IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO 2008 HCV 02574

BETWEEN WORLD WISE PARTNERS LIMITED CLAIMANT
AND RBTT BANK JAMAICA LIMITED DEFENDANT

IN CHAMBERS

Paul Beswick and Krishna Smith instructed by Beswick, Ballentyne and Company for the claimant

Sandra Minott Phillips, Corrine Henry and Ky-Ann Lee instructed by Myers Fletcher and Gordon for the defendant

June 10 and 13, 2008

BANKER/CUSTOMER - NATURE OF CONTRACT - INTERLOCUTORY INJUNCTION - APPLICABILITY OF AMERICAN CYANAMID PRINCIPLES - SECTION 4 (3) OF THE BANKING ACT - SECTIONS 20 AND 34 OF THE FAIR COMPETITION ACT

SYKES J.

1. On May 15, 2008, Daye J. granted an ex parte injunction in favour of World Wise Partners Limited (WWPL) restraining RBTT Bank Jamaica Limited (RBTT) from closing four accounts in the name of WWPL.

2. This is now the inter partes hearing to determine whether the injunction should continue until trial. There is also an application for a search order. At the end of the hearing the injunction was discharged and the application for extending the injunction until trial as well as the application for a search or order was dismissed with costs to RBTT to be agreed or taxed. These are my reasons.

The facts

3. RBTT is a bank licensed under the Banking Act to provide retail banking services. WWPL is a company incorporated under the Companies Law of Jamaica. It was incorporated on July 17, 2007.

4. According to the articles of incorporation the core business of WWPL would be business services, all legal investments, inland and offshore investments. The first directors were Mr. Noel Strachan and Miss Judy Strachan. Miss Judy Strachan is also listed as the company secretary.

5. This was not the first time that RBTT had occasion to deal with Mr. Strachan and Miss Judy Strachan. The bank had occasion to deal with them in their capacity as officers of Jade Property Development and Construction Limited (Jade) which opened an account at RBTT on March 30, 2004. This company was incorporated on September 8, 2003. According to the memorandum of association, the company was established to engage in purchasing and developing land. Article 3 (a) of the memorandum of association states that the company would supply consumers with all types of property, construction services and products of that nature. The article also states that the company would also deal in service contracts and any other product and/or service that may be related to the sale or service of land and/or buildings. The article has the usual subclauses spelling out in greater detail what the company could do in connection with its business of buying and developing land.

6. In April 2007, Mr. Noel Strachan and Miss Judy Strachan as well as Jade were registered and trading under the business name World Wise. According to the certificate of registration of the business name, World Wise would be involved in service products, servicing contracts, loan agreements and collections. In other words the, officers of Jade in their personal capacity and Jade as a corporate entity would be engaging in these services. It is to be observed that before WWPL was incorporated on July 17, 2007, the name "World Wise" was the business name of Mr. Strachan, Miss Strachan and Jade which was registered in April 2007.

7. The bank formed the view, rightly or wrongly, and I make no pronouncement on this, that it was uncomfortable with the developments that occurred in 2007 in respect of Mr. Strachan, Miss Strachan, Jade

and WWPL. In the eyes of the bank there did not seem to be a clear delineation between WWPL, World Wise and Jade as far as their commercial activities were concerned. The bank felt (again without agreeing one way or the other) that it wanted more information concerning the commercial activities of the various entities. The bank seems to be saying that the current regulatory environment with its emphasis on knowing ones customer and establishing effective anti-money laundering measure it needed more and better particulars from WWPL, World Wise, Jade, Mr. Strachan and Miss Strachan.

8. In August of 2007 the bank initiated dialogue. It spoke to Mr. Strachan who told the bank "that the nature of his business was to facilitate the creation of corporate partnerships by bringing people and money together" (see para. 14 of affidavit of Mrs. Jacqueline Cowan for the bank). The bank alleges that between August and October 2007, it was becoming increasingly concerned by the activities of the WWPL. The anxiety of the bank reached fever pitch when it saw an article in the Daily Gleaner of October 24, 2007, which referred to an entity known as World Wise Investment which had an escrow account at RBTT and that account held 80% of the "funds under management" (see para. 20 of Mrs. Cowan's affidavit). Mrs. Cowan adds that at no time did RBTT have an escrow account for WWPL or World Wise or World Wise Investments. From the evidence presented, the word "Escrow" was written on the contract relating to this account but no one knows how it got there or even who wrote it. In any event, the bank is denying that there was an escrow account in the normally understood sense of that word. It appears also from the evidence that WWPL does not dispute this.

