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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008 HCV 00118

BETWEEN	OLINT CORP. LIMITED	CLAIMANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	DEFENDANT

Maurice Manning and Georgia Gibson-Henlin instructed by Catherine Minto of Nunes Scholefield & DeLeon & Co. for Claimant.

Michael Hylton Q.C. and Carlene Larmond for Defendant

Heard: March 17th 18th and April 18th 2008

JONES, J.

[1] In January 1720 in the United Kingdom, the South Sea Company offered shares to the public at the modest price of £128.00. The directors of the company in an effort to whip up interest in the company's shares, published claims of great success and far-fetched tales of South Sea riches to entice investors. One such claim was that it was a "company for carrying out an undertaking of great advantage, but nobody to know what it is". By the end of June 1720, the share price rose to £1080.00. As the events unfolded, it led to what is euphemistically called the "South Sea Bubble".

[2] Unlike the South Sea Company, Olint Corp. Limited (hereinafter called the Claimant) provides customer services to its members as a private club. It is widely reported in the public media to be involved in what is said to be the lucrative business of foreign currency trading, but no one knows for sure. It is also widely reported to be one of a group of "alternative investment

schemes" currently engaged in a legal fight (at the Jamaican Court of Appeal) with the Financial Services Commission over whether or not it offered "securities" as a "prescribed financial institution" and therefore should be regulated. It is also widely reported in the public media to be competing successfully with the local banking industry (inclusive of the Defendant) for US$ investment funds. It is concerned about its ability to provide service for its customers if National Commercial Bank Jamaica Limited goes ahead with its threat to close its accounts.

[3] National Commercial Bank Jamaica Limited (hereinafter called the Defendant), despite a willingness to maintain a banking relationship with the Claimant, is increasingly anxious of the Claimant's continued tardiness in providing requested information in order to comply with its obligations under the "Know your Customer Guidelines" (KYC) and "Due Diligence" (DD) provisions under the "Bank of Jamaica Guidance Notes on the Detection and Prevention of Money Laundering and Terrorist Financing Activities".

[4] Despite numerous attempts to ease the anxiety each side remains apprehensive; one grumbling that the other has failed to comply with request for information to satisfy (KYC) and (DD) provisions of the Bank of Jamaica and the other that there is a breach of the Banking, and the Fair Competition Acts. On November 14, 2007, the music stopped, and the dancing ceased. The Defendant decided that the courtship must come to an end as all it received from the Claimant in answer to its request for specific information was high hopes, fine words, but no results. In a short tersely worded letter, the Defendant gave as its reason the Claimant's repeated failures to provide audited financial statements and on what it says is a reassessment of its risk in doing business with them.

[5] The Claimant complains that the maximalist stance adopted by the Defendant in deciding to summarily close its accounts will wreak havoc with its business and the consequential damage caused cannot be adequately compensated by way of damages. It obtained an interim injunction to prevent the closing of its accounts and now ask that this be extended pending the trial of this matter. For the Defendant, however, the Claimant's defiance is a critical test of what it says is its resolve to comply with the Bank of Jamaica's Guidance Notes. It has strenuously objected to the application for the extension.

BACKGROUND FACTS

[6] The Claimant was incorporated on October 14, 2005, under the laws of Jamaica with its registered office at 30 Dominica Drive in the parish of St Andrew, with the principal object being to provide customer service. The Defendant is a licensed and regulated commercial bank with offices at 32 Trafalgar Road in the parish of St. Andrew.

[7] The Claimant began its banking relationship with the Defendant in November 2005 by opening a local currency chequing account and a US$ savings account. The US$ savings account was for the purpose of its customer service business to facilitate club member encashments. Between 2005 and June 2007 the Claimant had an average monthly throughput ranging from US$5,000, 000.00 to US$20,000,000.00. This information was provided to the Defendant in the Customer Information Form presented at the time of opening of the account. In addition, the Claimant indicated that; its principal line of business was "club member" care; its principal source of funds was from "club members; and that the purpose of the account is "to facilitate payment to and receive funds from 'club members' and meet Operational Expenses".

[8] The Defendant wrote to the Claimant on August 8, 2007, requesting certain documents. The Defendant says that this was not the first request and followed oral requests that had been made before which had not been complied with. By letter dated November 14, 2007, the Defendant wrote to the Claimant and advised it that "the Bank has decided that it does not wish to continue to operate the accounts of the Claimant "and its affiliates. The reason stated by the Defendant is the "the combined effect of the Claimant's failure to provide the documents requested and NCB's assessment of the risks and challenges involved with maintaining a banking relationship with the Claimant led to the decision to close the accounts". The Defendant went on to indicate that it would be closing accounts bearing numbers 171–017–866, 171–011–647, 174–079–587 and 171 – 017 – 866 on December 17, 2007 (unless the Claimant does so before). It also indicated that it would stop accepting deposits on the account as at November 21, 2007.

