

The courts in the UK have declined to go that far, and as can be seen from **Smt. Sangita**, so have the courts in India. While there were several cases that acknowledged the technological and other advances in banking systems and practices, the Singaporean Court of Appeal was the only one, it appears, willing to go so far as to suggest that *'in the light of modern technological and business development it is doubtful whether the principle of banking law that a demand for payment must be made at the branch where the account is kept in order to found a cause of action is still good law'.*[30] This Court too would decline to go so far. I am persuaded by the reasoning in **Barclays Bank** in which this issue was central.

[84] Barclays Bank was an arbitration presided over by Bingham J, then a judge of the Commercial Court. The parties agreed there would be no appeal on the law. Issue number 1 for arbitration was framed by the parties as follows:[31]

> *Where Bank A ("the Presenting Bank") receives from a customer for collection a cheque drawn upon Bank B ("the Paying Bank") by a person having an account at a branch of the Paying Bank and the cheque is dealt*

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[29] [1944] A.C. 176, pg 184
[30] **Damayanti Tantilal Doshi v Indian Bank** 1999 4 SLR 1, 11 Sing CA
[31] [1985] 1 All ER 385, para 5(1)

> *with through the inter-bank system for clearing cheques (1) Is the Presenting Bank's responsibility to its customer in respect of the collection of the cheque discharged: (a) only when the cheque is physically delivered to the said branch; or (b) when the Presenting Bank so delivers it to the Clearing House, or in cases where this occurs when the Presenting Bank so delivers it to the Clearing Department in London of the Paying Bank; or (c) when the Paying Bank takes it away from the Clearing House; or (d) at some other time and place and, if so, when and where …*

Bingham J concluded that:[32]

> *Having carefully considered the said evidence and submissions I hereby award as follows:*
>
> *Where bank A (the presenting bank) receives from a customer for collection a cheque drawn on bank B (the paying bank) by a person having an account at a branch of the paying bank and the cheque is dealt with through the inter-bank system for clearing cheques, the presenting bank's responsibility to its customer in respect of the collection of the cheque is discharged only when the cheque is physically delivered to the said branch for decision whether it should be paid or not.*

In the course of his reasons he articulated the law thus:[33]

> *The factual premise on which issue (1) is founded envisages at least three contracts, and in my opinion four: a contract between the payee of the cheque and the presenting bank to which he delivers it for collection; a contract between the drawer of the cheque and the paying bank on which it is drawn; a contract between the drawer and the payee arising by virtue of the cheque itself; and (as I think) a contract between the presenting bank and the paying bank as members of the clearing house. Of these contracts, the issue is concerned, at any rate primarily, with the first, 'the Presenting Bank's responsibility to its customer in respect of the collection of the cheque'.*

[85] While referencing the statutory right of the drawer to be discharged from liability if the cheque is not presented to him or his branch of the paying bank for payment,[34] he determined that this right could only be displaced with the drawer's knowledge and assent which would require the *"very strongest proof"*.

[86] It is worth noting that Mr. Jackson is not contending that BNS has either expressly, or by implication, agreed to treat delivery of a cheque at any of its branches as dispensing

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[32] Ibid., para 6
[33] Ibid., para 13
[34] Ibid., para 26

with the requirement to present it at the drawee branch. Indeed, the alternate course offered to Mr. Jackson to deposit the cheque or present it for payment at the Half Way Tree Branch indicated that BNS' position was to the contrary. Further his Counsel also rightly submitted that the **Banking Services Act** did not amend the **Bills of Exchange Act** in any way.

[87] It is not up to the Court to displace this statutory protection of the drawer. I am of the view that this is a matter for the Legislature. In fact, the UK in 1996 amended the **Bills of Exchange Act** (now **S.74A and S.74B of the Bills of Exchange Act 1882**) to facilitate presentation of a cheque otherwise than to the branch on which the cheque was drawn. I am of the view, as was the Singaporean Court of Appeal,[35] that the time is ripe for changes to be made to the law. I would recommend, in so far as I do not trespass on the purview of the Legislature, that such a course be considered by the lawmakers.