9. It appears that there were further meetings between Mr. Strachan and RBTT since a letter dated November 1, 2007, was written over the signature of Mr. Strachan to the bank referring to the article in the Daily Gleaner. I should point out that Mr. Strachan did not identify the article but it is fair to say that when one reads the article and examines Mr. Strachan's letter of November 1, 2007, it is a fair conclusion that he was referring to the article of October 24, 2007.

10. The letter was typed on a paper headed 'World Wise' and Mr. Strachan signed as Chairman of World Wise. It is not clear whether this

was World Wise the business name or a shortened form of WWPL, the corporate entity. Significantly, the letter makes reference to the banking relationship of over three years. I make this observation. If Mr. Strachan was saying that WWPL and the bank had a relationship for over three years then that would not be quite accurate because WWPL was not incorporated until July 2007. Also he could not have been referring to those persons trading as World Wise because World Wise was not registered as a business name until April 2007 and there is no evidence that Jade or Mr. Strachan or Miss Strachan was trading as World Wise, whether individually or collectively at any time before 2007. From the evidence, the only banking relationship that was over three years old was that between RBTT and Jade. There is no evidence that for over three years Jade traded as anything but Jade.

11. Indeed the article in the Daily Gleaner made the express assertion that the writer spoke to Mr. Noel Strachan. The article alleged that the company, WWPL, claimed to have been around since September 2003. Again, there is no evidence that WWPL was incorporated in September 2003. The company that was incorporated in September 2003 was Jade and Mr. Strachan was an officer of that company. If it is that the writer of the article spoke to Mr. Strachan based on the evidence the only company he could have possibly been referring to was Jade. Was Jade the company being referred to by the article but it was called WWPL? Was Jade in fact doing, from 2003, the things attributed to WWPL? These are legitimate questions that any reasonable banker would ask. By asking these questions the bank is not condemning anyone it simply wishes to understand clearly the nature of the business being operated by its customers. It is not hard to see why the bank was more than anxious.

12. It is obvious that Mr. Strachan knew of the article because he referred to it in his letter and pointed out only one error, namely, the escrow account. Mr. Strachan's letter of November 1, 2007, states in part, "as it relates to our last conversation, you noted your concern about an article in the Gleaner where the Journalist (sic) stated that RBTT Bank of Jamaica Limited operates an Escrow account for World Wise. That is true, however, the purpose of the escrow account was false".

13. The reason for Mr. Strachan saying this in the letter was because of the following paragraph from the article:

> *It [World Wise] claims that 80 percent of funds under management are held in escrow at RBTT Bank Limited. Strachan also did not comment on how he was able to generate sufficient returns from 20 percent of funds under his management to pay investors their monthly 12 percent, nor how the funds were invested or traded.*

14. The normal understanding of an escrow account is that the funds are held for specific purposes and only paid out on instruction or on the occurrence of a particular event. The journalist clearly understood escrow in this sense and this explains why he was curious about how 20% could generate enough revenue to pay 144% annual returns if 80% of the fund were held in escrow. If this was true then it would truly be an example of extraordinary business acumen.

15. The point is that Mr. Strachan did not deny the rest of the allegations attributed by the journalist to an interview with him. After this article and Mr. Strachan's letter can any reasonable person, with knowledge of the history of the time when banking relationships with the various parties were established as described above, be surprised at the concerns of the bank?

16. On November 5, 2007, Miss Strachan on a document headed 'World Wise' wrote to RBTT asking it to close the account and transfer the funds to one of the accounts to one of WWPL's account which was opened on July 20, 2007. This request from Mrs. Strachan to close the account came after a letter dated October 29, 2007, was sent by the bank to Mr. and Miss Strachan stating that on November 29, 2007, the bank would be closing the account in the names Noel Strachan, Judy Strachan, Jade trading as World Wise and forward the balance by cheques to them.

17. On November 6, 2007, the bank wrote to WWPL informing it that it would be closing the four accounts and forward the balance by cheques. WWPL was also advised that as of November 16, 2007, no further deposits would be accepted. To put the matter in terms of strict law, as of

November 16, the bank would no longer constitute itself a debtor to WWPL.

18. There was further communication between WWPL and RBTT which led to the accounts remaining open. RBTT made certain requests of WWPL which appeared to have been met. It appears that RBTT's concerns were not sufficiently allayed and in a letter dated February 28, 2008, RBTT wrote to WWPL telling it that the four accounts would be closed on May 15, 2008.

19. It was on May 15, 2008, that WWPL sought and obtained an ex parte injunction from Daye J. In addition, as noted above, there was the application for an injunction to continue until trial as well as a search order application.