[9] By letter dated November 21, 2007, the Claimant responded to the Defendant saying that it had complied with all the Defendant's requests in order to satisfy the Defendant's Anti-Money Laundering Policy, Know Your Customer and other local and internationally acceptable control measures designed to protect the integrity of the banking system. It said that the short notice to close the banking accounts and establish new banking relationships would cause disruptions and major inconvenience to its "club members". It indicated that it would use its best efforts to establish alternative banking relationships in the shortest possible time; however, additional time will be required to effect a smooth transition that being the case. It requested an additional three months ending March 14, 2008, to be allowed to operate the accounts.

[10] The Defendant responded to this letter through its Regional Manager, Retail Banking Christopher Denny in letter dated November 22, 2007. He advised that, the Claimant was wrong to

suggest that it had complied entirely with the Defendant's request. In the letter Christopher Denny said:

> "in any event, you are no doubt aware that the decision to terminate the banker-customer relationship may be made by either the bank or the customer, without the requirement for the terminating party to have to or articulate specific reasons. Provision of all the information to NCB does not, therefore, place us under any duty to provide banking services or remain otherwise obligated to you (or any other customer) indefinitely. Instead we are entitled (as you are) to make our own assessment of the liabilities, risks and benefits of continuing the relationship and to make a decision accordingly...

[11] The Defendant by virtue of that letter extended the time to close the accounts to January 14, 2008. The Claimant thereafter in letter dated November 23, 2007, requested an extension of time to March 14, 2008, a meeting with the Defendant, and indicated that it had a difference of opinion on the bank's right to terminate its account without cause. The Claimant offered to provide management accounts in lieu of audited accounts until the latter were ready.

[12] The Defendant responded in letter of November 29, 2007, and indicated that it had requested various items in its letter of August 8, 2007, which were not provided. The documents requested were:

(1) The Audited Financial Statements

(2) Letter of Good Standing from the Registrar of Companies

(3) Current Tax Compliance Certificate

[13] The Defendant further indicated in that letter that it was not prepared to accept management accounts given the increased level of activity in the Claimant's accounts. It further advised the Claimant that it wished to be fair and reasonable regarding the Claimant's request for

an extension of time, but that the Claimant's letter did not provide sufficient reason to justify an extension beyond the time initially provided. In dealing with the Claimant's allegation of loss if the account was closed without the extension requested the letter continued:

> "we are unable to appreciate what delays would result from alternative banking arrangements and how these would result in a loss to you of US$1,000,000.00 per month. You would need to provide us with an explanation of all these statements and sufficient documentary support for them so that we can consider your request."

[14] The Defendant then refused to extend the time beyond January 14, 2008.

[15] The Claimant responded in letter dated December 19, 2007, providing the Defendant with a current Tax Compliance Certificate, the letter of Good Standing from the Registrar of Companies and a computation of loss if the account is closed at the time fixed by the Defendant. The Defendant's response is dated December 24, 2007, advising that it was not prepared to reconsider its decision to close the accounts on January 14, 2008. The Claimant was asked to open accounts at other banks.

[16] On January 11, 2008, the Claimant applied for several ex-parte injunctions from this court which in essence sought to prohibit the Defendant from closing its accounts. The ex-parte Interim Orders for injunction were all granted by Pusey J. inclusive of an Order for Specific Disclosure. That particular order was set aside ex parte by Pusey J. on January 17, 2008. The remaining orders were set to terminate on January 25, 2008, and the matter fixed for inter partes hearing and "further consideration" on January 24, 2008. The matter was subsequently adjourned to January 30, 2008, to deal with some preliminary applications and then eventually considered on March 17, and 18, 2008.

ISSUES

[17] From these facts, four issues arise. They are:

I) First, is there a serious issue to be tried before the court?

II) Second, and if so, are damages an adequate remedy for the Claimant?

III) Third, if damages are not an adequate remedy for the Claimant, is the Claimant's undertaking in damages adequate protection for the Defendant?

IV) Fourth, and if damages are an inadequate remedy and the Claimant's undertaking in damages is adequate protection for the Defendant, where does the balance of convenience lie?

[18] The clarity, coherence and depth of the submissions from Georgia Gibson-Henlin and Maurice Manning (hereinafter called Counsel for the Claimant) and Michael Hylton QC and Carlene Larmond (hereinafter called Counsel for the Defendant) provided great assistance to the court in evaluating these issues. Here they are.

(I) IS THERE A SERIOUS ISSUE TO BE TRIED?

> "...the court no doubt must be satisfied that...there is a serious question to be tried..."***American Cyanamid*** **[1975] AC 396 at 406G - 407G**

[19] The ***American Cyanamid*** guidelines apply to prohibitory injunctions, not to mandatory ones. I accept Counsel for the Defendant's submissions that the injunctions in this case are not merely prohibitory, but also mandatory. They essentially force the Defendant to continue to offer banking services to the Claimant during the period of the injunction. The Defendant has to accept the Claimant's deposits, honour its cheques and to provide support for "all other

transactions which would be exercised by the Claimant during the normal course of operating these bank accounts".