[88] The Court therefore finds conclusively that that the drawee is the Half Way Tree Branch, and the Portmore Branch is the collecting bank. The cheque could only be presented for payment at the Half Way Tree Branch. The Half Way Tree Branch would only be obliged to the drawer to pay the cheque. The Portmore Branch had no obligation to the payee to pay the cheque.

Whether the collecting bank breached any law by charging an encashment fee?

[89] The final point for consideration is whether there is any law or practice which prevents the collecting bank from charging a fee for its services. It is a mere verbal dispute whether the sum is taken from the proceeds of the cheque or paid over the counter. The effect is the same. A fee is required to be paid before the cheque is encashed by the collecting bank.

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[35] **Damayanti Tantilal Doshi v Indian Bank** 1999 4 SLR 1, 11 Sing CA

[90] I believe Mr. Jackson has impliedly agreed that there is no such law or practice since his sole contention of the unlawfulness of the encashment fee is grounded in the **Bills of Exchange Act**. Nonetheless, the Court will examine the issue.

Custom/Practice/Policy

[91] Counsel for BNS had averred that the imposition of fees to encash cheques at the counter is a custom and practice of the bank. The onus of establishing the existence of a customary right rests with the party who asserts its claim. The Learned Authors of **Commonwealth Caribbean Law Legal Systems**, 2nd Edition prescribes the test to be satisfied in establishing a customary right as:

> *(a) Antiquity*
>
> *The local custom must have existed from time immemorial…*
>
> *(b) Continuance*
>
> *The custom must have existed continuously, that is, since 1189, or the accepted date without interruption…*
>
> *(c) Peaceable enjoyment*
>
> *The custom must have existed peaceably, by common consent or without opposition…*
>
> *(d) Mandatory*
>
> *The custom must be obligatory or mandatory. Whatever rights are given must be given as of right…*
>
> *(e) Certainty and clarity*
>
> *The custom must be certain and clear in all respects…*
>
> *(f) Consistency*
>
> *Customs must not be contradictory; they must be consistent with one another…*
>
> *(g) Reasonableness*
>
> *The custom cannot be unreasonable. If it can be shown that it was unreasonable in 1189, then the claim would fail…*

[92] Counsel for the BOJ submitted that the imposition of encashment fees is a custom which is designed to reimburse the costs borne by the institution in conducting due diligence checks, to verify the authenticity of the request and the instruments tendered. This position was not shared by Counsel for the Attorney General. The Court agrees, as submitted by Counsel for the Attorney General, that BNS has not provided any evidence of the establishment of a custom for the Court's consideration, however, there are costs incurred for due diligence checks in accordance with industry practices, and fees may be imposed to cover those costs.

[93] Counsel for the Attorney General submitted further that based on the **Banking Services (Deposit Taking Institutions) (Customer Related Matters) Code of Conduct ("Code of Conduct")** the Court could be satisfied that the imposition of cheque encashment fees was a practice which existed from at least 2016, which is nine **(9)** years prior to the instant claim. Counsel also stated that the issuance of this Code of Conduct by BOJ also indicated that BOJ has had knowledge of the existence of the banks' policy to charge fees for certain services. The second schedule of the **Code of Conduct**, item 5, sets out the fees which must be disclosed by banks to customers. Item 5(b) provides for cheque encashment fees.