20. Each of the four accounts operated by WWPL which were opened between July 20, 2007 and October 19, 2007 had the following clause 16:

> *The Bank (sic) may at any time close the account upon giving five (5) days written notice of such termination. At any time after the expiration of the notice period the Bank (sic) may, at the risk of the Account Holder (sic), forward by ordinary mail to the Account Holder's address on record, a cheques for the balance of funds, if any, on the closed account. Any items drawn or presented for payment or deposit on the account subsequent to such notice of termination may be declined by the Bank and returned to the Account Holder. The Bank shall not be liable for dishonoring (sic) or returning such item.*

21. There is no challenge to the validity of this clause and there is no challenge to the fact that it was a term agreed by the parties. What is being said, among other things is that statute, particularly the Banking and Fair Competition Acts have modified the banker and customer relationship. The documents before me do not include the particulars of claim and all that is here are the claim form and the amended claim form which states the bald claim but do not otherwise show the detail supporting the

assertion that these statutes have modified the banker/customer contractual relationship.

The amended claim form

22. WWPL, it would appear, implicitly accepts that clause 16 on its face is valid and enforceable. There is no claim challenging the validity of the clause. Summarising as briefly and accurately as I can, WWPL is claiming an injunction (as a final remedy at trial) an injunction restraining RBTT from closing the four accounts on the following bases:

a. breach of sections 34 and 35 of the Fair Competition Act;
b. engaging in anti-competitive behaviour designed to interfere with the claimant's legitimate business relations with third parties;
c. interfering or disrupting the claimant's business operations;
d. abuse of dominant position in the market for the supply of commercial banking services to the public by threatening to close WWPL's accounts;

23. WWPL is also seeking declarations on the grounds that:

a. RBTT has a statutory duty to provide and maintain commercial bank accounts for the public including WWPL on a non-discriminatory basis;
b. RBTT's threat to close the accounts is a breach of the statutory duty in (a);
c. WWPL is entitled to maintain its accounts without getting any licence from the Financial Services Commission or the Bank of Jamaica;
d. RBTT is not entitled to impose conditions on WWPL's operation of its accounts.

24. The claim form is saying that the commonly understood nature of the banker/customer relationship has been modified by the Banking Act and the Fair Competition Act. No case was cited which even suggested this possibility to say nothing of concluding that these statutes have that effect. No academic opinion supporting this position was placed before the court. This is not to say that the claim form is necessarily any the worse

for that but the point is that WWPL is relying on a very novel claim, at least in Jamaica, to restrain RBTT from doing what it has a contractual right to do. Thus as far as Jamaica is concerned, at this point in our legal history, this is very, very weak case. Indeed, as Mr. Beswick developed his submission it became clear that success at trial is going to depend on very complex arguments. The arguments are not obvious on the face of the wording of the statutory provisions relied on. The arguments are derivative ones, that is to say, the arguments go something like this: the relevant statutes contain provisions (a), (b) and (c). These provisions when taken together impose a duty on RBTT to do so and so. This duty prohibits RBTT from doing this and that. This duty overrides the normal understanding of the banker/customer relationship. It is this duty which prohibits RBTT from relying on clause 16 to terminate the accounts in question.

25. This argument is similar if not identical to those put before Jones J. in ***Olint Corp. Limited v National Commercial Bank*** Claim No. 2008 HCV 00118 (delivered April 18, 2008). It was these considerations as well as the status of Guidance Notes issued by the Bank of Jamaica which led Harrison J.A. in the Court of Appeal to grant an injunction in the ***Olint*** case which Jones J. refused to grant.

Nature of banker/customer relationship

26. One of the critical issues important to the resolution to this application is the nature of the contractual relationship between a banker and customer. Let me say at the outset that I have read the judgment of Jones J. in ***Olint Corp. Limited v National Commercial Bank*** Claim No. 2008 HCV 00118 (delivered April 18, 2008) in which his Lordship declined to extend, until trial, an ex parte injunction granted in similar circumstances as the case before me. I have also read the judgment of Harrison J.A. in the same matter where the learned Justice of Appeal granted an injunction until the appeal was heard. I understand that the appeal has been heard and judgment is awaited. Harrison J.A. felt that 'a number of factual matters which give rise to questions of law, regarding the rights and duties of the appellant as customer and the respondent as banker, under the Banking Act' (see page 5, Application No. 58 of 2008 (delivered April 30, 2008)). Harrison J.A. also noted that, '[t]here is also the issue regarding the legal status of Guidance Notes issued by the Bank

