[2025] JMCC Comm 4

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO.SU2023CD00576

BETWEEN **DAVID STEWART**
(T/A SPEED AND TRUCK WORLD) **CLAIMANT**

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

Miss Stephanie Williams, Miss Keisha Spence and Mr Vasheney Headlam instructed by Henlin Gibson Henlin for the claimant

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

Heard: July 23, 2024, October 28, 2024, and January 21, 2025

CPR - Whether the hearing of an application for interim injunction was a Case Management Conference – Whether permission was required to file amended pleadings – CPR 11.3 – CPR 20.1 – Practice Direction No 20 of 2021

CORAM: JARRETT, J

Introduction

[1] This is an oral application by the defendant for the court to treat the amended claim form and the amended particulars of claim filed by the claimant on July

22, 2024, as null and void as they were filed without the court's permission. Alternatively, that they be disallowed because they are not bona fide.

[2] On May 24, 2024, after two days of hearings held on April 30, 2024, and May 8, 2024, respectively, I delivered a written judgment in this matter (**David Stewart v National Commercial Bank, [2024] JMCC Comm 25),** in which I refused the claimant's Urgent Notice of Application filed on November 23, 2023, seeking, among other things, interim injunctive relief directing the defendant to release funds frozen in a bank account held by him with the defendant. I refused the application on the basis that there are no serious issues to be tried in the claim. In doing so, one of my orders was that: *"A case management conference is scheduled for July 23, 2024, at 12 noon for 1 hour".* In the interregnum, the claimant, on July 22, 2024, filed the amended pleadings which are the subject of the present oral application.

[3] At the case management conference on July 23, 2024, the question arose whether the claimant required the court's permission to file the amended pleadings. The answer turns on whether the hearing of the Urgent Application for Court Orders took place at a case management conference. If it was, then pursuant to CPR 20.1, the claimant needs the court's permission to amend his claim.

The claim

[4] It is sufficient for present purposes to briefly summarise the claim which was filed on November 23, 2023. The claimant alleges that when the defendant froze his bank account, it was in breach of the Universal Terms & Conditions Merchant Bank Agreement they had both entered. It is also alleged that the defendant is in breach of a duty of care and /or is negligent in that it wrongfully froze the claimant's bank account without reasonable or lawful justification. The claimant claims to have suffered loss and damage because of the defendant's breach of contract and duty of care. Filed concurrently with the claim was the Urgent Notice of Application for injunctive relief supported by an affidavit of urgency of the claimant.

[5] In his amended pleadings, the claimant adds an allegation that the defendant has engaged in unconscionable conduct and is in breach of section 15(1) of the Charter of Fundamental Rights and Freedoms. He seeks a declaration that clause 8.3 of the Universal Terms & Conditions Merchant Bank Agreement is arbitrary, unreasonable and in breach of section 43 of the Consumer Protection Act and section 15(1) of the Charter of Fundamental Rights and Freedoms. He includes in the "***Particulars of breach of duty of care and/or negligence",*** allegations that the defendant failed to provide technical guidance in risk and fraud prevention and failed to inform the claimant of the existence of the Visa/MasterCard payment system. Included in the ***"Particulars of Breach of Contract",*** are allegations that in suspending his account the defendant did not give him notice or notice pursuant to section 8.47 of the Universal Terms & Conditions Merchant Bank Agreement; he did not get a chance to respond, and the suspension was indefinite.

The procedural background

[6] The procedural background is important. As earlier stated, on November 23, 2023, the claim and the Urgent Notice of Application for Court Orders supported by an affidavit of urgency of the claimant were filed. The defendant filed its defence on December 28, 2023. The court file indicates that the Registrar, on February 20, 2024, issued a Notice of Case Management Conference which stated that a case management conference was scheduled for February 27, 2024. The matter was listed on the court's list as:*"Case Management Conference and Application for injunction".*

