[2024] JMCC Comm 25

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 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 April 30, 2024, May 8, 2024, and May 24, 2024

Interim injunction - Whether there is a serious issue to be tried that the defendant is in breach of the Universal Terms & Conditions Merchant Agreement – Whether the defendant was entitled to freeze the claimant's bank account under the Universal Terms & Conditions Merchant Agreement – Whether the defendant was entitled to notice before his account was frozen – Whether the defendant was denied the opportunity to respond to the chargeback query.

IN CHAMBERS

CORAM: JARRETT, J

Introduction

[1] These are the reasons for my decision to refuse the claimant's Urgent Notice of Application for Court Orders, filed on November 23, 2023, in which he sought interim relief against the defendant. I will briefly outline the application and the evidence in support of it, consider the pleadings[1] and demonstrate why I ultimately found that there are no serious issues to be tried in the claim.

The application

[2] In his application the claimant seeks the following interim orders and interim declarations: -

a) The defendant is ordered to disclose and produce to the claimant the Universal Terms & Conditions Merchant Bank Agreement and the Visa credit card rules signed by the claimant and which governs the relationship between the claimant and the defendant. [2]

b) An interim declaration that the defendant is not entitled to freeze or place a hold on the claimant's account[3] no 581 007 892.

c) The defendant shall forthwith release all sums in the claimant's bank account 581 007 892 until the trial of this action or a further order of the court.

d) An injunction restraining the defendant, their servants and /or agents from taking any further action against the claimant's said account in any way which may disrupt the claimant's operations or ability to meet its financial obligations to customers, suppliers and for thirty party contractual agreements.

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[1] A reply filed by the claimant was out of time and consequently no regard was had to it either by the court or by counsel.

[2] The Universal Terms & Conditions Merchant Bank Agreement was attached to the defendant's defence and therefore submissions in relation to this relief were not advanced by the claimant.

[3] In the orders sought in the application, the word "accounts" is used but it is one (1) chequing account that was frozen.

e) Cost to the claimant/applicant

f) Such further and other relief as the court deems fit.

The claim

[3] The backcloth to the application is a claim form that was also filed on November 23, 2023. In it, the claimant claims that the defendant is in breach of the Universal Terms & Conditions Merchant Bank Agreement ("the Agreement") between himself and the defendant. He also claims that the defendant is in breach of a duty of care and /or is negligent in that it wrongfully froze his account without reasonable or lawful justification. Consequently, he suffered loss and damage. He pleads that the Agreement resulted in a merchant and merchant acquirer relationship between himself and the defendant and this facilitated access to the visa credit card network. He alleges that on May 5, 2023, he became aware that his chequing account with the defendant was frozen, but despite his efforts, he was not advised of the reason until June 7, 2023, when he received an email sent by the defendant on May 30, 2023. That email advised him that the defendant was investigating transactions completed on his ecommerce platform and required him to respond by June 2, 2023.

[4] The claimant pleads further that the defendant froze his chequing account and restricted his access to it since about May 5, 2023, without advising him of the reason and without giving him an opportunity to respond. His attorneys-at-law wrote to the defendant requesting a copy of the Agreement, but the defendant failed to respond. As a result of his account being frozen, he claims, among other things, that his entire business operation has halted, and he is put to significant reputational, legal and financial risk. He alleges therefore that the defendant is in breach of the Agreement, the particulars of which include the following: -

a) Failing to conduct a proper investigation to determine whether the chargeback applications against the claimant were legitimate prior to restricting the claimant's access to his chequing account.

b) Concluding without any valid or legitimate reason that the claimant had breached the terms or conditions of the Universal Terms & Conditions Agreement sufficient to freeze the claimant's account.

c) Failing to provide the claimant with sufficient or reasonable time to provide all necessary information to assist the defendant in their investigations or resolution of the chargeback applications.

d) Failing to permit the claimant the opportunity to resolve the issues of chargeback applications between [himself] and the cardholder as provided for in the said Agreement.

[5] In relation to the alleged breach of duty of care, the pleaded particulars are: -

a) Failing to take reasonable care or skill in processing chargeback applications against the claimant.

b) Failing to exercise its duty of care to make adequate enquires and to refrain from acting on illegitimate chargeback applications without giving the claimant an opportunity to respond to the said enquiries.

c) Causing and effecting the repayment/refund to customers, monies which were legitimately received by the claimant for services that were rendered by the claimant to customers or the persons on whose behalf the relevant card payments were made.