of Jamaica' (see page 5). Harrison J.A. added that these and other matters constituted good arguable grounds which favour the preservation of the status quo. The status quo here must necessarily mean the bank being forced to provide services of a personal and confidential nature to a customer it does not want. It also means forcing the bank to become an unwilling borrower from a customer thereby forcing the bank to become indebted to an unwanted lender. In the hearing before me, not a single case, in the several hundred years of banking law in which countless disputes must have arisen has been cited, in which any court has ever, after a trial or at an interim stage, granted an injunction. Not even the venerable and authoritative text of ***Paget's Law of Banking***, (cited by both counsel) a text running some thirteen editions has been able to find such a case. On the contrary, such authority as there is points in the opposite direction. The law of banking has become so specialized that the thirteenth edition of ***Paget*** saw assembled five specialist contributors, three assistant editors and a general editor – all eminent practitioners and academics and they have not been able to unearth any case to support the granting of an injunction restraining a bank from closing a customer's account. This is all the more significant when one considers that banking in England and Wales is taking place in a jurisdiction with competition law and a regulated banking sector.

27. Understandably, Mr. Beswick placed great reliance on the fact that Harrison J.A. extended the injunction barring National Commercial Bank from closing the account until the appeal from the decision of Jones J. is heard. This is an important consideration and a judge at first instance must take account of how a judge of Court of Appeal has dealt with a very similar case that raised the same issue as the case the judge at first instance has to adjudicate upon. Having said that, I am of the firm and fixed opinion that, subject to an actual decision supporting Mr. Beswick, if a first instance judge after a careful review of the applicable law finds that the law compels a particular conclusion then the judge at first instance must give effect to that conclusion.

28. I also observed that in his judgment Harrison J.A. did not examine the nature of the contract between a bank and its customer. It would seem to me that the nature of the contract points to the conclusion that the Courts of Equity before fusion of the administration of law and equity,

and courts in the post fusion era, have never granted specific performance in favour of a customer against a bank. Mr. Beswick was not able to point to a single case in which this has ever occurred. While this may seem strange to some there is quite a rational explanation for this. When one examines the nature of the contract and how it has been analysed, this inability to find any case in which an order compelling a bank to keep a customer that it does not want is not surprising. The ultimate point I am making is that if it is the law that a court will not grant any order compelling a bank to keep an unwanted customer even after a trial then it necessarily follows that an interim injunction ought not to be granted. The fact that equitable principles are involved does not mean that the court is at liberty to dispense with what has become specialized law when it comes to a bank and its customer. These conclusions are far reaching for WWPL and so I now set out the reasons that impel me to form the view that I have just expressed.

29. I have also noted that neither before Jones J. nor Harrison J.A. did the question arise of whether there was a term in the contract between the bank and its customer giving the right to the bank to terminate the contractual relationship. This to my mind is a fundamental distinction between ***Olint*** and the case before me. In the case before me, all the contracts relating to the four accounts have clause 16 which has been referred to above. Thus there can be no doubt that RBTT has the contractual right to terminate the contract and will not be liable in damages once it does so in accordance with the terms of the contract. It should be noted that there is no contractual provision requiring RBTT to give any reason for its decision. Thus to speak of whether RBTT's conduct was reasonable or not is beside the point. The issue is whether it acted in accordance with the terms of the contract. A contract obliges persons to act in accordance with the terms of what was agreed. Once that is done even if the result may be considered harsh there can be no cause for complaint and of course, there can be no breach that gives rise to a claim for damages.

30. In agreement with Jones J. and the long, very long and impressive line of cases stretching back over one hundred years without alteration or modification of one jot or tittle, I accept that the relationship between banker and client is a debtor/creditor relationship. That is to say, each

time the customer deposits money into the account the bank becomes indebted to the customer.

31. The principal case in my analysis is the case of ***Prosperity Limited v Lloyd's Bank Limited*** (1922 - 1923) 29 TLR 372. There McCardie J. held that although the notice given to the customer by the bank that it wished to close the account was not sufficient, that is to say, there was a breach of contract, he would not grant an injunction restraining the bank from closing the account. The report of the case is written in the form of reported speech as distinct from it being a written judgment of the court. However, this does not prevent me from being able to identify the relevant considerations McCardie J. took into account as reported by the law reporter. I should note that in ***Prosperity*** there was no term like clause 16 in the case before me.

32. In ***Prosperity*** the customer went to the branch of Lloyd's bank and told the manager, in detail, what his business was about and that he wished to open an account with the bank. The manager agreed and the account was opened. The head office of the bank read, in the newspapers, about the nature of the business of the customer and issues instructions that the account should be closed. There is no suggestion in the report that the customer was engaged in fraud or dishonesty but head office concluded that the nature of the customer's business was such that it did not wish to have such a customer. The customer was given one month to close the account. The customer sought an injunction restraining the bank from closing the account. Of particular importance was the fact that the contract did not have any provision regulating termination of the contractual relationship. The claimant sought a declaration that the defendants were not entitled to close their banking account without giving the claimant reasonable notice, and it also asked for an injunction restraining the defendants from discontinuing the account.