[7] At the hearing on February 27, 2024, counsel Miss Williams mentioned the application and indicated that she had filed a Judge's Bundle and that skeleton submissions were filed and served on February 26, 2024, a day before the hearing. King's Counsel Mrs Minott - Phillips, took issue with the late filing of the submissions and said that she had prepared cases which had been emailed to the Registrar and upon which the defendant wished to rely in response to the application. She had not however filed written submissions. Miss Williams brought to my attention the fact that there is a judgment of Batts J which deals with a similar issue involving the defendant, and in which similar injunctive relief

was granted.[1] Mrs Minott Phillip's however advised, that that decision was appealed and the court of appeal had not yet ruled. A discussion then ensued between the court and counsel around whether these proceedings should await the outcome of the decision of the Court of Appeal. Although I considered that it would be wise for this court to know the outcome of that appeal, I nevertheless adjourned the application to April 30, 2024; to allow the respondent to file and serve written submissions and asked that should the Court of Appeal rule before the adjourned hearing, its decision be brought to my attention. Thereafter I made the following orders: -

a) The Notice of Application field on November 23, 2023, is adjourned to April 30, 2024, at 12 noon for 1 hour.

b) The defendant/respondent's Attorneys-at-law are to file and serve written submissions and List of Authorities in response to the claimant/applicant's written submissions filed on February 26, 2024, on or before April 8, 2024.

c) Costs are costs in the application

d) The claimant/applicant's attorneys-at-law to prepare file and serve the formal order.

[8] After these orders were made, Miss Williams asked that I make an order adjourning the case management conference. King's Counsel said I should not make such an order as other applications may follow. I indicated that an order stating that the case management conference was adjourned was not necessary because the Commercial Division operates on a docket system, and therefore the matter would be back before me on April 30, 2024, and I will know what is before me.

[9] The hearing of the Urgent Notice of Application took place on April 30, 2024, and May 8, 2024, respectively. Included in the orders made on May 24, 2024, was one scheduling a case management conference for July 23, 2024.

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[1] **Chagod Tour Jamaica Limited v National Commercial Bank [2022] JMCC Comm 20**

[10] At the case management conference on July 23, 2024, Miss Williams contended that the hearing of the Urgent Notice of Application for Court Orders did not take place at a case management conference and therefore her client was at liberty to file the amended pleadings without the court's permission the day earlier. Learned counsel said that on February 27, 2024, when the matter first came before me, I adjourned the Urgent Notice of Application for Court Orders but made no order which indicated that the case management conference was adjourned. *Ipso facto*, what took place was not a case management conference.

[11] When Mrs Minott-Phillips completed her submissions on July 23, 2024, in support of the defendant's oral application, I invited Miss Williams to file and serve written submissions in response. I adjourned the case management conference to October 28, 2024, and made an order that the claimant was at liberty to file and serve written submissions in response by September 17, 2024. None was filed in compliance with that order.

[12] On October 25, 2024, the claimant filed an affidavit of Vasheney Headlam, an attorney-at- law employed to Henlin Gibson Henlin. At paragraph 3 of that affidavit, he states that he has been advised by Miss Williams (whom, he says, cannot give the affidavit due to a medical emergency), that on February 27, 2024, she reminded the judge that that date was also fixed for the case management conference and requested that included in the court's orders be an order adjourning that conference. He says that King's Counsel objected to the hearing being treated as a case management conference. He goes on to say this:

> "King's Counsel indicated that [February 27, 2024] was the hearing of the Claimant's application for interim relief and that consequent on the decision of the Court on the application, other applications may be made which the rules provide should be made at the Case Management Conference. The learned judge after hearing submissions from both parties ruled in favour of King's Counsel Minott Phillips and ordered that she would not treat the hearing as the case management conference. The learned judge also indicated that since the court now implements a

> "docket system" she would recall that the Case Management Conference had not yet taken place. There has been no appeal of this decision by the Court."

[13] At paragraph 4, he continues: -

> "Having refused the application for interim relief the learned judge made orders including explicitly fixing the Case Management Conference for 23rd July 2024. The learned judge made this order because to the knowledge of the learned judge and all the parties, the Case Management Conference had not taken place".

[14] At the adjourned case management conference on October 28, 2024, at the request of counsel for the claimant, I extended time to November 14, 2024, for the claimant to file and serve written submissions in response to the oral application of the defendant. I also permitted the defendant to file submissions in response by November 21, 2024. The case management conference was further adjourned to December 13, 2024.