[20] It is not sufficient for the Claimant to prove that there is a serious question to be tried; the case must be unusually strong and clear. In ***Shepherd Homes v Sandham*** **[1970] 3 All ER 406** the Claimant applied for an interlocutory mandatory injunction, and sought to rely on authorities that dealt with interlocutory injunctions generally. Megarry J said at page 412:

> "...on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction".

[21] Megarry J applied his own decision a few days later in ***London Borough of Hounslow v Twickenham Garden Developments Ltd*** **[1970] 3 All ER 326**

[22] In that case, the injunction was sought in prohibitory or negative terms, which if granted would be mandatory in effect, at least in part. He said at page 355:

> "the injunction sought on this motion, if not mandatory, at least has a mandatory element in it. If the contractor is restrained from 'entering, remaining or otherwise trespassing' on the site, then although the injunction is prohibitory in its language, it is at least in part mandatory in its substance and effect...This aspect was not discussed in argument, but it seems to be of some importance, in that on motion a far stronger case must be made for a mandatory order than for a prohibitory order; ... It so happens that a few days ago I gave judgment on a motion (Shepherd Homes Ltd v Sandham) in which I had to consider the principles applicable to interlocutory applications for mandatory injunctions. For the reasons stated in that judgment, I think that before granting a mandatory injunction on motion the court must feel a high degree of assurance that at the trial a similar injunction would probably be granted".

[23] Megarry J's decision in Shepherd was approved and followed by the English Court of Appeal in ***Locabail International Finance Ltd v Agroexport and others (The Sea Hawk)*** **[1986] 1 All ER 901.** Mustill LJ citing the abovementioned passage said at page 906:

> "It was pointed out in argument that the judgment of Megarry J antedates the comprehensive review of the law as to injunctions given by the House of Lords in American Cyanamid Co v Ethicon Ltd, but to my mind at least, the statement of principle by Megarry J in relation to the very special case of the mandatory injunction is not affected by what the House of Lords said in the Cyanamid case"

[24] Hoffman J took the view in ***Films Rover International Ltd v Cannon Film Sales Ltd*** **[1987] 1 WLR 670** that the "high degree of assurance test" does not have to be satisfied in all cases of interim mandatory injunctions. Later in ***Nottingham Building Society v Eurodyanmics Systems plc*** **[1993] FSR at page 468** Chadwick J seemed to reconcile both viewpoints in the following passage:

> "Firstly, this being an interlocutory matter, the overriding consideration in which course is likely to involve the least risk of injustice if it turns out to be 'wrong' in the sense described by Hoffman J. Secondly, in considering whether to grant a mandatory injunction the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage will carry a greater risk of injustice if it turns out to have been wrongly made than on order which merely prohibits action thus preserving the status quo. Thirdly, it is legitimate, where a mandatory injunction is sought to consider whether the court does feel a high degree of assurance that the claimant will be able to establish his right at a trial. This is because the greater the degree of assurance the Claimant will ultimately establish his right, the less will be the risk of injustice if the injunction is granted. But finally even when the court is unable to feel any high degree of assurance that the Clamant will establish his right there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted"

[25] The U.K Court of Appeal agreed with Chadwick J in ***Zockoll Group Limited v Mercury Communication Ltd*** **[1998] FSR 354** stating that those observations should be "all the citation necessary on this matter in future".

a) Breach of Contract and of the Banking Act

[26] Counsel for the Claimant contends that new statutory duties were placed on commercial banks under the Banking Act by an amendment to Section 4 (3) (c).

> "4. (1) Every application for a licence to carry on banking business shall be made to the Minister in such form and manner and shall contain such particulars as may be prescribed, and the Minister may, in his discretion, grant or refuse such application.
>
> (3) A licence shall not be granted to any company to carry on banking business in Jamaica unless the Bank of Jamaica makes a recommendation to the Minister stating that every person who is a director of the company or who is to perform corporate management functions in the company or who is a shareholder holding (whether in his own right or when counted with any holding of a connected person) 20% or more of the voting shares of the company, is a fit and proper person for that purpose, that is to say, he is a person-
>
> (a)...
>
> (b)...
>
> (c) who, in the opinion of the Bank of Jamaica, is a person of sound probity, is able to exercise competence, diligence and sound judgment in fulfilling his responsibilities in relation to the bank and whose relationship with the bank will not threaten the interests of depositors..."

[27] This provision they argue was inserted after the collapse of the financial sector in the 1990's in order to safeguard the interest of depositors and the financial sector in Jamaica. They argue that these provisions modify the normal contractual relationship between banker and customer.