33. McCardie J. ,in his analysis, noted three distinct situations. First, there might be a special contract between bank and customer which bound both of them and that special contract might provide that the banking relationship should last for a specific time. Second, the contract may provide that no notice may be given. Third, if there was no special contract then the law was that the bank could not close an account in credit unless

the customer received reasonable notice (see page 372 column 1). The third situation identified by the learned judge is crucial. His Lordship was stating as a matter of law that unless the contract had some specific stipulation regulating closure of the account the customer of an account in credit was entitled to reasonable notice. In the case before me it is not being suggested that WWPL's accounts were not in credit but there is the intractable fact that there is a specific stipulation governing closure and therefore falls within the first situation identified by McCardie J.

34. It should be noticed that McCardie J. found that the client was entitled to reasonable notice which meant that the bank was in breach of its contract with the client. If ever there was a case in which an injunction ought to have been granted if the law allowed it, this would have been the case. The account was in credit, the customer was not being accused of any act of dishonesty and there was a breach of contract. Can there be a stronger case for an injunction if that law was the courts would grant an injunction in such circumstances? Note even ***Paget*** has sought to argue that the case was wrongly decided either factually or in principle.

35. McCardie J. next considered the rights of defendant. Was the defendant entitled to an injunction? The major premise of his Lordship's thesis at this point is this (see page 374 column 1 and 2):

> *[T]he court would not entertain jurisdiction in the case of covenants or agreements for personal services, or involving duties of a personal or confidential character or involving supervision which the court could not undertake. It was clear that the question whether the Court should grant an injunction was closely interwoven with the question whether the court ought to grant specific performance; the two matters were closely related. He (his Lordship) desired further to refer briefly to Leake on Contract, 7th ed., pp 846, 847, where it was pointed out: "The Court does not give specific performance of contracts involving personal services, skill or confidence; nor will the Court restrain a party by injunction from putting an end to such contract or dismissing an agent or servant." ... As pointed out by Lord Selbourne in Wolverhampton and Walsall*

Railway Company v London and North Western Railway Company (L.R. 16 Eq., at 439), "It is obvious that, if the notion of specific performance were applied to ordinary contracts for work and labour, or for hiring and service, it would require a series of orders and general superintendence, which could not be conveniently undertaken by any Court of Justice; and therefore contracts of that sort have been ordinarily left to their operation at law."

36. His Lordship is here pointing to the fact that in cases involving duties of personal and confidential nature or cases involving supervision an important consideration of whether a court would grant an injunction until trial is whether at the end of the trial the claimant would ever be awarded any remedy amounting to compelling the defendant to perform services of a personal and confidential nature. Here we see in classic syllogistic form, McCardie J. setting out his major premise which was that courts do not grant any order that has the effect of ordering a person to perform personal and confidential services.

37. McCardie J. then develops his minor premise. The report continues at page 374 column 2:

What are the functions of a banker? In his (his Lordship's) opinion he occupied two distinct functions in ordinary cases. First of all he was a person who performed services of a most confidential character - in fact the confidential relationship of a banker and customer was not only obvious, but one which ought strictly to be observed. Secondly, the bank in strict technicality was also a borrower from the customer; he received the money from him as a loan and if he (his Lordship) were to grant an injunction in this case, he would apparently be doing this: he would be directing the defendants to fulfil personal services for the plaintiff company, and he would also be directing them day by day to constitute themselves borrowers of the plaintiff's money as and when paid in, in

spite of their desire to escape from the incurrence of debt to the plaintiffs.

38. His Lordship's minor premise is that the contract between a bank and its customer is a contract of personal service and one of confidentiality.

39. The passage cited at paragraph 37 also contains the obvious and inevitable conclusion from the major and minor premises. The contract between the bank and its customer having fallen within the class of contracts classified as personal and/or confidential it follows that (a) a court would not grant the ultimate remedy of specific performance or any other order having the same or similar effect, then clearly an injunction ought not to be granted at the interlocutory stage and (b), a court cannot force a banker to be debtor to a person whose money he does not wish to borrow.

40. The lack of willingness to continue the relationship will quite likely lead to antagonism and if this is so it does not require a great deal to see constant conflicts in the future which would require constant supervision by the courts. Thus once the nature of the contract is brought into sharp focus and the principles of equity are bourne in mind I am afraid that it is impossible for me to grant an injunction restraining RBTT from closing the accounts. Added to this is the fact of a clear contractual provision between the parties permitting the RBTT to close the account on five days written notice which WWPL has received in this case. Further, as Mrs. Minott Phillips pointed out there is no challenge to the validity of clause 16 and even if there were such a challenge, it is doubtful whether an injunction could be granted even in these circumstances having regard to McCardie J.'s stating the three circumstances identified above.