[6] Lastly, the claimant seeks the following remedies:-

a) A declaration and/or an order that the defendant is in breach of the Universal Terms & Conditions Merchant Agreement between the claimant and the defendant.

b) A declaration and /or order that the defendant wrongfully froze the claimant's bank accounts without reasonable or lawful justification.

c) A declaration and/or order that the defendant's actions toward the claimant caused irreparable damage to the claimant's goodwill and reputation in his business, Speed and Truck World.

d) Damages for breach of contract.

e) Damages for breach of duty and/or negligence.

f) Interest.

g) Costs.

h) Such other relief as this Honourable Court deems fit.

The evidence

[7] In his affidavit filed on November 23, 2023, in support of the application, the claimant says that his business installs and sells rims and tyres for motor vehicles, and he has been in business since 2007. He maintains three bank accounts with the defendant including checking account 581 007 892, and a large portion of his business uses online transfer of funds or point- of- sales machines. He says he entered into the Agreement with the defendant which he signed and that at all material times, he was compliant with its terms. Given the lapse of time since it was executed, he could not find his copy of the Agreement. According to him, on or about May 5, 2023, he became aware that his chequing account with the defendant was frozen when his cheque to a supplier was dishonoured. His enquiries at the Ocho Rios branch of the defendant led to him receiving a call that same day from the defendant's Head Office in Kingston scheduling an appointment for him to attend a meeting there on May 8, 2023.

[8] The meeting on May 8, 2023: "fell through" and he was given a second appointment for May 17, 2023. At that meeting he was informed that "a

transaction"[4] using his point-of-sale machine was fraudulent. He says that the only explanation given to him was that the transactions were done "offline". He was told that he was not being accused of fraud, but he must go to the police to report a fraud and thereafter, inform the defendant when he would return. He explained that he could not make a report to the police since he did not receive anything from the defendant to do so. He says he was aware that there were offline transactions processed using his point-of-sale machine, but as far as he knew, such transactions are permissible, and he uses offline processing when there are difficulties with his internet. At the time his chequing account was frozen, he had approximately J$24,000,000.00, in it, not including the value of any questioned transactions. He received an email dated May 30, 2023, from the defendant's chargeback officer, but he only saw it on June 7, 2023, as it had gone into his spam folder.

[9] 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.

[10] The further evidence of the claimant is that the defendant did not respond to his attorney's request for a copy of the Agreement and his account remains frozen

[4] The claimant initially uses the singular word "transaction" but in his further evidence he uses the plural word "transactions".

to date. The continued freezing of his account, he asserts, has caused him great prejudice, his business has been halted and he has been put to great reputational, legal and financial risk. He has reviewed the five transactions and determined that they were all done in the presence of the customer who presented picture identification and the goods purchased which total J$ 36,875,000.00, were picked up at his location. He took copies of the picture identifications and has retained some of the invoices. His attorneys-at-law have advised him, that the freezing of his account is unlawful and in breach of the Agreement. It was done without notice and without giving him an opportunity to respond. He says he is fearful that without the court's intervention he will suffer irremediable loss and damage.

The defence

[11] The defendant did not file an affidavit in response to the application but relied on its defence, and the claimant's own evidence. It avers in its defence that it froze the claimant's chequing account in accordance with its contractual right to do so under the Agreement. A copy of the Agreement attached to the defence bears the signature of the claimant. The defendant denies that the claimant was not advised of the reasons for the restriction or given an opportunity to respond. It says that the email of May 30, 2023, indicated that there were five unauthorised and disputed card transactions done during the period April 17 to 19, 2023 in excess of US $250,000.00, and requested a response from the claimant by June 2, 2023. No response was received from the claimant to enable it to respond to the issuing bank within the stipulated time.

[12] The defendant pleads further that the email of May 30, 2023, stated that it was a chargeback query; the defendant had received a claim for "no authorisation" in respect of the five disputed transactions and requested that the claimant provide it with the details of the transactions. When the claimant did provide a response, it was out of time and inadequate, particularly with respect to the claimant's inability to provide the names of its customers or cardholders who purportedly made the purchases, and this was a breach of the Agreement.

[13] The defendant observed that the claimant had issued a number of cheques after each of the disputed transactions, one of which was in the amount of J$900,000.00 to another merchant who was under investigation by it in circumstances "not dissimilar" to those applicable to the claimant. Upon enquiry, the claimant could not provide an answer about the circumstances concerning the drawing of this cheque. The defendant further pleads that in all the circumstances set out in its defence, it "deemed itself insecure" with respect to the claimant's business, and this led it to invoke its right under the Agreement to suspend the Agreement, freeze the claimant's account and take such other steps as it deemed necessary.