[28] On this basis Counsel for the Claimant argues that the Defendant as a bank has a duty to act in the best interest of it as a depositor and to avoid from engaging in unsound and/or unsafe banking practices. They also say that the bank has a fiduciary duty to them as a depositor. In support of this argument, Counsel for the Claimant cites the "Standards of Sound Business

Practices – Guidelines to Fit and Proper Assessments. – Section C" set out by the Bank of Jamaica, which states:

> "By definition "fit and proper" test is the statutory basis for evaluating the probity, expertise base, competence, diligence and sound judgment of board member, management and major shareholders to effectively discharge their fiduciary responsibility"

[29] Up to recently the courts have reaffirmed the position that "on the face of it the relationship of a bank and its customer is not a fiduciary relationship". See ***Governor and Company of the Bank of Scotland v A Limited*** **[2001] EWCA Civ 52.**

[30] In our own jurisdiction in ***FIS v Negril, Negril Holdings and Negril Investments Limited*** **[2004] 65 WIR 227** (an appeal from Jamaica) Lord Walker speaking on behalf of the Board said:

> "...the authorities show that the relationship between a banker and his customer, although not normally a fiduciary relationship, may exceptionally become one (although equitable relief is available only if the relationship is shown to have been abused: see the judgment of the Board in National Commercial Bank (Jamaica) Ltd v Hew [2003] UKPC 51). But the most important element in the judge's finding of a special relationship was Mr Crawford's assurance to Mr Sinclair, given in or around April 1987, that he (Mr Crawford) would do all that Mr Bingham had done in the past".

[31] I agree with Counsel for the Defendant that there is nothing in the facts of this case which could have given rise to some "special relationship" and create a fiduciary relationship. In my judgment, Section 4(3) (c) of the Banking Act is concerned with the suitability of board members, management and major shareholders of a bank to discharge their responsibility to depositors as a whole. It does not create a fiduciary relationship between the bank and its customers, nor does it create fiduciary obligations.

[32] It is also contended by Counsel for the Claimant that a stipulation of the Defendant's license or the regulatory framework under which it operates it is required not to behave in an oppressive and/or deceitful manner towards its depositors. They say that the Defendant is in breach of this provision by seeking to close the Claimant's accounts without a proper reason.

[33] The relationship between a banker and its customer, although contractual, is unusual in its terms. It is essentially a relationship of borrower and creditor. The bank has a right to use the money deposited by the customer for its own purposes on its undertaking to repay an amount equal to that paid in with or without interest either on call or at a fixed time.

[34] The learned authors of ***Paget's Law of Banking*** 13th Edition at page 153 make it clear that an ordinary (as opposed to fixed period or other contract with special conditions) banker and customer contract can be terminated by the customer at any time and by the bank on giving reasonable notice. In this case, the Defendant gave notice on November 14, 2007, of its intention to close the Claimant's bank accounts on December 17, 2007. The Claimant complained that the period of notice was much too short and would cause severe dislocations in its business. The Claimant suggested March 14, 2008, as a more convenient date to make arrangements for the closure of its accounts. The Defendant responded by giving an additional month, up to January 14, 2008, for the Claimant to close its account.

[35] Counsel for the Claimant contends that the Defendant's motive for closing its accounts is based on ill-will, is unlawful, capricious, oppressive, arbitrary, intimidatory and anti-competitive. Counsel for the Claimant supports this contention by the public statements made by the Defendant's Chairman, Michael Lee-Chin, and Christopher Williams, Managing Director of NCB Capital Markets, one of the Defendant's subsidiary companies that the Claimant competes with

them and its presence must not be tolerated. They also contend that the Defendant acted together with other financial institutions that had already closed the Claimant's accounts. These institutions (on the Claimant's case) are First Caribbean International Bank, RBTT and First Global Bank.

[36] It is true that motive is often difficult to make out. Acts that may appear righteous fall apart when subjected to rigorous analysis. However, there are two points to be made in relation to motive. First, there is no affidavit evidence to support an allegation of improper motive on the part of the Defendant. Counsel for the Claimant contends that the Defendant became increasingly apprehensive about competition from the Claimant in its investment side of the business. This is a curious claim as the Claimant has not admitted to competing with the Defendant in the securities or banking business. The main contention of the Claimant is that it is a private member's club involved in customer service and is not engaged in trading securities. Second, ill-motive on the part of the Defendant - where the act complained of is not a cause of action in law - is not a relevant consideration in granting an injunction. So then, a Defendant cannot be prevented from doing an intrinsically lawful act simply because he acted deliberately and maliciously to the disadvantage of the Claimant. See: ***Mayor of Bradford v Edward Pickles*** **[1895] AC 587.**

[37] In any event, the Defendant gave three reasons for closing the Claimant's account. They say that these reasons are credible, rational and commercially reasonable. Firstly, the Defendant had serious concerns about the considerable increase in activity on the Claimant's accounts. The Claimant opened two accounts in 2005 (17-4079587 and 17-1011647). When opening those accounts the Claimant indicated on the Customer Information Forms that the anticipated monthly turnover would be US$5 million to US$10 million and J$5 million to J$20 million, respectively. The highest turnover (or total credits) took place in March 2006, when it was just over US$5 million. Next highest was February 2006, when it was about US$4.5 million. From

the documentary evidence supplied by the Defendant the throughput on the accounts fluctuated, and in fact, declined during the first 6 months of 2007. In June 2007 the Claimant opened a third account (17-1017866). On the Customer Information Form for that account, the Claimant indicated an anticipated monthly turnover of US$30 million.