Submissions

The defendant in support of its oral application

[15] In her oral submissions on July 23, 2024, King's Counsel argued that she had received the Notice of Case Management Conference issued by the Registrar on February 20, 2024, which set the case management conference for February 27, 2024. She said that the court list indicated that the matter was indeed set for a case management conference on February 27, 2024, and the Urgent Notice of Application for Court Orders, which was served, also had a hearing date of February 27, 2024. She further argued that the listing of the application is consistent with CPR 11.3(1) which requires that all applications must be listed for hearing. According to her, the case management conference process began on February 27, 2024. That being the case, she argued, an amended statement of case cannot be made without the court's permission. What was filed on July 22, 2024, is therefore a nullity. She said that based on Practice Direction No. 20 of 2021, the Registrar was entitled to set the

application for injunctive relief on the same day as the case management conference.

[16] Mrs Minott - Phillips further argued, that if the court does not find favour with her primary argument, the amendment ought to be disallowed for not being bona fide, because the collateral purpose for the amended pleadings, was to circumvent the court's earlier decision in **David Stewart v National Commercial Bank, [2024] JMCC Comm 25** (supra), and is a means of introducing a triable issue where there was none. Furthermore, the allegations of breaches of the claimant's constitutional right to property in the amended pleadings cannot apply to the actions of the defendant, as it is not seeking to appropriate the property of the claimant. In closing, King's Counsel added that the certificate of truth, signed as it is by counsel Miss Williams, contravenes CPR 3.12. She submitted that pursuant to CPR 3.13, the court can strike out the statement of case because the certificate of truth is improper.

The claimant's submissions in response to the defendant's submissions

[17] In written submissions filed by the claimant on November 14, 2024, paragraphs 1, 3 to 8 under the rubric **"Background"** read as follows**: -**

> "1. The Claimant's Application for interim relief was fixed for hearing on the 27th of February 2024. On the 20th February 2024, the Court emailed to the parties a Notice of Appointment of Case Management Conference for the said 27th February 2024.
>
> 2. …
>
> 3. The hearing concerned orders in relation to the Application for interim relief. At the conclusion of the hearing, Counsel for the Claimant Ms Williams, reminded the learned judge that the date was also fixed for the Case Management Conference and requested that the court make an order that the Case Management Conference was adjourned.

4. Counsel for the Defendant, Mrs. Sandra Minott-Phillips, KC objected to the hearing of the 27th February 2024 being treated as the Case Management Conference.

5. The learned judge after hearing submissions from both parties, concluded that the hearing on the 27th February 2024 would not be treated as the case management conference. The application for interim relief was adjourned.

6. The application for interim relief came on for hearing on the 30th April 2024 and the 8th May 2024. On the 24th May 2024, the learned judge delivered her decision refusing the application for interim relief. Having refused the application for interim relief, the learned judge made orders including fixing the Case Management Conference for the 23rd July 2024.

7. An Amended Claim Form and Amended Particulars of Claim was filed on behalf of the Claimant on the 22nd July 2024.

8. The Claimant's conduct envisages that all material times, consistent with the orders of the Court, the Case Management Conference did not take place until the 23rd July 2024 when it was fixed by the Court."

[18] The further submission is, that, based on the evidence, the defendant agrees that the case management conference did not take place until July 23, 2024. The court was also of this view, as it made an order fixing a case management conference for July 23, 2024, without any reference to February 27, 2024, or any other date. Furthermore, the orders the court made demonstrate that what was before the court was an application for injunction and no case management orders were considered by the court. As the claimant amended its pleadings on July 22, 2024, before the case management conference, by virtue of CPR 20.1, he did not require the court's permission to do so. According to learned counsel, the defendant's submission that the amended pleadings are not bona fide is unsupported by legal authority. CPR 27.9(1), states that at a case management conference the court must consider whether to give directions for standard

disclosure and inspection, service of witness statements and expert reports, and may give directions, among others, for an agreed statement of facts and issues. None of this was done on February 27, 2024.

[19] Counsel sought support from the decision in **Thames v National Irrigation Commission Ltd [2024] JMCA Civ 17,** for the matters the court must consider on applications to amend statements of case. The proposition made is that the court in the exercise of its discretion will grant amendments once to do so will not cause any injustice to the opposing party. Additionally, the underlying principle borne out in **Thames**, is that amendments should be made where they are necessary to ensure that the real dispute between the parties is determined. It is submitted that the amendments satisfy this principle. Therefore, if the court decides that permission is needed, it should grant it as the amendments do not introduce any new facts and are made early in the proceedings. The defendant has not said it will be prejudiced by the amendments and so its oral application should be refused with costs to the claimant.