[14] The amounts in the disputed transactions were charged back against its account with the organizations that issued the cards in question, and such amounts were recouped by it from the claimant's chequing account. This, the defendant pleads, was a step it deemed necessary. The defendant avers further that the amount recouped as at the filing of the defence is J$ 20, 296,685.71. It denies that it breached the Agreement and denies that it was delinquent in handling the chargebacks or the freezing of the claimant's account. It also denies that it is responsible for any losses sustained by the claimant. The defendant contends that the claimant was solely responsible for any such losses as his conduct, as outlined in the defence, including processing offline unauthorised transactions gave it reasonable cause to: a) deem itself insecure in relation to the claimant's business ; b) believe the claimant has engaged in transactions conducted through his accounts with it that could constitute or be related to money laundering and to ; c) take steps to secure itself financially and reputationally.

Analysis and discussion

[15] No authority need be cited for the well-known principles applicable to an application for interim injunctive relief[5]. The threshold test is that I must first be satisfied that there is a serious issue to be tried. It is accepted that the question raised at this stage of the enquiry is whether the claimant has any real prospect

[5] American Cyanamide v Ethicon Ltd [1975] 1 ALL ER 504

of succeeding at trial. [6] It is only if I am so satisfied, that I need go on to consider whether damages would be an appropriate remedy and the balance of convenience. Miss Williams argued that there are three serious issues to be tried. The first issue is whether clause 9.5 of the Agreement permits the defendant to suspend the claimant's account without notice to him and for an indefinite period, or to provide him with an opportunity to respond. She argues that there is nothing in the Agreement that gives the defendant that right. The second issue identified by her is whether the defendant is permitted to suspend the claimant's account pursuant to clause 9.5 of the Agreement when it has not followed the procedure set out in clause 8.4 which deals specifically with chargebacks. The third issue is whether the defendant can suspend the account indefinitely based on a suspicion of money laundering. Counsel Miss Williams argued that if the defendant was suspicious of money laundering, then it should have followed the procedure under the Proceeds of Crime Act (POCA) and report the matter to the competent authority.

[16] King's Counsel, Mrs Minott-Phillips submitted on behalf of the defendant that the claim is hopeless and there are no serious issues to be tried. She argued that substantially, the claimant's case is in contract; he claims a declaration that the Agreement was breached by the defendant, and he seeks damages for the breach. King's Counsel argued that nowhere in the claim, does the claimant claim a breach of any statutory duty whether under POCA or otherwise. According to her, the claimant signed the Agreement which outlines in clause 2.11, the steps to be taken in relation to offline transactions (including when the terminal is back online). She submitted that the Agreement also outlines in clause 8.11, that responses to the defendant's requests in respect of chargeback queries must be within 3 business days of any request. King's Counsel argued further that the claimant did not provide the response within the agreed 3 day period; he did not provide the information requested by the defendant ; the transactions in total amount to more than was in the claimant's account at the time; the conduct of the claimant led the defendant to feel insecure about his business and to be suspicious that he could be using his

[6] Ibid

account to facilitate money laundering. She argued that the defendant acted entirely within the terms of the Agreement and was entitled to freeze the claimant's account.

[17] I agree with Mrs Minott-Phillips that the claim is one in contract. The pith and substance of which is that the defendant breached the Agreement when it froze the claimant's chequing account as it had no legal justification to do so. Mrs Minott-Phillips also argued, and I agree with her, that the claim for breach of the duty of care really does not take the contract claim any further, as on ordinary principles, tortious duties of care and contractual duties co-exist. (See for example the dicta of Lord Scarman in **Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd. [1985] 2 All ER 947**)

[18] The Agreement provides in clause 9 for its termination[7]. This clause is central to a determination of the application. Clause 9.1 allows for termination in any of the following circumstances: -

a) by either party giving the other 30 days written notice,

b) upon the occurrence of any Event of Default,

c) upon the defendant reasonably suspecting that an Event of Default has occurred, or,

d) as otherwise provided in the Agreement.

Clause 9.3 provides that the defendant may terminate the Agreement immediately if the claimant becomes insolvent or bankrupt or the defendant deems itself to be insecure with respect to the claimant's business.

[19] An "Event of Default "referred to in clause 9.1, is said to occur in 4 circumstances outlined in clause 9.6: -

[7] In this judgment, when citing clauses from the Agreement, the word "claimant "has been interposed where the word "Merchant" appears in the Agreement, and the word "defendant" interposed where the word "Bank" appears in the Agreement .

a) The claimant makes any warranty or representation under the Agreement which is or becomes incorrect in any material aspect.

b) The claimant fails to observe or perform any of the terms and obligations contained in the Agreement or any of the rules issued by the defendant from time to time.

c) The claimant institutes or does anything which would permit to be instituted, any proceedings leading to the defendant being declared a bankrupt or being found insolvent.

d) The defendant feels unsafe or insecure in the manner in which the defendant is conducting its business.