[38] The Defendant's records show that from June 2007, onwards there was an unexpected and substantial increase in turnover from the Claimant's new account. The turnover in June was almost US$24 million, July US$30 million and in October it had reached US$47 million.

[39] The trend the Defendant says was similar with the bank balances. At the end of February 2006, the highest figure was approximately US$9 million. In general the balances never exceeded US$1.4 million (or J$100 million). In June 2007, however, the balance jumped to approximately US$17 million then to more than US$40 million in July and August. Counsel for the Defendant contends that this was a massive, unexplained increase in activity on the Claimant's accounts. They argue that on these facts the Defendant's concerns were justified.

[40] The second reason the Defendant gives is that there were a very large number of transactions on the Claimant's accounts which not only required a great deal of staff time, but also considerable supervisory and managerial time and effort .

[41] The third reason given is that maintaining a banking relationship with the Claimant puts at significant risk, the Defendant's relationships with correspondent banks overseas. There are communications from one of those banks expressly advising the Defendant that they would not process transactions involving the Claimant and specifying their concern in relation to the Claimant. The Defendant also points to the fact that the International Monetary Fund has expressed concerns

about "alternative investment schemes" such as the Claimant's operations and to the ruling of the Supreme Court that the Claimant is acting in breach of the Securities Act.

[42] Counsel for the Claimant contends that there was no basis for the Defendant to have required the Claimant to produce the documents referred to in its letter dated August 8, 2007. In fact, Counsel for the Claimant goes so far as to suggest that the Defendant has acted dishonestly by claiming that there is a regulatory requirement that a customer such as the Claimant provide these documents when there is no such requirement .

[43] One of the requests of the Defendant was that the Claimant provide audited financial statements. The Claimant responded to this request in letter dated December 19, 2007, saying "we are in the process of appointing an audit firm of international repute to conduct and independent review of our books of account". The Claimant has admitted that it did not provide audited financial statements as requested by the Defendant, and from the evidence presented, has not done so almost six months after the first written request.

[44] The Defendant is licensed under the Banking Act to operate a commercial bank, and that Act provides that the Bank of Jamaica is responsible for the supervision of banks. The Bank of Jamaica has issued Guidance Notes to commercial banks for the detection and prevention of money laundering and terrorist financing activities. In the introduction to the Guidance Notes, the Bank of Jamaica states that:

> "failure to comply with these Notes could expose the Financial Institution to prosecution under the Money Laundering Act or Regulations, or to prosecution under the Terrorism Prevention Act as well as to regulatory action by the Bank of Jamaica....in the bank's view a court would have regard to these Guidance Notes to determine the appropriateness of the AML and CFT measures adopted by the financial institution. The Attorney General's Chambers has also issued an opinion on the import and effect of this clause which confirms that [regulation 3(3) of the

> Money Laundering Regulations 1998] makes compliance with these Guidance Notes compulsory".

[45] Finally, the Bank of Jamaica states in the Guidance Notes that it "will also consider an institution's ... non-adherence to these Guidance Notes to constitute unsafe or unsound practices for the purposes of section 25(1) of the Banking and Financial Institutions Acts."

[46] The Guidance Notes expressly require banks to "ensure that they obtain" audited financial statements of companies which have been incorporated for more than 18 months. The Claimant was incorporated on October 13, 2005, and as at the date of the Defendant's written requests for documents (August 8, 2007) had been incorporated for more than 18 months. Note 50(e) of the Guidance Notes therefore not only allowed, but required, that the Defendant obtain audited financial statements from the Claimant.

[47] Note 45 of the Guidance Notes provides that "any business relationship that has already commenced should be legally terminated (unless otherwise advised by law enforcement authorities) if the customer fails to provide requested follow up information or if any other verification problems arise which cannot be resolved".

[48] However churlish the Claimant may feel about the Defendant's reliance upon the "Know your Customer Guidelines" (KYC) and "Due Diligence" (DD) provisions under the "Bank of Jamaica Guidance Notes on the Detection and Prevention of Money Laundering and Terrorist Financing Activities" the right of a bank to decide who to do business with cannot be seriously challenged. A bank's knowledge of its customers and the source of funds placed on deposit with it, is after all, an important step towards transparency and affect its ability to establish compliance under the Proceeds of Crime Act 2007. This has become an important requirement in what has become the hazardous business of banking. In my judgment, the Defendant by taking steps to

terminate the Claimant's accounts either as a matter of contract or as required by the "Know your Customer Guidelines" (KYC) and "Due Diligence" (DD) provisions, referred to above, acted lawfully and within the terms of the banker customer relationship and cannot be in breach of its contract with the customer or of the Banking Act. As there is a complete lack of useful disclosure by the Claimant as required, there is no serious issue to be tried, nor is there any assurance whatsoever, that the Claimant can succeed at a trial on this issue.

b) Breach of the Fair Competition Act

[49] Counsel for the Claimant put forward the position that the Defendant has breached a number of provisions of the Fair Competition Act. The first assertion is that the Defendant by itself or together with other commercial banks occupies a dominant position of economic strength in the provision of banking services in Jamaica as defined by Section 19 of the Fair Competition Act. On this basis Counsel for the Claimant contends that the Defendant has abused this dominant position in breach of Section 20 of the Fair Competition Act by refusing to supply the Claimant with banking services. Now then, what is a position of dominance? Section 19 of the Fair Competition Act provides that:

> "For the purposes of this Act an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors."