The defendant's response to the claimant's submissions

[20] In submissions in response on behalf of the defendant, King's Counsel cited the House of Lords decision in **Rondel v Worsley [1967] 3 All ER 993**, and our Court of Appeal decision in **Moo Young and Another v Chong and Others (2000) 59 WIR 369**, to argue that the court has the power to disallow amendments which are not bona fide or made in good faith. In relation to the amendment pleading a breach of section 15(1) of the Constitution, it is argued that the Constitution ought not to be used as a last resort where the parties' relationship is defined by their contract and where the court has determined that the claim has no triable issues. As to the amendment which pleads unconscionable conduct on the part of the defendant, King's Counsel argued that it seeks to import the concept of objectivity when the Court of Appeal in **National Commercial Bank Ja Ltd v Chagod Tour Jamaica Limited [2024] JMCA Civ 29**, in interpreting similar provisions as those in issue in the present claim, held that the contract does not allow for such importation to affect the defendant's position in deeming itself insecure under the Universal Terms and Conditions Merchant Bank Agreement. In the current case, the defendant in its

defence outlined the factual circumstances which led it to deem itself insecure in relation to the claimant's activities, this therefore calls into question the importance of the amendments in resolving the real dispute between the parties as well as their arguability.

[21] It is further submitted that the amendments are "constructs" of the claimant which he introduced after the court found that there are no serious issues to be tried in his claim and, three hours after he was served with the defendant's application to strike out the claim and/or for summary judgment. [2] Borrowing from the language of the House of Lords in **Rondel v Worsley,** King's Counsel argued that this case is one in which: "*a party changes his story to meet difficulties*". It is therefore not bona fide; it prejudices the defendant as the claimant now seeks to resuscitate an: *"all but dead case that contains no triable issue*." The guiding principles from **Thames** of the a) potential effect of the proposed amendment on the public interest in the efficient administration of justice and b) the importance of having finality to litigation were cited. Referring to CPR 1.1(1) and (2), King's Counsel argued that the court's resources are limited and ought not to be allotted to try claims devoid of triable issues.

Analysis and discussion

Was the hearing on February 27, 2024, a case management conference?

[22] I will immediately say that it cannot be seriously contended that the hearing on February 27, 2024, was not a case management conference. CPR 27.3(6), states that the registry must give the parties not less than 14 days' notice of the date, time and place of the case management conference. The notice issued by the Registrar on February 20, 2024, set the date of February 27, 2024, as a case management conference, the defence to the claim having been filed on December 28, 2023. CPR 11.3 falls under the rubric: ***"Applications to be dealt with at case management conference",*** and provides that:

[2] A copy of the front page of the Amended Particulars of Claim showing the admit stamp of Myers Fletcher and Gordon with a time stamp of 2.51 pm on July 22, 2024, is affixed to the submissions of the defendant. The Court's copy of the defendant's application filed on July 22, 2024, has a time stamp of 9.25 am.

> "So far as is practicable all applications relating to pending proceedings must be listed for hearing at a case management conference or pre-trial review."

This means that when the claimant filed its claim form and particulars of claim along with its Urgent Notice of Application for Court Orders, on November 23, 2023, unless it was impracticable so to do, the Registrar was obliged to list the hearing of that application on the date scheduled for the case management conference. The court list for February 27, 2024, in fact listed the matter for a case management conference and an application for interim injunction.

[23] Implicit in counsel Miss Williams' very request for an order adjourning the case management conference to April 30, 2024, was an acknowledgment by her that what was indeed before the court on February 27, 2024, was a case management conference. The fact that I indicated in response to her request that such an order was not necessary as the matter would come back before me, simply meant that in the absence of the explicit words indicating that the case management conference was adjourned, it was enough to adjourn the Urgent Notice of Application for Court Orders to a set date and time. Simply put, the court would know that it was the adjourned case management conference that was before it, come April 30, 2024, at which time the application would be heard.

