[2024] JMCA Civ 29

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2022CV00073

APPLICATION NOS COA2023APP00143 & COA2023APP00161

BETWEEN NATIONAL COMMERCIAL BANK JA LTD APPELLANT

AND CHAGOD TOUR JAMAICA LIMITED
(formerly Shago Tours Jamaica Ltd) RESPONDENT

Mrs Sandra Minott-Phillips KC and Jacob Phillips instructed by Myers, Fletcher & Gordon for the appellant

Mrs M Georgia Gibson Henlin KC, Ms Tamiko Smith, Ms Zoya Edwards and Ms Whitney Richards instructed by Smith, Afflick, Robinson & Partners for the respondent

27 November 2023 and 28 June 2024

Civil procedure — Application to adduce fresh evidence and to strike out appeal — Appeal against order for an interim mandatory injunction – Appellant obeying order and subsequently paying remaining monies in dispute – Whether evidence of the post-order occurrences admissible — Whether appeal purely academic

Civil procedure – Injunction – Whether serious question to be tried – Whether damages would be an adequate remedy – Where balance of convenience lies – Exercise of discretion by judge at first instance – The appropriate order to be made on appeal

BROOKS P

[1] This case raises three broad but distinct issues:

a. whether a letter produced by one of the parties after the execution of the judgment that is under appeal, ought to be admitted into evidence;
b. whether the appeal should be struck out as being academic; and
c. whether the judge at first instance erred in granting an interim mandatory injunction against a party that claimed it was contractually and legally entitled to its course of action.

The background to the litigation

[2] Chagod Tour Jamaica Limited ('Chagod') offers tour packages for sale. National Commercial Bank Jamaica Limited ('NCB') had a banker/customer contractual relationship with Chagod. As part of that relationship, credit card transactions could be made through Chagod, with NCB, as the local financial institution, honouring the payment to Chagod. Chagod's customers mostly paid by credit card and the proceeds of the transaction were credited to one or other of Chagod's three accounts with NCB.

[3] In May 2022, a dispute arose between NCB and Chagod. NCB identified that there was an "exponential" increase in the number of credit card transactions done by Chagod. According to NCB, the number increased from "less than 20 per day in February and March [2022] to over 75 per day in early April at an average value of US$300,000 per day" (para. 3 of NCB's skeleton arguments). NCB asserted that some of Chagod's credit card transactions were fraudulent and placed NCB at risk of financial exposure to cardholders and other financial institutions. On that premise, NCB informed Chagod that, based on the terms of the contract between them, it had frozen the three accounts. One of the accounts is said to have stood in credit totalling approximately US$3,000,000.00. Without access to its accounts, Chagod says it could not meet its obligations to its customers, suppliers, and staff.

[4] Chagod sued NCB in the Supreme Court for breach of contract, seeking, among other relief, the release of the money in the accounts, and damages. As part of the claim (although the application preceded the filing of the claim), Chagod applied for an interim mandatory injunction for the release of its funds. NCB contended that its contract with Chagod entitled it to freeze the accounts.

[5] On 1 July 2022, after a contested hearing before him, the learned judge of the Supreme Court ('the learned judge') ordered the release of most of the funds ('the order'). He made certain orders, as outlined in his judgment, including:

> "1. [NCB] shall forthwith release all sums in [Chagod's] bank accounts Nos. ... which are over and above US$600,000.00 until the trial of this action or a further order of the court.
>
> …"

The sum of US$600,000.00, mentioned in the order, represented funds that the learned judge considered to be NCB's financial exposure ('chargebacks') for certain of Chagod's credit card transactions.

[6] NCB filed an appeal against the order and applied to have its execution stayed, pending the outcome of its appeal. A judge of this court refused the application, and NCB obeyed the order.

[7] In September 2022, NCB, having determined that it was no longer financially exposed, closed Chagod's accounts and instructed it to withdraw its funds. By letter dated 29 September 2022 ('the letter'), NCB informed Chagod that:

a. the recourse period for chargebacks had expired;
b. NCB was terminating Chagod's accounts on 31 October 2022;
c. Chagod was at liberty to withdraw the remaining funds from the accounts;

d. no transaction other than the withdrawal would be allowed;
e. NCB believed that Chagod had breached the Merchant Agreement;
f. NCB required Chagod to return all NCB's equipment and other property by 9 November 2022; and
g. NCB considered the letter as being comprehensive, but if Chagod considered that there was any residual contractual matter it should bring it to NCB's attention.