[50] Who is an interconnected company? Section 2 of the Fair Competition Act provides that:

> (a) "any two companies are to be treated as interconnected companies if one of them is a company of which the other is a subsidiary or if both of them are subsidiaries of the same company;

(b) a group of interconnected companies shall be treated as a single enterprise."

[51] Counsel for the Claimant makes the case that the Defendant "by itself or together with the other commercial banks herein named which had closed its accounts" was in a position of dominance. First, there is no evidence that the Defendant and the other banks named by the Claimant are interconnected. The audited financial statement of the Defendant provided to the court has in point of fact rubbished such a claim. Second, there is no evidence that the Defendant "occupies such a position of economic strength as will enable it to operate without effective constraints from its competitors or potential competitors". There is, however, evidence that there are five other commercial banks operating in Jamaica and they compete for business. There is also evidence that the Defendant is the second largest bank with assets of between 34% to 37% of total deposits and 30% to 34% of total loans. The largest bank and competitor to the Defendant is the Bank of Nova Scotia with over 40% of total deposits and loans. In my judgment there can be no serious issue that the Defendant firstly, occupies "such a position of economic strength as will enable it to operate without effective constraints from its competitors" in the market under the Fair Trading Act; and secondly, was abusing it in relation to the Claimant.

[52] The second assertion made on behalf of the Claimant under the Fair Competition Act is that the Defendant together with other commercial banks are colluding against it to limit the supply of banking services in breach of Section 35 (1) of the Fair Competition Act. Section 35 (1) provides as follows:

"(1) No person shall conspire, combine, agree or arrange with another person to –

(a) limit unduly the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service;

> (b) prevent, limit or lessen unduly, the manufacture or production of any goods or to enhance unreasonably the price thereof;
>
> (c) lessen unduly, competition in the production, manufacture, purchase, barter, sale, supply, rental or transportation of any goods or in the price of insurance on persons or property;
>
> (d) otherwise restrain or injure competition unduly."

[53] They argue that the Defendant and other commercial banks have taken the position that the Claimant is in the business of giving investment advice, dealing in securities and involved in a speculative investment and foreign currency trading scheme. On this basis Counsel for the Claimant argue that the Defendant and the other commercial banks have formed the view that the Claimant is a competitor or intends to enter the market for investment products. The evidence put forward to support this contention of collusion is firstly, that RBTT and First Caribbean have closed the Claimant's accounts and First Global Bank has closed David Smith's account. Secondly, the Defendant now threatens to close the Claimant's account and to refuse it commercial banking services.

[54] Collusion may be either tacit or direct. Robert Whish in his book ***Competition Law*** 4th Edition at page 462, deals with the question of tacit collusion in this way:

> "There is little doubt that there are markets in which it is possible for economic operators to co-ordinate their behaviour without entering into an agreement or being party to concerted practice...such behaviour will be to their own self advantage and to the disadvantage of customers and ultimately to consumers. This is often described by economists as 'tacit collusion': enjoying the benefits of a particular market structure without actually entering into an agreement to do so."

[55] The only evidence presented by the Claimant to support the claim of collusion by the five banks is the letter dated March 8, 2006, showing that RBTT closed its account on that date. The Defendant opened a new account for the Claimant in June 2007. There are two significant bits of evidence which negate Counsel for the Claimant's contention of collusion. First, this closure by

RBTT is more than one year before the letter from the Defendant threatening closure of the Claimant's accounts. Secondly, the Defendant allowed the Claimant to open a new account in June 2007. Both these facts are inconsistent with Counsel for the Claimant's argument of collusion.

[56] In any event, the other parties to the collusion are not a party to this action. Any finding by the court on this matter would be bound to have adverse effects on the other conspirators. It would be difficult to make a finding on this issue as the Claimant requests without giving them an opportunity to be heard. For these reasons, there is, in my judgment, no serious issue to be tried under this head.

[57] Counsel for the Claimant has also contended that the Defendant breached Section 34 (1) (b) of the Fair Competition Act. Section 34 (1) (b) provides as follows:

> "(1) A person who is engaged in the business of producing or supplying goods or supplying services shall not, directly or indirectly –
>
> (a)...
>
> (b) refuse to supply goods or services to or otherwise discriminate against any other person engaged in business";

[58] It is clear that 34 (1) (b) makes it an offence for a person who is engaged in the business of ...supplying services to directly or indirectly refuse to supply that service to or otherwise discriminate against any person engaged in business. The Claimant is engaged in business and Counsel for the Claimant contends that it is illegal for the Defendant to refuse to supply the Claimant with banking services. They argue that notwithstanding common law notions of "freedom to contract" the Claimant's right to protection under this section is a statutory right conferred by the Fair Competition Act.