[24] The fact that the orders made on May 24, 2024, included an order which reads: "A case management conference is scheduled for July 23, 2024, at 12 noon for 1 hour", does not change the fact that February 27, 2024, was a case management conference, and that the hearings which took place subsequent to that, took place at an adjourned case management conference. It certainly is not the case, as contended by Vasheney Headlam in his affidavit, that the order was made because to the: *"knowledge of the learned judge …the Case Management Conference had not taken place*".

[25] Contrary to the affidavit evidence of Vasheney Headlam and the submissions of counsel for the claimant, I made no ruling or order that the hearing on February 27, 2024, would not be treated as a case management conference.

The only orders I made on February 27, 2024, are those stated in paragraph 7 of this judgment. Contrary as well to the submissions of the claimant's counsel, on February 27, 2024, I did not hear submissions from both parties and afterwards *"concluded that the hearing on February 27, 2024, would not be treated as a case management conference*". The only very short exchange that took place between the court and counsel on this issue, is that which is recounted above at paragraph 8. I am surprised and dismayed that Mr Vasheney Headlam would have been advised otherwise.

[26] The question what a case management conference is, was helpfully answered by the Court of Appeal in Trinidad and Tobago in **Estate Management and Business Development Company Limited v Saiscon Limited, Civil Appeal No. P 104 of 2016**. Applying the provisions of CPR 25, 26 and 27 of the Eastern Caribbean Supreme Court Rules as they then stood, which are almost identical to our CPR 25, 26, and 27, P Jamadar JA at paragraph 18 of his judgment said: -

> "[I]n answer to the question 'what is a case management conference?', the CPR, 1998 responds conceptually by way of Part 25. That is to say, a case management conference is a court 'hearing' at which a CPR judge actively manages a particular case in furtherance of the overriding objective, by carrying out any of the thirteen (13) actions listed at Rule 25.1; and/or any of the twenty two (22) actions listed at Rule 26.1; and makes such orders, and gives such directions as are necessary, including those set out in Rule 27.6, all of which are not exhaustive of the actions that can be taken, directions given or orders made in the exercise of active judicial case management, so as to advance the matter towards a just disposition."

I accept and gratefully adopt this dictum.

[27] February 27, 2024, was not only the date scheduled for a case management conference, but it was also an occasion on which active judicial case management took place. I fixed a timetable to control the progress of the Urgent Application for Court Orders which included fixing a date for the

adjourned hearing and scheduling a time for the respondents to file and served skeleton submissions. These are undoubtedly matters governed by CPR 25 and 26. The court is not mandated to make the orders in CPR 27.9 (1) and (2) cited by counsel for the claimants at a case management conference when, as in this case, there was an urgent application which needed to be heard as a matter of priority.

[28] In the result, I find that February 27, 2024, was a case management conference.

Was permission required to amend the claim and if so, should it be granted?

[29] Having found that February 27, 2024, was a case management conference, it follows that the amended pleadings filed on July 22, 2024, could not have been properly filed without the court's permission. According to CPR 20.1: -

> "A party may amend a statement of case at any time before the case management conference without the court's permission unless the amendment is one to which either-
>
> (a) rule 19.4 (special provisions about changing parties after the end of a relevant limitation period); or
>
> (b) rule 20.6 (amendments to statements of case after the end of a relevant limitation period) applies.

[30] Having been made without the court's permission, I find the amended claim form and the amended particulars of claim filed on July 22, 2024, are without legal effect and consequently are null and void. With this finding it is unnecessary for me to consider whether these pleadings should be disallowed because they are not *bona fide*, which was the alternative argument advanced by the defendant.

[31] However, the claimant has submitted that if I determine that permission was required, I should grant it because the amendments do not introduce any new facts, are made early in the proceedings and the defendant has not said that it would suffer any prejudice were the amendments allowed. The first observation

I make, is that the claimant has not made any application asking the court to allow the amended pleadings to stand as properly filed. It is not enough, in my view, to state in written submissions that I should grant permission if I find that permission is needed. Nevertheless, I refuse to allow the amendments for the reasons that follow.