[8] Chagod recovered its money and the parties' financial arrangements, thereby, came to an end. However, Chagod did not withdraw its claim in the Supreme Court and NCB did not withdraw its appeal against the order.

[9] On 13 July 2023, Chagod filed an application in this court to adduce fresh evidence and to strike out NCB's appeal on the basis that there is no live issue remaining in the appeal. Chagod asserted that since NCB has paid all the monies that Chagod had claimed against it, NCB's appeal against the order is now academic. Chagod asked that:

a. NCB's letter, instructing Chagod to take the funds in the accounts, be admitted into evidence; and
b. the appeal be struck out.

[10] NCB insisted that it should be allowed to argue its appeal to demonstrate that the learned judge erred in granting the interim injunction. It contended that he ignored the contractual terms allowing it to freeze the accounts. A successful appeal, it asserted, will have a real effect on Chagod's continuing claim in the Supreme Court.

[11] After hearing Chagod's application, and considering submissions by counsel for each party, this court ordered that:

a. the application to adduce fresh evidence is refused; and

b. the application to strike out the appeal is refused.

The court then heard NCB's appeal and reserved its decision thereon. It promised to give its reasons for refusing the applications when delivering its judgment on the appeal.

[10] After the court had reserved its decision, counsel for each party submitted additional cases. The court has considered the cases without requesting any submissions on them from counsel.

The fresh evidence application

[12] Learned counsel for Chagod, Mrs Gibson Henlin KC, submitted that the letter should be admitted into evidence for the application to strike out NCB's appeal. She contended that it satisfies all the requirements of the leading case on the point, **Ladd v Marshall** [1954] 3 All ER 745, in that it:

a. was not available at the time that the learned judge considered the application for the interim mandatory injunction;
b. will have an important influence on the outcome of the proceedings; and
c. was authored by NCB and therefore there is no issue as to its authenticity or credibility.

[13] On the other hand, learned counsel for NCB, Mrs Minott-Phillips KC, argued that the letter does not satisfy the **Ladd v Marshall** requirements because, although it is NCB's letter and it did not exist at the time that the learned judge made his ruling, it necessarily is unhelpful in assessing whether he erred in arriving at his decision. All three requirements of **Ladd v Marshall** must be met, learned King's Counsel submitted. The failure to meet the second requirement, since it came into existence after the learned judge made his order and, therefore, could not have impacted his decision, she said, meant that the letter could not be admitted into evidence by that

route. Mrs Minott-Phillips contended that neither did the overriding objective provide a route for admission.

[14] Learned King's Counsel argued that the application to adduce the letter into evidence, at this stage, was unnecessary as it would have been admissible in this court on the appeal. In that regard, she contended, Chagod could have exhibited the letter in an affidavit.

[15] **Associated Gospel Assemblies v Jamaica Co-Operative Credit Union League Limited and Registrar of Titles** [2022] JMCA Civ 36 ('**Associated Gospel**') is among the cases upon which counsel for each party relied for different aspects of their submissions.

[16] In **Associated Gospel**, this court recognised that the requirements of **Ladd v Marshall** are not a straitjacket. The following was said at para. [31]:

> "In **Russell Holdings Limited v L&W Enterprises Inc and another** [2016] JMCA Civ 39, a distinction was made between an application to admit fresh evidence following a trial or a hearing on the merits and an application to adduce fresh evidence in interlocutory proceedings. It is stated that the **Ladd v Marshall** principles are strictly applied to the former but not the latter. The court opined that it is unnecessary to strictly apply the **Ladd v Marshall** principles to decisions in interlocutory proceedings…." (Emphasis as in original)

[17] Counsel's competing submissions show that there is no dispute that the first and third requirements of **Ladd v Marshall** have been met. The letter did not exist at the time the learned judge made his ruling, and there is no issue as to its authenticity or credibility, as NCB's communication.

[18] The second requirement set out in the judgment of Denning LJ (as he then was) in **Ladd v Marshall** is "the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive" (see page 748). It was on this requirement that the court hesitated, for the letter

created an entirely different situation from that which the learned judge had to consider. It was felt that the court could not properly assess the learned judge's exercise of his discretion in that changed situation.

[19] On that basis, despite the flexibility afforded by **Associated Gospel**, the court decided that the letter was not appropriate as fresh evidence for an application to strike out the appeal. Accordingly, the court refused the application to admit the letter as fresh evidence at that stage.