41. The written judgment of Harrison J.A. does not indicate that he analysed the matter in these terms and so it is not clear to me what weight he gave to the fact that courts of equity before fusion and courts after fusion were not found to be granting injunctions, as a matter of course, against bankers closing their customers' accounts. It is true that Harrison J.A. clearly addressed his mind to many important issues raised but with the greatest humbleness I am constrained to say that those issues, as important as they are, have not struck at the root of the nature

of the contract between banker/client. Mrs. Sandra Minott Phillips pointed out that the confidential nature of the relationship in Jamaica has been underscored by section 45 of the Banking Act which makes it a criminal offence to disclose confidential information without legal authorization. If anything this shows that the legislature is quite content with the traditional understanding of the banker/client relationship.

42. This, then, is the strict and pure legal position of the banker/client relationship. I should add to this that in the normal course of events there is no fiduciary relationship between a bank and its client. There would have to be some evidence that the bank assumed some responsibility in relation to the client over and above that provided for by the contract and that such assumption of responsibility gave rise to fiduciary duty.

43. According to ***Prosperity*** even if the bank did not give reasonable notice to the customer the remedy is in damages only. Even though that case was a first instance judgment, in my opinion, the underlying premises are sound and the analysis of McCardie J. was rational, internally coherent and followed the time-honoured methodology in syllogistic reasoning which is major premise, minor premise and conclusion. If the premises are true and the reasoning valid then the conclusion necessarily and inescapably must be true.

44. Mr. Beswick sought to say that modern times have altered the nature of banking. He cited ***Paget's Law of Banking*** (13^{th}). In that text the editors suggested that "[i]n modern banking, personal services have been so far superseded by computerization that the first ground above may no longer carry weight" (see page 153). The expression "first ground" refers to that principle stated in ***Prosperity*** which was that an injunction in those circumstances would have "amounted to a specific performance of a contract to provide personal services of a most confidential character and would have been a direction to the bank to constitute itself a borrower of the customer's money as and when paid in" (see page 153). I am unable to see how the fact of computerization changes the fact that the relationship is one of debtor/creditor and confidentiality. The means of accessing the service provided by a bank does not make the relationship any less confidential than if the person had to go to the bank for each transaction. Even in the modern era it is well known for customers to ask

their bankers to provide many services of a confidential nature. The learned editor was constrained to accept that the second ground of ***Prosperity***, namely, that damages will always be an adequate remedy, "represents a substantial hurdle to a successful application for an injunction" (see page 154). There is another observation to be made about this text. The thirteenth edition was published in 2007, well into the era of well developed bank regulation and fair competition laws in the United Kingdom and in the section of the text cited by counsel for the claimant on termination of the contract it did not seem to have occurred to the authors that bank regulation and fair competition laws altered the fundamental basis of this type of contract to the extent that injunctions will or may be granted restraining a banker from closing the customer's account. This does not mean that new ideas cannot be generated by persons other than authors. What it does mean is that there is not yet a consensus or even a growing or fledgling body of opinion that competition and bank regulation laws have the effect contended for by counsel for WWPL.

Has the banker/customer contract been altered by statute?

45. One of Mr. Beswick's main points was that the Banking Act and the Fair Competition Act have imposed statutory duties on commercial banks, including RBTT which in turn gave rise to rights in favour of the customer that are enforceable. According to Mr. Beswick, banking has moved on since the days of ***Prosperity*** and banks are an integral part of the national and world economy. This increasing importance has been recognized by the legislature in Jamaica which as enacted legislation governing the operation of commercial banks. In support of this broad thesis Mr. Beswick cited section 4 (3) of the Banking Act and sections 20 and 34 of the Fair Competition Act.

46. I have to confess immense difficulty in seeing the connection sought by Mr. Beswick. Section 4 (3) is concerned with the probity of persons who wish to engage in operating commercial banks. When section 4 (3) (c) speaks to "person of sound probity … and whose relationship with the bank will not threaten the interests of depositors" it is hard to see how those words and indeed the entire section confer statutory obligations on a banker which alters the nature of the contractual relationship between a bank and its customer. In a very broad sense the depositors benefit in

that if the banks are properly run they ought not to collapse but that is a far cry from saying that the statute imposes duties on banks that have changed (i) the confidential nature of the contract and (ii) the fact that at its core the relationship is one of debtor/creditor.

47. Mr. Beswick's next port of call was sections 20 and 34 of the Fair Competition Act which deal, respectively, with abuse of a dominant position and offences against competition. Again, I am unable to appreciate how these provisions impact on the issue before this court which is whether RBTT is able to terminate the contract with WWPL in accordance with the terms of the contract agreed between them.