[94] This **Code of Conduct** derives its authority from **S.132(4)(b) of the Banking Services Act** which states that the Supervisor (BOJ) may issue a code of conduct on consumer-related affairs. **S.132(4)(b)(i)** states that the code may provide for, *"the obligation to provide customers with reasonable notice of fees and charges, terms and conditions and changes thereto."*

[95] Counsel for Mr. Jackson, in response, contended that BNS has failed to sufficiently demonstrate the existence of a custom, practice, or policy justifying the imposition of a cheque encashment fee. Moreover, even if such a custom or policy were established, it would not override the provisions of the **Bills of Exchange Act**. It was argued by Counsel that the **Code of Conduct** does not authorize the imposition of encashment fees; it merely requires notification of such fees and any changes thereto. This, Counsel argued, does not equate to the imposition of any such fees being legal. Additionally, the **Code of**

Conduct does not supersede any Act of Parliament, as it is a form of subsidiary or delegated legislation. Therefore, if the Court finds that the **Bills of Exchange Act** prohibits the imposition of any fees on a negotiable instrument, then the provisions of the **Code of Conduct** and/or any custom which exists cannot circumvent it.

[96] Based on the prior findings it is clear that the imposition of an encashment fee does not contravene the **Bills of Exchange Act**. The force of the arguments on behalf of Mr. Jackson therefore falls away. Counsel for Mr. Jackson is however correct that the **Banking Services Act**, and by extension the **Code of Conduct**, do not authorize the imposition of fees for cheque encashment. Rather, the **Code of Conduct** merely indicates that banking institutions must notify customers of fees for their services and any changes thereto. Among those fees are cheque encashment fees. It does however indicate that a practice exists where banking institutions charge a fee for cheque encashment. In the final analysis however it does not matter whether such a custom or practice exists. It is not precluded by law.

[97] The question of bank charges was addressed by the UK Supreme Court in **Office of Fair Trading v Abbey National plc and others** [2010] 1 AC 696 **("Abbey")**, reversing the Court of Appeal, which supports the conclusions above. The question in issue was that the competition watchdog was entitled to assess the fairness of the charges for an overdraft facility under the 1999 Regulations. Lord Walker's statement, endorsed by Lord Phillips, that:[36]

> *… I would declare that the bank charges levied on personal current account customers in respect of unauthorised overdrafts (including unpaid item charges and other related charges) constitute part of the price or remuneration for the banking services provided...*

This dictum, in the Court's view, is in recognition of BNS' right to charge for the services it offers.

[98] A business, and indeed anyone, is entitled to conduct itself/himself in such a manner as they see fit subject to the law. To that end, parties are free to enter into

[36] [2010] 1 AC 696, para 51

contracts, even disadvantageous ones. In **Abbey**, Lady Hale suggested that financial services are no different from other goods and services that are paid for, saying:[37]

> *We buy all sorts of products which a sensible person might not buy and some of which are not good value for the money. We do so with our eyes open because we want the product in question more than we want the money. Should financial services be treated differently from other goods and services?*

Mr. Jackson had the free choice to decline to enter into this contract with the collecting bank, or deposit the cheque if he was a customer of the bank or present it for payment at the Half Way Tree branch.

[99] Also, in **Abbey**, Lord Walker acknowledged that the bank's terms may be oppressive for the customer but postulated that it was within the remit of the Legislature to protect the consumer.[38] He suggested that the attempt in the UK to protect consumers from unfair terms in standard contacts in the **Unfair Terms in Consumer Contracts Regulations 1999 SI 1999/2083** might not have gone far enough.

[100] The Fair Trading Commission in its publication **Compete**, in an article titled, **The Scope For Greater Competition: Trends In Market Concentration In The Banking Sector 2017 - 2023** by Carlton Thomas, Competition Analyst, concluded that:

> *The commercial banking sector, with its consistent index patterns indicating moderate concentration, may indicate a landscape that fosters stability but also hints at limitations in fostering intense competition. This situation could influence pricing strategies, product offerings, and the overall accessibility of financial services to the broader population.*

This may be just short of suggesting that the banking industry operates in an oligopolistic manner but still demonstrates the relative strength of the banks vis a viz the consumers of banking services. The banks have the superior bargaining strength to set the terms and conditions of contracts with their customers, i.e. take-it-or leave-it contracts.