[20] Clause 9.5, on which the defendant places significant weight, states as follows:-

> "Upon the occurrence of any circumstance which would enable the [defendant] pursuant to the terms of this Agreement to terminate this Agreement, the [defendant] shall be entitled, in lieu thereof, to suspend this Agreement, list the [claimant] on terminated merchant files, freeze the [claimant's] accounts with the [defendant] and take such other steps as it deems necessary".

[21] "Chargeback" is defined in the Agreement as a reversion by the defendant against the claimant in whole or in part of the dollar value of a transaction whereby the liability for that transaction reverts to the claimant. Clause 8.4 states that the claimant agrees that the defendant "shall be entitled" to chargeback to him, the dollar amount of any transaction in the event of any of the circumstances outlined in clause 8.5. One of the circumstances specified in clause 8.5[8], is where the cardholder disputes the sale of goods or services and the defendant has, if it deems it necessary, investigated the dispute and concluded that the claim was legitimate. Clause 8.6, states that the claimant agrees to repay the defendant on demand, the amount of any chargebacks and the defendant is entitled to debit the claimant's account or bill him for such

[8] Clause 8.5(d)

chargebacks. Clause 8.30 states that any dispute between the claimant and a cardholder respecting any sale of goods or in relation to the provision of service or payment of taxes or duties and imposts in respect of any transaction shall be resolved between the cardholder and the claimant and where the disputes are not resolved in this way, the defendant reserves the right to charge the items back in accordance with the Agreement.

[22] It is undisputed that the defendant in an email to the claimant dated May 30, 2023, from its chargeback department, referred to five transactions on the claimant's ecommerce platform for which there was a claim for "no authorisation". Those transactions took place during the month of April 2023 and amounted in total to US $250,474.72. It is also undisputed that the claimant failed to respond to the email and to provide the information required by the defendant within the 3 business days stipulated and as required under clause 8.11 of the Agreement. I agree with Mrs Minott- Phillips, that the fact that the email went to the claimant's spam folder cannot be an answer for the claimant's failure to respond to the chargeback query within the period required by the Agreement.

[23] There can be no gainsaying the necessity for chargeback queries to be treated with alacrity and urgency. The defendant was faced with a "no authorisation" claim from an issuing bank in which cardholders were disputing very large transactions conducted on the claimant's ecommerce platform. The defendant was required to respond to the claim. The claimant, when he did respond to the defendant's query, did so inadequately. It is noteworthy that in his affidavit, the claimant says that all the transactions were done in the presence of the cardholders who presented their picture identifications, and he took copies of the identifications. Yet, he has not given any evidence refuting the allegation in the defence that he failed to provide the names of the customer or customers who purchased the goods, the subject of the five disputed transactions. It is equally noteworthy that despite receiving the email of May 30, 2023, which gives details on the five disputed transactions, the claimant has not given any evidence indicating that he complied with the defendant's directive to make a fraudulent transaction report to the police.

[24] The defendant pleads in its defence that in addition to the claimant's failure to respond to the chargeback query within the stipulated time, and the inadequacy of the response which he eventually gave; there were a number of cheques drawn by him after each of the disputed transactions , one of which was in the sum of J$900,000.00, issued in favour of another Merchant who was under investigation in respect of similar circumstances . When asked about the circumstances pertaining to this cheque, the claimant was unable to provide an answer. This averment was not refuted by the claimant in his affidavit evidence.

[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, [9], ("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.

[27] Mrs Minott- Phillips submitted that whether the defendant felt insecure in the manner in which the claimant was conducting its business is a subjective fact. In **K Ltd v National Westminster Bank Plc (Revenue and Customs**

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

Commissioners and another intervening) [2006] 4 All ER 907, a decision cited by her, the claimant who had a business account with the defendant, sought an interim injunction against it, requiring it to comply with its mandate to make a payment on its behalf in relation to a transaction. The defendant wrote to the claimant indicating that it could not comply and could not enter into any further discussions on the matter. It sent a letter with its solicitors to the court explaining that it had made an authorised disclosure to the Revenue and Customs under the Proceeds of Crime Act 2002. Under section 328 (1) and (2) of that Act, a person committed an offence if he entered or became concerned in an arrangement which he knew or suspected facilitated the acquisition, retention, use or control of criminal property by or on behalf of another person and, did not commit the offence if he made an authorised disclosure. The court addressed the question how, in a civil case, evidence of suspicion is adduced and whether the suspicion can be controverted and be cross examined. It took the view that any cross examination would decline into an argument whether what the bank employee holding the suspicion thought could amount in law to a suspicion, and this was not a proper matter for cross examination. In answer to the argument that this would make it too easy for banks to say that they were suspicious, the court held that under the Act there was no requirement for the suspicion to be reasonably held and suspicion is a subjective fact.