The application to strike out the appeal

[20] In this application, Chagod asserted that NCB, having released all the funds to it, has rendered the pursuit of the appeal an abuse of process. Mrs Gibson Henlin submitted that the hearing of the appeal would be an academic exercise as there would be no benefit to be derived from the appeal. This court, she submitted, does not hear purely academic matters. She relied on **Gordon Stewart v Senator Noel Sloley and others** [2017] JMCA Civ 19 and **Julie Anne Thompson-James v Marcus Hastings James** [2023] JMCA Civ 41 in support of her submissions.

[21] Mrs Minott-Phillips contended that allowing the appeal and setting aside the order is not an academic exercise. Those outcomes, she submitted, turn upon the issue of whether the learned judge was right to find that there was a serious issue to be tried. She argued that it was open to this court to find that the interim injunction ought not to have been issued. Learned counsel submitted that if this court ruled that there was no serious issue to be tried, there would be a real impact on Chagod's case in the Supreme Court.

[22] In the absence of the letter at this stage, the court felt obliged to hear NCB's appeal without assessing the competing submissions. The court, therefore, refused the application to strike out the appeal.

The appeal

[23] NCB filed several grounds of appeal, namely:

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

(2) In addressing his mind to the balance of convenience and the course likely to cause the least irremediable prejudice to one party or the other, the learned Judge below erred in concluding it favoured [Chagod] for the following reasons:

i. The learned Judge below erred in failing to appreciate the extent of the obligations on a business in the regulated sector imposed by the Proceeds of Crime Act and the potential consequences of not acting in conformity with those obligations, including:

1. failing to appreciate that the disclosure obligations of a business in the regulated sector are triggered by it having, from information gleaned in the course of its business, reasonable grounds for believing that another person has engaged in a transaction that could constitute or be related to money laundering; and that proof of the offence is not required; and
2. failing to appreciate that the disclosures made to the designated authority under the Proceeds of Crime Act meant that the Appellant was constrained by section 97 of the Act.
3. failing to appreciate that, pursuant to section 134 and the 9th Schedule of the Banking Services Act, that even where disclosure is permitted for the purpose of [NCB's] anti-money laundering and counter-terrorism or financing risk management procedures, it is without prejudice to section 97 (tipping off) of Proceeds of Crime Act.

ii. The learned Judge below erred in failing to sufficiently appreciate that there are several regulatory regimes involved in the processing of [Chagod's] cross border monetary transactions and that [NCB's] ability to maintain its correspondent banking relationships depends, in part, on the view of those regulatory regimes that, in doing business with [NCB], there is little, if any, risk of exposure of those correspondent banks to illicit transactions.

iii. The learned judge below erred in failing to sufficiently appreciate [Chagod] contractual obligation to [NCB] to:

1. not conduct any activity or facilitate transactions prohibited under Jamaican law including, but not limited to, money laundering; and
2. know its customer and not knowingly aid or abet any activity prohibited by law;

in the context of evidence of an incidence of fraudulent transactions being conducted through its accounts that was over nine times greater than the acceptable level and such as to cause [Chagod] to itself explore the option of making a report to the United States Federal Bureau of Investigations (FBI) and continuing chargebacks.

iv. The learned Judge below erred in failing to sufficiently appreciate that:

1. [T]he contractual obligations of the parties are subject to the provisions of the Proceeds of Crime Act and that a business in the regulated sector that is complying with its obligations under the Proceeds of Crime Act and Banking Services Act can incur no liability to its customer for so doing.
2. Things done or not done by [NCB] in compliance with the requirements of the Proceeds of Crime Act are justified, and are

now commonplace, in many free and democratic societies (post 9/11) in relation to anti-money laundering and counter-terrorism or financing risk management procedures.

v. The learned Judge below erred in failing to appreciate that:

1. [NCB] had a continuing exposure arising from the chargebacks under the parties' Merchant Agreement (Exhibit A) that were continuing with recourse against [NCB] for each of those transactions being available for a defined period which has not yet expired; and
2. The parties' contractual arrangements include a covenant by [Chagod] granting [NCB] the right to set off [Chagod's] liabilities to the bank against the monies standing to its credit in its accounts with the bank."

[24] NCB's first complaint in its grounds of appeal is that the learned judge erred when he granted an interim mandatory injunction because the issues had not been defined between the parties since NCB had not yet had an opportunity to file a defence.