[32] The principles the court considers when deciding whether to grant an application to amend pleadings are well known. They were recently restated by the Court of Appeal in **Thames.** The Court of Appeal in its earlier decision in **Jamaica Redevelopment Foundation Inc v Clive Banton and Sadie Banton [2019] JMCA Civ 12,** McDonald-Bishop JA (as she then was) , put the principles this way:-

i. The foremost consideration is whether the proposed amendment is needed in order to determine the real issues in dispute between the parties in light of all the relevant circumstances.

ii. The court must have regard to the need to avoid prejudice to the other party as well as to the need for the efficient administration of justice: **Cobbold v London Borough of Greenwich,** 9 August 1999, unreported, CA; [1999] Lexis Citation 1496 per Peter Gibson LJ. The court must have regard to the need to ensure that court and party resources are not unnecessarily wasted: **Bowerbank v Amos (formerly Staff)** [2003] EWCA Civ 1161.

iii. The court's approach to late amendments cannot be radically different from the approach to enforcing compliance with any other process requirements and to case management generally. Tolerance to late amendments may undermine the court's ability to manage the litigation process effectively.

iv. The jurisdiction is now governed by the overriding objective. The older authorities that amendments should

be allowed as of right, if a party could be compensated in costs without injustice, had made way for a view which pays greater regard to all the circumstances. This is now summed up by the overriding objective (**Savings and Investment Bank Ltd v Fincken** [2003] EWCA Civ 1630 per Rix LJ).

v. A heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court (**Swain-Mason and others v Mills & Reeve (a firm)** [2011]EWCA Civ 14 per Lloyd LJ).

vi. Applications for permission to amend must necessarily turn on the particular facts and no hard and fast rules are possible. The outcome of an application to amend will, therefore, depend on a fact-based assessment of the various relevant considerations. Decided cases can only illustrate the way in which discretion is exercised.

vii. The interest of justice would not be advanced by amendments that are bound to fail on the merits and so, the court will allow an amendment only if it has a reasonable prospect of success.

[33] The paramount consideration has always been whether the proposed amendment is needed to resolve the real issue in dispute between the parties. In the present case, I am of the view that the proposed amendment fails to meet this requirement. The claim was filed over a year ago on November 23, 2023. It is premised on an alleged breach by the defendant of the Universal Terms and Conditions Merchant Agreement, and a breach of duty of care, which, in my view, harks back to the contract. On the pleadings, the claimant does not impugn the agreement in any respect whatsoever. He alleges that the defendant in freezing his account and responding to the chargeback enquires

in the way that it did, breached the agreement. The defendant in its defence denies that it is in breach of the agreement and invokes contractual terms of the Universal Terms and Conditions Merchant Agreement to support its stance and outlines the circumstances why it deemed itself insecure in relation to the claimant, thereby entitling it to freeze his account. The real dispute between the parties therefore is whether either party breached the Universal Terms and Conditions Merchant Agreement, which they both freely entered and rely on. I fail to see how the proposed amendment to the pleadings, to now allege the unconstitutionality of clause 9.3[3] (which allows the defendant to freeze the claimant's account), is needed to resolve the real dispute between the parties. This allegation, if allowed, would drastically change the claimant's case, rather than clarify the issues in dispute.

[34] Mrs Minott-Phillps has argued that the Court of Appeal in **National Commercial Bank Ja. Ltd. v Chagod Tour Jamaica Limited [2024] JMCA Civ 29**, found, in construing similar provisions, that there is no place for objectivity in determining whether the defendant deemed itself insecure within the meaning of the agreement. I agree with her that the proposed amendment which alleges unconscionable conduct on the part of the defendant, seeks to import an element of objectivity which both the Court of Appeal and this court have ruled is inapplicable.

[35] In **David Stewart v National Commercial Bank**, I said at paragraphs 28 to 30 that: -

> "[28] . . .under clause 9.1 of the Agreement, the defendant can terminate it upon the occurrence of an Event of Default. An Event of Default under clause 9.6 (d) is where the defendant feels unsafe or insecure in the manner in which the claimant is conducting its business. Under clause 9.3 it may freeze the defendant's account in lieu of termination if it deems itself insecure with respect to the claimant's business. Laing JA (Ag) in **National Commercial Bank v Chagod Tour Jamaica Limited, [2002] JMCA App 27**, raised the question of the meaning of "deemed itself to

[3] Clause 8.3 is in the proposed amendment, but I assume the intended clause is 9.3

be insecure with respect to the Merchant's business" in a clause in issue in that case, which is identical to clause 9. 3 of the Agreement. For my part, I see no reason why clauses 9.3 and 9.6(d) should not be given their ordinary meaning[4]. To deem itself insecure must mean, in my view, that the defendant considered or regarded itself as being insecure or unsafe. I believe the use of "deem" and "feels" in both these clauses necessarily carry the same meaning. I also am of the view that the insecurity may include financial insecurity as well as reputational risk where there is a belief that transactions concerned with money laundering are being conducted using the defendant's accounts.