[28] As observed earlier, 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 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[10]. To deem itself insecure

[10] 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.

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.

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.

[31] 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.

[32] Miss Williams argued that the defendant cannot rely on POCA, since under section 94(2) of POCA, the defendant has a duty to make disclosure to the competent authority of any belief it had that the disputed transactions could constitute or be related to money laundering, and it did not do so. My short answer to this submission is that there is no evidence that the defendant has not made a required disclosure. *A fortiori*, the claimant has not relied on POCA in his claim (which is based on a breach of the Agreement), and it is the Agreement on which the defendant relies in its defence to the claim.

[33] The submission that the defendant ought to have given the claimant notice that it intended to freeze its account ignores the fact that giving notice in circumstances where the defendant had cause to believe that the claimant has engaged in transactions that could constitute or be related to money laundering, would defeat the purpose of the right the defendant has under the Agreement to freeze the claimant's account. It is impractical, in my view, to require the defendant to give notice of a belief that money laundering or criminal activity is taking place through its accounts, since the whole purpose of freezing the account is to prevent further unauthorized or unlawful transactions. In my view this is precisely why there is no provision under either clause 9.3 or 9.5 of the Agreement for the defendant to give notice prior to freezing the claimant's account. Surely, there can be no question that banks must take steps to counter the risks that they might be used to further financial crime.

[34] The claimant has not provided any evidence to substantiate his claim that the defendant failed to conduct a proper investigation into the chargeback applications or to comply with the chargeback provisions in the Agreement. It was the claimant who failed to respond timeously or adequately to the defendant's queries to facilitate and assist its investigation into the chargeback claims. There is no doubt that the claimant was given the opportunity to respond to the chargeback query and that under clause 8.6 of the Agreement, the defendant was entitled in the circumstances to debit the claimant's account for the chargebacks. I am of the opinion, having regard to clause 8 in its entirety , and in particular clauses 8.4 and 8.5, that clause 8.30 which provides for disputes respecting the sale of goods and/ or the provision of services rendered to be resolved between the defendant and the cardholder, does not apply to claims of "no authorisation" from an issuing bank, such as the claim made in this case.

[35] In the final analysis, there is no serious issue to be tried whether the defendant was in breach of contract by freezing the claimant's account. There is also no serious issue to be tried whether the defendant was entitled to rely on clause 9.5 of the Agreement to suspend the claimant's account when it did not follow the chargeback provisions in clause 8.4.

[36] I disagree with Miss Williams that the claim raises any serious issue whether under POCA the defendant can suspend an account indefinitely on suspicion of money laundering. This issue simply does not arise on the pleaded claim. As observed earlier, in its defence the defendant clearly relies on the Agreement for the actions which it took. For the same reason I disagree that any serious issue arises on the claim, whether the defendant's conduct was done in compliance with POCA. The defendant's defence lies squarely on the terms of the Agreement.

[37] I am encouraged in this view by the dicta of Laing JA (Ag) in **National Commercial Bank v Chagod Tour Jamaica Limited**(supra). An issue in that appeal was whether the defendant could have frozen the account of the

merchant under clause 8.5 of the agreement in question, a clause identical to clause 9.5 of the Agreement before me. Laing JA (Ag), who had before him an application for a stay of execution of the decision of the trial judge, in which the release of funds held by the defendant was ordered , took the view that had the trial judge considered clause 8.5 of the agreement, it is possible that that may have affected his conclusion that there was a serious issue to be tried, given that the claim was based on a breach of contract and negligence. He found that the defendant (the appellant in that appeal) had a good chance of success on appeal as it was clear that the trial judge did not have any regard to clause 8.5 in coming to his decision. The stay was however ultimately refused when in conducting the balancing exercise required, it was found that there was a real risk that the respondent would suffer irremediable harm if it were granted.

Conclusion

[38] In the result, I find that there are no serious issues to be tried in the claim and therefore make the following orders: -

a) The Urgent Notice of Application for Court Orders is refused.

b) Costs to the defendant to be agreed or taxed.

c) A case management conference is scheduled for July 23, 2024, at 12noon for 1 hour.

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

A Jarrett

Puisne Judge