48. It is true that the Fair Competition Act is aimed at promoting competition. It is also true that the relevant market for the purposes of competition law needs careful definition and delineation. For example, it is possible for the uninitiated to say that in the banking sector there is one market, that is persons in need of banking services but it is entirely possible for the market to be broken down into persons with a net worth of several million dollars or persons in need of chequing account services or persons in need of correspondent banking services and so on. To establish Mr. Beswick's propositions, while not impossible, will certainly take much effort. All this means that the case founded on these arguments is not strong or even a good arguable case. This is a new area of law in Jamaica. It is not a well traveled route so that one cannot say that there is a well developed or developing body of jurisprudence that points to the conclusions contended for by counsel. The words of the statute do not readily point to the conclusion for which Mr. Beswick contends. In this state of the law it could not be right to prevent RBTT from exercising their contractual right and a right which it has by general law even in the absence of clause 16.

49. Based on the current state of the law supported by one of the most authoritative texts in this area (Paget's) it can safely be said that the prospect of success in establishing the matters contended for is very low. It is not that a litigant cannot raise new ideas which may ultimately prevail but surely if such ideas have not begun to gain traction in law it cannot be said that the claimant has any prospect of success.

Should a different approach be taken to the grant of interim injunctions in these kinds of cases?

50. Mr. Beswick urged that I follow Laddie J.'s analysis in ***Series 5 Software Ltd v Clarke and others*** [1996] 1 All ER 852 of ***American Cyanamid v Ethicon*** [1975] 1 All ER 504. I agree with the masterful analysis of his Lordship and his views have provided much clarification on the decision that has been used to fossilize, in this jurisdiction, the judge's approach to interim injunctions. Laddie J. having carefully analysed Lord Diplock's speech in ***American Cyanamid*** formulated the following statement at page 864:

> *In my view Lord Diplock did not intend by the last quoted passage to exclude consideration of the strength of the cases in most applications for interlocutory relief. It appears to me that what is intended is that the court should not attempt to resolve difficult issues of fact or law on an application for interlocutory relief. If, on the other hand, the court is able to come to a view as to the strength of the parties' cases on the credible evidence then it can do so. In fact, as any lawyer who has experience of interlocutory proceedings will know, it is frequently the case that it is easy to determine who is most likely to win the trial on the basis of the affidavit evidence and any exhibited contemporaneous documents.* ***If it is apparent from that material that one party's case is much stronger than the other's then that is a matter the court should not ignore. To suggest otherwise would be to exclude from consideration an important factor and such exclusion would fly in the face of the flexibility advocated earlier in American Cyanamid. As Lord Diplock pointed out in Roche, one of the purposes of the cross undertaking in damages is to safeguard the defendant if this preliminary view of the strength of the plaintiff's case proves to be wrong.*** (my emphasis)

51. It must not be forgotten that it was Lord Diplock himself who reminded the legal world in ***Hoffmann-La Roche & Co. A.G. v. Secretary***

of State for Trade and Industry [1975] A.C. 295, at pages 360 - 361 that:

> *An interim injunction is a temporary and exceptional remedy which is available before the rights of the parties have been finally determined and, in the case of an ex parte injunction, even before the court has been apprised of the nature of the defendant's case. To justify the grant of such a remedy the plaintiff must satisfy the court, first, that there is a strong prima facie case that he will be entitled to a final order restraining the defendant from doing what he is threatening to do, and, secondly, that he will suffer irreparable injury which cannot be compensated by a subsequent award of damages in the action if the defendant is not prevented from doing it between the date of the application for the interim injunction and the date of the final order made on trial of the action. Nevertheless, at the time of the application it is not possible for the court to be absolutely certain that the plaintiff will succeed at the trial in establishing his legal right to restrain the defendant from doing what he is threatening to do. If he should fail to do so the defendant may have suffered loss as a result of having been prevented from doing it while the interim injunction was in force: and any loss is likely to be damnum absque injuria for which he could not recover damages from the plaintiff at common law. So unless some other means is provided in this event for compensating the defendant for his loss there is a risk that injustice may be done.*

52. There is nothing in ***American Cyanamid*** to indicate that Lord Diplock had diluted this statement that he made a few short months before deciding ***American Cyanamid***. In the case before me the law as it presently is, is clearly and unambiguously on the side of RBTT. The two passages cited at paragraphs 50 and 51 point to the great care that must be exercised when a court is being asked to prevent a bank from doing that which not only the general law allows them to do but a specific term of the contract gives it the power to do. The position becomes even more

delicate when one takes into account the fact that the specific contract in view has been classified by the law as one for personal service and is also of a confidential nature and there one in which the courts of equity do not grant specific performance. Thus if equity will not award specific performance even if a breach by the bank is established then clearly an interim injunction is out of the question.