[59] I accept Counsel for the Defendant's submission that the words "or otherwise discriminate", in the section suggest that for the refusal to be objectionable, it must be discriminatory and not based on some legitimate commercial concern or reason. This view is supported by Richard Whish in **Competition Law** where he says:

> "Refusal to supply is a difficult and controversial topic in competition law. First, as a general proposition most legal systems in countries with a market economy adopt the view that firms should be allowed to contract with whomsoever they wish; compulsory dealing is not a normal part of the law of contract. Secondly, irrespective of whether the law should sometimes require that a dominant firm should be required to supply, there are many possible objective justifications for a refusal to do so: for example that a customer is a bad debtor, that there is a shortage of stocks or that production has been disrupted".

[60] In the ***Bond Law Review*** an article entitled "Refusals to Supply under Section 46 of the Trade Practices Act: Misuse of Market Power or Legitimate Business Conduct?" a review of court decisions relating to alleged breaches of similar provisions in various jurisdictions, was conducted. The author concluded that a common thread runs through all the authorities: "a refusal to supply will be excused by the courts provided there is some legitimate business explanation for it".

[61] In my judgment the reasons given by the Defendant for the closing of the Claimant's accounts constitutes valid business reasons for doing so. Accordingly, there is no serious question to be tried on this issue nor does the court "feel a high degree of assurance that the Claimant will be able to establish his right at a trial".

c) Breach of Tort: Intimidation, Inducing a Breach of Contract and Causing Loss or Damage by Unlawful Means

[62] Counsel for the Claimant contends that the Defendant's conduct in threatening the closure of its accounts constitutes the Tort of Intimidation, Inducement for it to Breach its Contracts with customers and Causing Loss by Unlawful Means

[63] The learned author of ***Street on Torts* 12th Edition at page 376** says that:

> "Intimidation is committed whenever an unlawful threat is successfully used deliberately in order to cause another to do something they would not otherwise do or to cause them to refrain from doing something that they would otherwise do with the result (in either case) that harm is caused either to the subject of the threat or to a third party. The requirement that the threat must be coercive in one of these ways is well established"

[64] In ***Rookes v Barnard*** the court recognized that there can be two party intimidation i.e. intimidation of the "plaintiff himself" or three party intimidation i.e. "intimidation of other persons to the injury of the plaintiff". ***Street on Torts*** at page 377 again makes the point that:

> "while threats of breach of contract will suffice to supply the requisite unlawfulness in cases of three party intimidation (where X threatens to break his contract with Y thereby causing loss to Z in respect of which Z can sue) such threats will give rise only to contractual remedies in respect to two party intimidation (where the threatened breach is of the defendant's contract with the claimant)"

[65] In this case, Counsel for the Claimant contends that the Defendant threatened to close its accounts at the Defendant's branches first by December 17, 2007 and then by January 14, 2008, if the Claimant failed to do so voluntarily. This is clearly a claim for two party intimidation where the remedies are contractual. The Claimant is required to show that the Defendant committed an "actionable wrong" to coerce it by way of a threat of some illegal act to terminate its account whereby it suffered loss.

[66] The reason given by the Defendant in giving notice to terminate the Claimant's bank accounts was that it required audited financial statements from the Claimant, which were not forthcoming and, that these documents were required in order to comply with its obligations under the "Know your Customer Guidelines" (KYC) and "Due Diligence" (DD) provisions under the "Bank of Jamaica Guidance Notes on the Detection and Prevention of Money Laundering and Terrorist Financing Activities". In my view there is no unlawful act on the part of the Defendant. First, it is an implied term of the banker customer contract that the Defendant is entitled to give reasonable notice to terminate an ordinary bank account. Second, the Defendant is obligated under the Bank of Jamaica Guidance notes to terminate the relationship for the Claimant's failure to supply the audited financial statements requested. There is no serious issue to be tried on this question.

[67] As far as the tort of inducing a breach of contracts is concerned, the tort is established where the Defendant knowingly induces a third party to break his contract with the Claimant with the result that the Claimant suffers loss and damage. Where there is direct inducement it is not necessary to prove that the Defendant used unlawful means. In indirect inducement cases the tort is committed when the Claimant does it by unlawful means i.e. the intentional bringing about of a breach by indirect methods involving wrongdoing. There are a number of points to note on this tort. First, if the breach of contract is neither an end in itself or a means to an end, but just a foreseeable consequence then it is not intended. Second, it is obvious that one cannot be made liable for inducing a breach of contract unless there has been an actual breach. There cannot be secondary liability without proving primary liability.

[68] In this case, Counsel for the Claimant contends that the Defendant has unlawfully interfered with the Claimant's contractual obligations to facilitate payments to its "club members". There is no evidence that the actions of the Defendant have caused the Claimant to breach its

contracts with its members. In fact, the third affidavit of Gilbert Smith made an ambiguous statement that "the Claimant does not have club members". There is also no evidence that the "members" suffered damage or loss as a result of the threatened closure of the accounts. There is no serious issue to be tried under this head.

