Privy Council Appeal No 61 of 2008

National Commercial Bank Jamaica Limited *Appellant*

v.

Olint Corp. Limited *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

REASONS FOR DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE 26th January 2009, Delivered the 28th April 2009

Present at the hearing:-

Lord Hoffmann
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood
Lord Mance

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*[Delivered by **Lord Hoffmann**]*

1. The chief issue in this appeal, as formulated by Panton P in the Court of Appeal, is whether a bank, "by merely giving reasonable notice", can lawfully close an account that is not in debit, where there is no evidence of that account being operated unlawfully: see paragraph 12. Their Lordships have no doubt that in the absence of express contrary agreement or statutory impediment, a contract by a bank to provide banking services to a customer is terminable upon reasonable notice: *Paget's Law of Banking* 13th ed (2007) p. 153.

2. Olint Corp Ltd ("the company") carries on the business of providing administrative and other services to an investment club which

appears to have offered its members very high returns, allegedly derived from profits made in foreign exchange trading. In 2005 it opened two accounts with the National Commercial Bank Jamaica Ltd ("the bank") and a third account in 2007. Towards the end of 2006 the company attracted a good deal of unfavourable publicity in the press. There were allegations that it was, not to put too fine a point upon it, a pyramid or Ponzi scheme in which the returns to investors were paid out of the money subscribed by new investors attracted by the prospect of high returns. In August 2007 the bank asked to see the company's audited accounts (as it is required to do under guidance issued by the Bank of Jamaica for the purpose of countering money-laundering and terrorist financing) but they were not forthcoming.

3. On 14 November 2007 the bank, no doubt apprehensive that if the rumours turned out to be true, it might at best suffer some damage to its reputation and at worst find itself on the receiving end of a claim for negligence or dishonest assistance in paying away money derived from club members, decided that it did not want to continue to be the company's banker. It wrote saying that it intended to close the company's accounts on 17 December and, in the absence of other instructions, would send the company a draft for its net credit balance. That was 32 days notice.

4. On 21 November 2007 the company asked that the period of notice be extended to 14 March 2008. The bank said that this was too long but agreed to an extension until 14 January 2008. It said that the company had given no information which could justify a longer period.

5. On 11 January 2008 the company, without any notice formal or informal to the bank, successfully applied *ex parte* for an injunction restraining the bank from closing its accounts until 25 January or further order. The application came before Jones J *inter partes* on 17 and 18 March. On 18 April he dismissed it. The company appealed and on 18 July 2008 the Court of Appeal granted the injunction until trial.

6. There is no allegation in the particulars of claim served on behalf of the company that the extended period of notice was unreasonably short. Instead, it is alleged that the bank was acting maliciously, contrary to its statutory obligations under the Banking Act and the Fair Competition Act and with the intention of inducing breaches of contract between the company and members of the investment club whose monies had been deposited. Their Lordships will consider each of these causes of action.

7. First, it was argued that the bank's contractual right to terminate the banking relationship by reasonable notice has been modified by section 4(3)(c) of the Banking Act. That paragraph is part of a general requirement, contained in section 4, that a licence to carry on a banking business should be granted only to companies which the Bank of Jamaica recommends as having fit and proper persons as their directors, managers and major shareholders. Section 4(3)(c) says what is meant by a fit and proper person: he must be of sound probity, competent, diligent and so on. Their Lordships are unable to see what these provisions have to do with the terms of the contract between the bank and its customers. In the Court of Appeal, Morrison JA criticised the judge for deciding this matter by way of a "mini-trial" and held that it gave rise to a serious issue which ought to be tried. But he did not explain what that issue would be and their Lordships consider that one has only to read section 4(3)(c) to see that it is irrelevant to any issue in this case.

8. The claims under the Fair Competition Act appear to their Lordships to be equally unpromising. First, it is said that by closing the account, the bank was abusing a dominant position in the market. There appears to have been no evidence to suggest that the bank occupied a dominant position – defined in section 19 as "such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors" – in the market for banking services in Jamaica. The bank is the second-largest in Jamaica, with 34-37% of total loans and 30-35% of total deposits, but the Bank of Nova Scotia is larger and there are four other commercial banks in Jamaica, to say nothing of foreign banks. They are all in competition with each other. It is not easy to acquire a dominant position in the banking market. However, even if the bank did occupy a dominant position, their Lordships cannot see how a refusal to be the company's banker can be an abuse of that position. Abuse of a dominant position is normally with a view to securing some advantage in the market. Section 20 defines such abuse as impeding the "maintenance or development of effective competition". It does not appear to their Lordships that the bank's action could have any effect on competition between banks. On the contrary, it enabled competitors to pick up another customer if they felt inclined to do so.