[25] It is not unusual for interim injunctions to be granted before the issues have been crystallised in statements of case. The question is whether the learned judge observed the hallowed principles concerning the granting of injunctions, particularly mandatory injunctions. There is no merit in this first complaint.

[26] A summary of the next set of complaints is that the learned judge failed, in considering the balance of convenience, to give proper regard to:

a. NCB's contractual entitlement to freeze Chagod's account in the event that NCB deemed itself insecure

by occurrences involving Chagod's accounts or any of them;

b. NCB's obligations under, and the implications of, the regulation imposed by the Proceeds of Crime Act;

c. NCB's obligations under various regulatory regimes involved in processing cross-border monetary transactions and the risks caused by illicit transactions;

d. Chagod's contractual obligations to NCB not to conduct any activity prohibited by Jamaican law;

e. NCB's potential exposure to chargebacks;

f. NCB's contractual entitlement to set off any liabilities it incurred by chargebacks against Chagod's accounts; and

g. NCB's potential exposure to possible illicit transactions.

[27] Mrs Minott-Phillips, as mentioned above, also submitted that these errors by the learned judge showed that Chagod had no serious issue to be tried and he need not have had to consider the balance of convenience. She relied on **K Ltd v National Westminster Bank plc** [2006] 4 All ER 907 and **Shah and Another v HSBC Private Bank (UK) Ltd** [2013] 1 All ER (Comm) 72.

[28] The various complaints may be addressed by assessing the learned judge's treatment of the case against the requirements of the principles set out in the cases of **American Cyanamid Limited v Ethicon Limited** [1975] AC 396; [1975] UKHL 1; [1975] 1 All ER 504 ('**American Cyanamid**'), and their Lordships' Privy Council decision in **National Commercial Bank Jamaica Limited v Olint Corp Limited** [2009] UKPC 16; [2009] 1 WLR 1405 ('**NCB v Olint**'). The matters to be considered in applications for injunctions are:

a. whether there was a serious issue to be tried;

b. whether damages were an adequate remedy; and

c. the location of the balance of convenience.

These principles for analysis will be considered in sequence.

Whether there was a serious issue to be tried

[29] At para. [6] of his judgment, the learned judge referred to the first requirement set out in **American Cyanamid**:

> "I say all this to demonstrate that the first limb for the court's consideration, when deciding whether or not to grant interlocutory relief, has been satisfied. **On the evidence before me** [**Chagod**] **has a real prospect of success in its claim that** [**NCB**] **is acting in breach of contract when freezing assets** worth US$3 million, on account of alleged fraudulent activity by a third party, totalling approximately US$400,000. In the course of submissions, it emerged that the amount had since increased." (Emphasis supplied)

[30] Mrs Minott-Phillips submitted that the learned judge was in error in his assessment of whether Chagod had a serious issue to be tried. In para. 16 of her written submissions in response to Chagod's application to strike out the appeal, she argued:

> "16. NCB's position, throughout, has always been that in freezing the accounts it was acting in accordance with its contractual rights. If it was acting in accordance with its contractual rights, there can be no breach of contract. If there is no breach of contract by NCB, there is no triable issue as the claim is for damages for breach of contract (the *lis*)." (Italics as is original)

[31] At para. 28 of her written submissions, learned King's Counsel argued that the learned judge, "went outside the parties' contract and imposed his own test of seeking to find evidence establishing wrongdoing which was, in any event, an incorrect test in law as regards the triggering of NCB's obligations under the [Proceeds of Crime Act]". Learned King's Counsel stressed the contractual provisions that entitled NCB to freeze the accounts if it "deemed itself to be insecure in relation to Chagod's business" (para. 30).

[32] Mrs Gibson Henlin submitted that the learned judge correctly assessed that NCB's basis for freezing Chagod's accounts "relied on mostly unsupported aspersions" (para. 8 of her written submissions). Learned King's Counsel submitted that NCB's contractual right to terminate was "conditional on the occurrence of specified circumstances", and those circumstances were not sufficiently made out (para. 9 of her written submissions). Mrs Gibson Henlin attempted to demonstrate the inadequacy of all of NCB's bases for asserting that it deemed itself insecure, including an assertion that there was no allegation that Chagod was a party to any fraud.