[69] The tort of Causing Loss by Unlawful Means is actionable where the Defendant intentionally causes the Claimant loss or damage by employing some unlawful means or method. As Lord Hoffman put it in ***O.B.G Limited and Others v Allan and others*** **[2007] UKHL 21 at paras 47 and 51**

> "The essence of the tort therefore appears to be wrongful interference with the actions of a third party in which the claimant has an economic interest and an intention thereby to cause loss to the Claimant"..."unlawful means therefore consists of acts intended to cause loss to the Claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the Claimant

[70] It is clear that causing loss by unlawful means is actionable only against a third party and only where that party has suffered loss. In this case there is no allegation by the Claimant that the Defendant caused loss by interfering with or inducing any third party to act to the detriment of the Claimant. There is no serious issue to be determined here nor does the court "feel a high degree of assurance that the Claimant will be able to establish his right at a trial".

[71] Finally, in my judgment, the risk of injustice to the Claimant if this injunction granted on January 11, 2008, is not extended does not effectively offset the risk of injustice to the Defendant if it is extended until the trial of this matter. The risk of injustice to the Defendant is greater than to the Claimant if the injunction is extended as to keep the accounts open is to invite non-compliance with the "Know your Customer Guidelines" (KYC) and "Due Diligence" (DD) provisions under the "Bank of Jamaica Guidance Notes on the Detection and Prevention of Money

Laundering and Terrorist Financing Activities". On the Claimant's part, it is easy to avoid injustice: comply with the request.

[72] In the event that I am wrong in the conclusion that I have come to; that there are no serious issues to be tried; there is not a high degree of assurance that the Claimant will be successful on a trial; and, that there is a greater risk of injustice to the Defendant than to the Claimant if the injunction were to be extended until the trial, I will for completeness go on to deal with the second issue of the adequacy of damages.

(II) ARE DAMAGES AN ADEQUATE REMEDY FOR THE CLAIMANT?

> "if damages ...would be an adequate remedy and the defendant would be in a position to pay them, no interim injunction should normally be granted, however strong the claimants case appeared to be at that stage" - ***American Cyanamid* [1975] AC 396 at 408 B-C**

[73] It is settled law that an injunction should not be granted if damages would be an adequate remedy for the Claimant and the Defendant would be able to pay them. In the context of a banker customer relationship the court in ***Prosperity Limited v Lloyds Bank Limited* Times Law Reports, April 27, 1923, at page 372** refused an application for an injunction as it took the view that to grant the injunction would have amounted to specific performance of a contract to provide personal services of a confidential nature. The court also took into consideration the fact that an injunction would be a direction to the bank to constitute itself a borrower of the customer's money. Furthermore, the court said that damages were an adequate remedy. The learned authors in ***Paget's Law of Banking*** 13th Edition makes the point that:

> "In modern banking, personal services have been so far superseded by computerization that the first ground may no longer carry weight. But damages remain as adequate a remedy as they ever were, and this ground of the decision represents a substantial hurdle to a successful application for an injunction".

[74] As far as claims under the Fair Competition Act are concerned, Section 48 provides that damages are the only remedy for breaches under the Act. The only provision for an injunction in the Fair Competition Act is in Section 47 which gives the Commission itself investigative powers and provides that it can request the Court to order an injunction against a person who fails to comply with the Commission's requirement to stop anti-competitive behaviour.

[75] Counsel for the Claimant contends, however, that it stands to suffer irreparable damage to its business and to its reputation if the injunction is not extended. They claim that there is no equivalent damage to the Defendant from continuing to operate the accounts. The Defendant has, on the other hand, stated that its correspondent banking relationships, in particular with Bank of New York Mellon, are at stake if it continues it's banking relationship with the Claimant in the present circumstances. This loss it says would affect its ability to offer banking services to other customers including the Claimant. In my assessment, the risks faced by the Defendant from continuing to operate the Claimant's accounts without compliance with the regulatory guidelines, clearly, cannot be compensated in damages.

[76] On the other hand, in my judgment, damages would be an adequate remedy for the Claimant in this case. From the audited financial statements provided the Defendant has assets of more than $179 billion, and it cannot seriously be contended that it could not pay any damages which may be awarded to the Claimant if it is successful at the trial. With damages being the remedy available if the Claimant is successful at trial and with there being no issue as to the Defendant's ability to pay such damages if the Claimant is successful at the trial, this application to extend the ex-parte injunction of Pusey J entered on January 11, 2007, must fail on this issue.

DISPOSITION

[77] For all the above reasons:

(a) The application to extend the without notice injunctions granted by the Honourable Mr. Justice Pusey in the Supreme Court on January 11, 2008, is denied.

(b) There shall be cost to the Defendant, to be taxed, if not agreed.

(c) Certificate of Cost for two (2) Counsel