53. Laddie J. concluded his analysis by stating the following propositions at page 864:

> *It follows that it appears to me that in deciding whether to grant interlocutory relief, the court should bear the following matters in mind:*
>
> *1. The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.*
>
> *2. There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible.*
>
> *3. Because of the practice adopted on the hearing of applications for interlocutory relief, the court should rarely attempt to resolve complex issues of disputed fact or law.*
>
> *4. Major factors the court can bear in mind are (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo, (d) any clear view the court may reach as to the relative strength of the parties' cases.*

54. I have no difficulty with any of these propositions of Laddie J. But it must not be overlooked that these were pronouncements intended to apply in cases other than where specialized jurisprudence governing the grant of injunctions has emerged. The specific takes precedence over the general. This point will be developed after I have referred to one other authority cited by both counsel.

55. Mr. Beswick urged me to follow the following passage from Chadwick J. in ***Nottingham Building Society v Eurodynamics*** [1993] F.S.R. 468, 474

In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense described by Hoffmann J.

Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo.

Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.

But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted.

56. Counsel placed considerable reliance on principle four. This passage was approved by the Court of Appeal of England in ***Zockoll Group Ltd v Mercury Communications Ltd*** [1998] F.S.R. 354. Counsel made this submission specifically with regard to that part of the claim based on the Banking and Fair Competition Acts, that is to say, the fact that these points are novel or even difficult to make, an injunction should still be granted since the risk of injustice to WWPL if the injunction is not granted is greater than the risk of injustice to RBTT if the injunction were granted.

57. I am afraid that I cannot accede to this submission for this crucial reason. In the law relating to interim injunctions it is fair to say that there are two types of cases. There are those cases which over time have attracted their own specific jurisprudence and therefore are not dealt with at the higher level of generality suggested by ***American Cyanamid***. Then there are other cases that are governed by more general principles suggested by ***American Cyanamid***.

58. I shall refer to three instances of special jurisprudence. For example, in restraint of trade cases, it is well established that even if the person seeking restrain the defendant from breaching the contract has a good case but the trial cannot be had early in the restraint period an interim injunction will not be granted because the effect would be to grant the full remedy before the defendant has had a trial. Also, in mortgagor/mortgagee cases, there is a very strong general rule that mortgagees will not be restrained from exercising the power of sale unless the mortgagee pays what the mortgagee says is owed. This is so even in cases where the mortgagor alleges fraud (see ***SSI (Cayman) Ltd. and Others v International Marbella Club S.A.*** S.C.C.A. No. 57/86 (delivered February 6, 1987) or even where he alleges that he does not owe any money (see ***Global Trust Limited v Jamaica Re-Development Foundation*** S.C.C.A. No. 41/2004 (delivered July 27, 2007)). It is noteworthy that Cooke J.A. in ***Global Trust Limited*** observed that in the mortgagor/mortgagee cases where an injunction is sought restraining the mortgagee from exercising the power of sale or any other power, the Court of Appeal did not refer to ***American Cyanamid*** at all (see pp. 12 and 13). This is not inexplicable and is an implicit recognition of the plain fact that once we are dealing with a type of contract which equity has devised very specific principles then it is those specific principles that apply and not the principles that operate at a higher level of generality. The bank/customer relationship is yet another example in which equity invariably leans against restraining the banker from terminating the contract with the customer thereby leaving the customer with a claim in damages. It may be that competition law may alter this but as presently advised that possibility, at least in this jurisdiction, is rather remote given the absence of any decided cases on this and that the wording of the statute does not immediately lead one to this conclusion.

Adequacy of damages

59. I turn finally to the question of damages. It was said, by Mr. Beswick, that damages are inadequate because they are "not capable of calculation as money damages". I can only rely on Roche L.J. in ***Nottingham Building Society v Eurodynamics*** [1995] F.S.R. 605, 615 where he said:

> *Courts have to assess damages in many cases where that procedure is one of difficulty, but such problems do not mean, in my opinion, that damages are an inadequate remedy. It has to be assumed that a court will in the result make a fair and proper estimate of the compensation to which the party concerned is entitled.*

Leave to appeal

60. Mr. Beswick asked that I stay the order until he appealed. Regrettably, I cannot do that since the effect of that would be to continue to force RBTT to maintain the banker/customer relationship which the law says no court can do.

Conclusion

61. Injunction is discharged. Application for court orders dated May 15, 2008 is dismissed in its entirety with costs to the defendant to be agreed or taxed. Special costs certificate for one counsel granted to the defendant.