[29]. In the case before me, the defendant was entitled under clause 9.1, 9.3 and 9.6(d) of the Agreement to terminate the Agreement if it felt itself unsafe or insecure with respect to the claimant's business. I agree with King's Counsel, that as with "suspicion" under the English Proceeds of Crime Act 2022 as discussed by the court in **K Ltd v National Westminster Bank Plc (Revenue and Customs Commissioners and another intervening)** (supra), whether the defendant felt itself insecure, within the meaning of the Agreement, is also a subjective fact. It is the defendant's feeling of insecurity that is important.

[30] The claimant accepts that he signed the Agreement and is not challenging or impugning it any way. Its clauses are precisely what he agreed to. The defendant was entitled to freeze his chequing account under the terms of the Agreement if it felt or considered itself insecure with respect to the claimant's business. The defendant felt insecure in circumstances where:

i. It received a claim for "no authorisation" from an issuing bank in respect of five transactions totalling in excess of US $250,000.000 which took place on the claimant's ecommerce platform.

[4] See the decision of M Jackson J (Ag) in **KAG Stockpile & Hardware Supplies Limited v National Commercial Bank Jamaica Limited [2023] JMSC Civ 24, para 67,** in which the same view was held.

ii. The claimant failed to provide a response to chargeback queries made by the defendant in email dated May 30, 2023, within the 3 day contractually agreed period.

iii. When the claimant did respond to the chargeback queries, his response was inadequate. He did not provide the names of the customers who allegedly purchased the goods relating to the five disputed transactions.

iv. After receiving payment for each of the disputed transactions, the claimant wrote a number of cheques, one of which was for J$900,000.00 payable to a merchant who was under investigation in not dissimilar circumstances; and could not answer queries relating to this cheque".

[36] Considering the Court of Appeal's decision in **National Commercial Bank Ja. Ltd. v Chagod Tour Jamaica Limited [2024] JMCA Civ 29**, and this court's decision in **David Stewart v National Commercial Bank**, I do not see how the proposed amendment to allege unconscionable conduct, can have any reasonable prospect of success at trial.

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

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

> "[25] The defendant falls within the regulated financial sector. The **Guidance Notes on the Prevention of Money Laundering and Countering Financing of Terrorism, Proliferation and Managing Related Risks,** gazetted on June 14, 2018, [5], ("Guidelines), describes protecting the financial system as one of the most critical features of any Anti Money Laundering (AML) regime. Guide note 18 of the Guidelines, advises financial institutions to ensure, among other things that contractual arrangements entered into in the course of the regulated business permits a legal termination of the transaction, arrangement or business relationship if the institution conducting the arrangement or facilitating the commercial arrangement forms the view that criminal activity is taking place and to continue with the relationship, arrangement or transaction "would expose that institution to legal or reputational risk due to the suspected criminal activity".
>
> [26]. The Agreement was made between the claimant and the defendant on June 24, 2012, and would have predated the Guidelines. However, Jamaica's AML regime began long before 2018. POCA was passed in 2007 and the Money Laundering Act which it repealed was passed in 1996. It is apparent that the termination provisions in clause 9 of the Agreement and particularly clauses 9.1, 9.3, 9.5 and 9.6(d), reflect aspects of the pre 2018 AML regime which continue and find expression in the Guidelines".

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

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

[39] There are no pleadings to support the proposed amendment to the "***Particulars of breach of duty of care and/or negligence",*** to allege that the defendant failed to provide technical guidance in risk and fraud prevention and failed to inform the claimant of the existence of the Visa/MasterCard payment system. In other words, there is nothing in the pleadings which state the basis on which it is contended that any such duty of care arose on the part of the defendant in relation to these proposed amendments, and how such a breach resulted in loss. As to the proposed allegation that the defendant failed to provide the claimant with notice of the suspension of his account, that issue was dealt with in paragraph 31 of the decision in **David Stewart v National Commercial Bank,** where I said**: -**

> "I am of the certain view that on these undisputed facts, the defendant, a bank in the regulated financial sector, was entitled to feel itself insecure with respect to the claimant's business (whether reputationally or by virtue of increased exposure to prosecution or liability under POCA) , and to believe that the claimant was engaged in transactions conducted through its accounts which could constitute or relate to money laundering."