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[37] Ibid., para 93
[38] Ibid., para 52

[101] Again, in so far as this Court does not offend the separation of powers, the Court suggests that the Legislature gives consideration to the extent that it should interfere, as a matter of public policy, in the law of contract and the principle of *pacta sunt servanda* for the protection of the banks' customers.

[102] It is now clear that Mr. Jackson's application must fail. What course should the Court adopt where it is also clear that Mr. Jackson's case has no reasonable prospect of success? **CPR Rule 15.2 (a)** provides that the Court may grant summary judgment where the claimant has no real prospect of succeeding on the claim. Some guidance was given in **Three Rivers District Council (Appellants) V. Governor and Company of the Bank of England (Respondents)** [2001] UKHL 16 **("Three Rivers")**, where a similar rule, then new, was under consideration. **Rule 24, 2 of the UK Civil Procedure Rules 1998** provided that:

> *The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if -*
>
> *(a) it considers that -*
>
> *(i) that claimant has no real prospect of succeeding on the claim or issue; or*
>
> *(ii) that defendant has no real prospect of successfully defending the claim or issue; and*
>
> *(b) there is no other reason why the case or issue should be disposed of at a trial."*

Lord Hope of Craighead in **Three Rivers** referred to this passage from **Swain v Hilman** *(Supra):*[39]

> ***[93]*** *"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position.*

[39] [2001] UKHL 16, paras 93-95

> *Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible….*
>
> *Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."*

He concluded:

> *(6) Whether the claim should be summarily struck out*
>
> ***[94]*** *For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?*
>
> ***[95]*** *I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible.*

[103] It is this Court's finding that as a matter of law, Mr. Jackson is not entitled to the remedy he seeks. The Court is obliged to give effect to the overriding objective of dealing justly with a case when exercising any power under the **CPR**. This includes the objective of saving expense, ensuring that the case is dealt with expeditiously and fairly and that the case is allotted an appropriate share of the court's resources. The Court therefore must grant Summary Judgment in BNS' favour.

CONCLUSION

[104] Upon consideration of the submissions and authorities, it is this Court's decision that the drawee bank was the Bank of Nova Scotia Half Way Tree Branch, which was obliged by statute and by contract with the drawer to pay the amount of the cheque on presentation. This Court, while recognizing that there have been technological advances supporting the banking industry, and concomitant evolving practices, does not agree that these changes have occasioned a change in the law relating to the drawee bank.

[105] The Portmore Branch as the collecting bank was not obliged by the **Bills of Exchange Act** to pay the cheque to the payee, Mr. Jackson. Payment of the cheque at the Portmore Branch therefore constituted a contract between the payee and the collecting bank. The collecting bank has by practice charged a fee for this service and there is no law which prevents this. In particular, this practice is not in breach of the **Bills of Exchange Act** nor the **Banking Services Act**. BNS' right to charge a fee for this service is however subject to the obligations set by the **Code of Conduct** made under the **Banking Services Act**.

[106] Changes to the law, the practice of the banking industry and the protection of the consumers of banking services are matters for the Legislature and not the Court. It follows that Mr. Jackson would be unable to prove his case on a balance of probabilities and so would be unsuccessful in his claim. In the event, there must be Summary Judgment in favour of BNS.

[107] On the question of Costs, after hearing submissions from the parties, 80% of the Costs of this Application is awarded to BNS, there will be no Order as to Costs to the Attorney General and the Bank of Jamaica, who are funded by the state and whose participation was occasioned in the public interest due to the impact of this ruling on the banking industry.[40]

ORDERS

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[40] See **Virgo (Dale) and Another v Board of Management of Kensington Primary School and others** [2024] JMCA Civ 33

[108] The Court makes the following Orders:

1. Summary Judgment is entered in favour of the Defendant against the Claimant.

2. 80% of the Costs of this Application is awarded to the Defendant to be taxed if not sooner agreed.

3. No Order as to Costs for the Bank of Jamaica and The Attorney General of Jamaica.

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Judge