[33] In assessing whether there is a serious issue to be tried, it is appropriate to point out that the learned judge did not place much credence on the evidence that NCB placed before him concerning fraud or breaches of the Proceeds of Crime Act ('POCA'). At para. [4] of his judgment, he said that NCB "relies mostly on unsupported aspersions against [Chagod]". The learned judge implicitly recognised that NCB did have the contractual right to freeze Chagod's accounts but was of the view that in the light of the evidence that had been provided to him, NCB was not justified in feeling "insecure".

[34] In that context, the learned judge ruled that there was a serious issue to be tried. He based this conclusion on the premise that NCB's assertions did not amount to an allegation of a breach of contract by Chagod. In paras. [3] – [4] he said, in part:

> "[3] …The only issue [NCB] raised with [Chagod in answer to Chagod's queries about the freezing of the accounts] concerns '*call back*' issues related to suspected fraudulent activity by third party cardholders. [Chagod] has exhibited correspondence demonstrating its answers to queries raised by [NCB] in relation thereto. [Chagod] says these claims do not now exceed US$400,000.
>
> [4] [NCB] for its part does not seriously challenge these assertions. The explanation, for freezing [Chagod's] accounts, does not rely on any alleged breach of contract by [Chagod]. Rather, and I say this respectfully, it relies mostly on unsupported aspersions against [Chagod]. Changing the name of a

> company, having only one US dollar bank account and requesting payment in cash do not together, or separately, amount to evidence of wrongdoing. [Counsel for NCB] cited the [POCA] and relied on sections which impose confidentiality duties and time periods for investigations. The suggestion, not entirely articulated, is that [Chagod], or its money, is tainted and that the authorities may have an interest. Alternatively, the suggestion may be, and I put it this way because Queen's Counsel says her client's obligations of confidentiality prevent any clear assertion, that the potential exposure whether to fraudulent claims or otherwise may amount to US$9 million. Hence the need to freeze all [Chagod's] accounts." (Italics as in original)

[35] Although Mrs Minott-Phillips argued that the learned judge misunderstood the evidence concerning the origin of the "fraudulent activity", he referred to the concerns that NCB had raised with Chagod. He referred to Chagod's answers to NCB's queries. He assessed those concerns in the context of NCB holding over US$3,000,000.00 of Chagod's money because NCB asserted that it was feeling "insecure".

[36] It is noted that NCB relied on, among others, clauses 8.3 and 8.5 of the Merchant Agreement, governing the relationship between it and Chagod in respect of credit card transactions, to support its entitlement to freeze Chagod's accounts. The clauses respectively state:

> "8.3 **[NCB] may terminate this Agreement immediately if** the Merchant [in this case, Chagod] becomes insolvent or bankrupt, becomes involved in any prohibited activity set out in clause 10 **or [NCB] deems itself to be insecure with respect to the Merchant's business**." (Emphasis supplied)

and,

> "8.5 **Upon the occurrence of any circumstances which would enable [NCB] pursuant to the terms of this Agreement to terminate this Agreement, [NCB] shall be entitled**, in lieu thereof, to suspend this Agreement, list the Merchant on terminated merchant files, **freeze the Merchant's accounts**

> **with [NCB]** and take such other steps as it deems necessary." (Emphasis supplied)

[37] In this context, the learned judge assessed the issue of whether there was sufficient basis for NCB to have deemed itself insecure concerning Chagod's business. In the end, he was not convinced by NCB's assertions.

[38] Regrettably, it must be said that, in exercising his discretion about the breach of the Merchant Agreement, the learned judge was wrong to find that there was a serious issue to be tried on the issue of breach of contract. A fair reading of clause 8.3 of the Merchant Agreement does not allow for the importation of the concept of objectivity to NCB's position, when it asserts that it "deems itself insecure". The learned judge's lament at para. [5] of his judgment that "[i]t does seem unfair, whether that unfairness is the one required at common law or by the Constitution, for no explanation to be provided to [Chagod for NCB's action]" is entirely understandable, but was not open to him to act upon. That was the bargain that the parties made, and Chagod was obliged to accept NCB's reliance on the Merchant Agreement.

[39] Mrs Gibson Henlin's submissions in support of the learned judge's findings, cannot succeed.

[40] Mrs Minott-Phillips referred to two decisions of the Supreme Court in **KAG Stockpile & Hardware Supplies Limited v National Commercial Bank Jamaica Limited** [2023] JMSC Civ 24 ('**KAG**') and **David Stewart (t/a Speed and Truck World) v National Commercial Bank Jamaica Limited** [2024] JMCC Comm 25 ('**David Stewart**'), in both of which it was held that NCB was entitled to rely on similar contractual provisions, to those in this case, to freeze their respective client's account. As a result, the respective applications for injunction were refused as it was held that there was no serious issue to be tried. However, both cases are distinguishable on their facts from this case.