[40] My view is that in circumstances where the defendant felt itself insecure due to the activities of a merchant, it would be foolhardy to give notice of an intention to freeze or suspend an account. In the proposed amended pleadings, the claimant alleges in his "***Particulars of Breach of Contract***", that the defendant breached clause 8.47 of the Universal Terms & Conditions Merchant Bank Agreement but does not plead the basis of this contention. This clause provides that:

> "All **notices** and publications made by either party shall be deemed to have been sufficiently given to each party if in writing and if sent by prepaid post letter, or delivered by hand to the last known address of such party's principal place of business in Jamaica and shall be deemed to have reached the addressee on the fifth day following the posting thereof , or if by personal

delivery , on the date that same is handed to a person duly authorised to accept service on behalf of such party."

[41] The claimant in his affidavit in support of his Urgent Notice of Application for Court Orders said that on May 30,2023, he received an email from the defendant's chargeback officer which he only saw on June 7, 2023, as it had gone into his spam folder. He also exhibited that email. In paragraph 9 of **David Stewart v National Commercial Bank**, this is what is said in respect of this evidence: -

> "The said email, which is exhibited, lists five transactions which the defendant says were conducted on his ecommerce platform and for which the defendant had received a claim for "No Authorization". With respect to each transaction, the claimant was asked to provide details on the name of the person who initiated the transaction, the address to which the item was delivered, the email address and the contact number, to assist the defendant in the recovery process. The email further indicates that the five transactions were conducted between April 13, 2023, and April 29, 2023, with two of the five being done on April 29, 2023. The chargeback amounts for the latter two transactions were US$ 27,584.38 each. The chargeback amount for transaction on April 13, 2023 was US$ 64,780.55 ; the chargeback amount for the transaction on April 17, 2023 was US$ 65,833.37, and the chargeback amount for the transaction done on April 27, 2023 was US$ 64,691.94 .The email goes on to say that the defendant is asking for the claimant's response by June 2, 2023 to enable it to respond to the issuing bank within the stipulated deadline."

[42] On the claimant's own evidence, he received written notification of the chargeback query. Clause 8.11 of the Universal Terms and Conditions Merchant Agreement stipulates that responses to chargeback enquires are to be within 3 business days. The claimant failed to comply with this clause. As was stated in **David Stewart v National Commercial Bank**, chargeback enquires must obviously be dealt with speedily. It could not be the case, that

notification of such enquires are to be made in accordance with the provisions of clause 8.47 which falls under the general provision in the agreement dealing with notices and publications.

[43] The claimant also seeks to allege in the amended pleadings that his account was suspended without giving him an opportunity to respond. On the evidence, this was hardly the case. The proposed amendments alleging lack of notice and the denial of an opportunity to respond before the freezing of the claimant's account, are plainly without any reasonable prospect of success.

[44] Furthermore, Mrs Minott-Phillips is right to argue that a court can refuse to allow amendments to pleadings if it is considered that the amendments are not made bona fide. Given the nature of these amendments (particularly those alleging a breach of the Constitution and the Consumer Protection Act), and the time of filing, I agree with King's Counsel that they are not made bona fide and would result in the defendant being required to respond to a drastically changed claim.

Conclusion

[45] Having regard to the foregoing, I make the following orders: -

(a) The defendant's oral application is granted.

(b) The amended claim form and amended particulars of claim filed on July 22, 2024, without the court's permission are null and void and without legal effect.

(c) The claimant's request for the amended claim form and amended particulars of claim filed on July 22, 2024, to stand as properly filed is refused.

(d) Costs to the defendant to be agreed or taxed.

(e) Leave to appeal is refused.

(f) The case management conference is further adjourned to November 5, 2025, at 10:00am for 15 minutes for the parties to report on the

status of the appeal in **David Stewart v National Commercial Bank, [2024] JMCC Comm 25.**

(g) The defendant's attorneys-at-law are to prepare file and serve the formal order.

A Jarrett
Puisne Judge