9. Secondly, under the Fair Competition Act, it was argued that the bank was in breach of section 34(1)(b), by refusing to supply services to the company. Read literally, this subsection could mean that a refusal to supply goods or services to anyone, for whatever reason, was an offence under the Act. Section 34 has the side-note "Price Fixing" and their Lordships suspect that paragraph (b) of subsection (1) is the result of a slip in the legislative process, because it covers exactly the same ground in exactly the same words as paragraph (c), without the qualifying words

"because of the low pricing policy of that other person." It must be read in its context as confined to discrimination for the purpose of maintaining prices, which has nothing to do with this case.

10. The third complaint under the Fair Competition Act was that, contrary to section 35, the bank colluded with other banks to restrain or injure competition. The only evidence of such collusion is that at least one other bank has also closed the company's accounts. But there is nothing to suggest that this action, which took place more than a year earlier, was in collusion with the bank, still less that it was for anti-competitive purposes. No doubt it was for much the same reasons as the bank decided that it did not want the company as a customer, but that is hardly an anti-competitive act.

11. The final alleged cause of action was inducement of breaches of contract with members of the investment club. Their Lordships consider this to be a hopeless proposition. Inducement of breaches of contract is a tort which requires the bank to know that it will cause the breach of a contract between the company and the members and to intend to cause that breach: see, most recently, *OBG Ltd v Allan* [2008] 1 AC 1. There was no evidence that the bank knew anything about the relationship between the company and the members (indeed, that was one of its complaints) or that it intended to cause a breach of contract.

12. Their Lordships therefore consider that Jones J was right to have held that there was no triable issue and to have refused an injunction on that ground. In those circumstances it is unnecessary for their Lordships to consider whether, if there had been a triable issue (such as whether the period of notice had been too short) it would have been proper to grant an interlocutory injunction or whether the company should have been left to pursue its remedy in damages. Nevertheless, their Lordships wish to draw attention to two features of this case.

13. First, there appears to have been no reason why the application for an injunction should have been made *ex parte*, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, *audi alterem partem* is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) *or* there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to

be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none.

14. In this case, the applicants were told on 22 November 2007 that their accounts would be closed on 14 January 2008 and a request for a further extension was refused on 24 December 2007. No explanation has been given for why it was not possible for the bank to be given notice of the application to the court made on 11 January 2008. Their Lordships were told that such last-minute *ex parte* applications have become common practice in Jamaica. In *World Wise Partners Ltd v RBTT Bank Jamaica Ltd* (unreported, 13June 2008). the bank wrote on 28 February 2008 to the plaintiff saying that their accounts would be closed on 15 May 2008. On that day, the plaintiff applied *ex parte* for an injunction which was granted and not discharged until after an *inter partes* hearing on 13 June 2008. In *Smith v National Commercial Bank Ltd* (unreported 3 September 2008) the bank notified the plaintiffs that their accounts would be closed on 14 April 2008 and they applied for an injunction *ex parte* on 14 April 2008. Following the decision of the Court of Appeal in this case, that injunction has been extended until trial.

15. These cases appear to show a disregard of rule 17.4(4) for which no justification is offered. If the rule is not generally enforced, plaintiffs will be encouraged to make a tactical use of the legal process which should not be allowed.

16. The second feature is the basis upon which Jones J decided to refuse an interlocutory injunction and the Court of Appeal decided to grant one. It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the

defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the *American Cyanamid* case [1975] AC 396, 408:

> "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."

18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

19. There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603, 682-683. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670, 680. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the

chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted."

20. For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see the *Films Rover* case, *ibid.* What matters is what the practical consequences of the actual injunction are likely to be. It seems to me that both Jones J and the Court of Appeal proceeded by first deciding how the injunction should be classified and then applying a rule that if it was mandatory, a "high degree of assurance" was required, while if it was prohibitory, all that was needed was a "serious issue to be tried." Jones J thought it was mandatory and refused the injunction while the Court of Appeal thought it was prohibitory and granted it.

21. Their Lordships consider that this type of box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction. Factors which the court might have taken into account in this case if there had been a triable issue were, first, that the injunction required the bank to continue against its will to provide confidential services for the plaintiffs; secondly, that the injunction would require the bank to continue to incur reputational risks and possible exposure to legal action; thirdly, that it was by no means clear that the plaintiffs would be able to satisfy a claim under the cross-undertaking in damages; fourthly, that the plaintiffs' case was, even if not (as their Lordships think) hopeless, certainly very weak, and fifthly, that the plaintiffs could no doubt have obtained alternative banking services from any bank whom they could persuade that they were not running a fraudulent scheme. It is unnecessary to say what should have been the outcome of a weighing of these factors because that was a matter for the discretion of the judge but they suggest that, even if there had been a serious issue to be tried, it is by no means obvious that Jones J was wrong to refuse an injunction.

22. For these reasons, their Lordships announced at the conclusion of argument that they would humbly advise Her Majesty that the appeal should be allowed with costs before the Board and in the Court of Appeal and the judgment of Jones J restored.