[41] In **KAG**, NCB provided evidence on affidavit of contractual breaches by its customer, KAG. NCB's witness deposed that, having identified the breaches, it

requested a meeting with KAG, but its representative refused to attend. The decision, at first instance, in Chagod's case, was cited to the learned judge in **KAG**, but she properly distinguished it as being different on its facts. She said in para. [65]:

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

[42] Additionally, KAG complained that NCB breached its constitutional right to be heard as well as the disclosure provisions of POCA. The judge concluded, at paras. [76] to [78] that there were no serious issues to be tried relating to the constitutional point since KAG declined its own opportunity to be heard. In relation to the disclosure provisions under POCA, the judge found that they were irrelevant in that case since NCB only acted based on the breach of contract. In the circumstances, the judge determined that there was no serious issue to be tried.

[43] In this case, NCB also cited POCA considerations. As in **KAG**, based on the finding in respect of NCB's contractual entitlement to freeze the account, it is unnecessary to further consider the impact of POCA considerations on NCB in this judgment.

[44] **David Stewart** is also distinguishable from this case because of the evidence that was before the judge in that case. In para. [30] of the judgment in **David Stewart**, the judge pointed to the various reasons that supported NCB's considering itself insecure. There were failures by Mr Stewart, which the judge found to have justified NCB's stance. Counsel for Mr Stewart raised the issue of POCA, however, the judge dismissed it since it did not form part of the pleadings.

[45] There were no such, or similar, failures attributed to Chagod in this case. Notwithstanding the distinction on the facts, NCB was authorised by clause 8.5 of the Merchant Agreement to freeze the account, despite the difficulties with the reasons it proffered.

[46] Mrs Gibson Henlin referred the court to the Privy Council decision of **Justin Ramoon v The Governor of the Cayman Islands and Another** [2023] UKPC 9. The case was not found to be helpful, except concerning the issue of open justice, which briefly raised its head during oral submissions. That issue was not important to this decision. The Privy Council's decision dealt with the issue of "whether a closed material procedure ('CMP') is available before the courts of the Cayman Islands, in the absence of any statutory basis" (para. 1 of the judgment) and discussed whether certain material should be disclosed to an applicant requesting judicial review of an administrative action. Issues of "open justice" and fundamental rights were analysed in that case. It cannot be overstated that open justice is an essential right. It must be recognised that the court has the inherent jurisdiction to set the parameters of open justice (see para. [63] of **William Clarke v The Bank of Nova Scotia Jamaica Limited** [2013] JMCA App 9).

[47] In the present case, the relevance of open justice is acknowledged, but the subject matter of the point (a letter that counsel for NCB sent to the learned judge, before sharing it with Chagod) did not prejudice Chagod in any way, since there is no indication that the learned judge considered the letter and in any event, he ruled in Chagod's favour.

Whether damages would be an adequate remedy and the location of the balance of convenience

[48] In the absence of a finding that there is a serious issue to be tried it is unnecessary to consider the other issues as set out in Lord Diplock's formulation in **American Cyanamid**.

Costs

[49] On the principle that costs should follow the event, NCB should have its costs of:

a. the application to adduce fresh evidence;

b. the application to strike out the appeal; and

c. the appeal.

Conclusion

[50] On the above reasoning, NCB's appeal must be allowed. Although the learned judge was exercising his discretion, which was a true demonstration of equity softening the hardship that the law can sometimes cause, he erred in failing to give proper recognition to NCB's contractual right to freeze Chagod's accounts. Regretfully, therefore, his decision must be set aside. Thankfully, Chagod was spared the ordeal of having to await the outcome of a trial before being able to recover its money.

V HARRIS JA

[51] I have read the draft judgment of my learned brother Brooks P. I agree with his reasoning and conclusion and have nothing useful to add.

G FRASER JA (AG)

[52] I, too, have read the draft judgment of Brooks P and agree.

BROOKS P

ORDER

a. The appeal is allowed.

b. Costs of the applications, to adduce fresh evidence and to strike out the appeal, to the appellant to be agreed or taxed.

c. Costs of the appeal to the appellant to be agreed or taxed.