JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 40/2008

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.

BETWEEN	**OLINT CORP LIMITED**	**APPELLANT**
AND	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**RESPONDENT**

Gordon Robinson, Mrs. Georgia Gibson-Henlin and Miss Catherine Minto, instructed by Nunes, Scholefield, DeLeon & Co., for the appellant

B. St. Michael Hylton, Q.C., and Miss Carlene Larmond, instructed by Michael Hylton & Associates for the respondent.

12th, 13th, 14th, May & 18th July 2008

PANTON, P.

1. This appeal is from a decision of Jones, J. made on April 18, 2008, dismissing the application of the appellant for an extension of certain ex parte injunctions granted by Pusey, J. on January 11, 2008. In summary, the injunctions had forbidden the respondent bank and its officers and agents from:

(a) closing the appellant's accounts;

(b) committing breaches of the Fair Competition Act;

(c) dealing with the appellant's accounts so as to interfere with or disrupt the appellant's legitimate business operations;

(d) preventing the appellant from generally operating the accounts; and

(e) disposing of or destroying the communications within the respondent's organization and communications between the respondent and other commercial, banking and financial institutions regarding the appellant, its accounts and the closure of such accounts.

2. The appellant, in its amended claim form, is seeking the injunctions as well as declarations that:

(a) the respondent has acted unlawfully towards it thereby interfering with the appellant's business and causing it to suffer loss and damage: and

(b) the respondent by threatening to close the appellant's accounts is doing so for an improper purpose knowing that by so doing it would be interfering with and/or disrupting the appellant's contracts with its club members.

That action is to be tried in the Supreme Court. There is a counterclaim seeking a declaration that the appellant is in breach of contract and so the respondent is entitled to terminate the contract for the provision of banking services on the giving of reasonable notice.

3. The appellant has filed twenty-two grounds of appeal. That fact may lead one to think that the issues here are very weighty, and well they may yet prove to be if there is a trial in the Supreme Court. For the purposes of the present

proceedings, however, I trust that I will be forgiven for thinking that the grounds suggest an element of overkill. I suspect that it could be argued that the number of grounds is a response to the very comprehensive judgment penned by Jones, J.

4. The factual matrix placed before the learned judge is set out at pages 18 to 21 of the supplemental record of appeal. I trust that the following summary captures the essential details for the present purpose. The appellant commenced its banking relationship with the respondent in November, 2005, through the opening of a regular Jamaican dollar current account as well as a United States dollar savings account. The latter account was for the purpose of facilitating money transactions by club members. The respondent wrote to the appellant on August 8, 2007, requesting certain documents. Due to the respondent's view that the appellant had failed to fully comply with the request, the respondent advised the appellant by letter dated November 14, 2007, that it had decided to close the accounts on December 17, 2007. However, deposits would not be accepted as of November 21, 2007. After negotiations between the parties, the time for closure was extended to January 14, 2008. During this period, the appellant expressed the view that it had complied with the requests of the respondent. The sticking point seems to be in relation to the request for audited accounts from the appellant, which claims that it is unable to supply same due to the removal of documents from its office by the regulatory body. Instead of audited accounts, the appellant has offered management accounts. This has not been accepted by

the respondent which has said that it is concerned with the increased level of activity in the appellant's accounts.

5. In deciding that he would not grant the injunctions, the learned judge posed and answered four questions:

> "i) First, is there a serious issue to be tried before the court?
>
> ii) Second, and if so, are damages an adequate remedy for the Claimant?
>
> iii) Third, if damages are not an adequate remedy for the Claimant, is the Claimant's undertaking in damages adequate protection for the Defendant?
>
> iv) Fourth, and if damages are an adequate remedy and the Claimant's undertaking in damages is adequate protection for the Defendant, where does the balance of convenience lie?

6. As to whether there is a serious issue to be tried, the learned judge dealt with the matter under three sub-heads:

> (a) Breach of contract and of the Banking Act;
>
> (b) Breach of the Fair Competition Act; and
>
> (c) Intimidation, Inducing a Breach of Contract and Causing Loss or Damage by Unlawful Means.

7. In relation to breach of contract and breach of the Banking Act, the learned judge found that as there had been, in his view, a "complete lack of useful disclosure" by the appellant, "there is no serious issue to be tried, nor is there any assurance whatsoever, that the (appellant) can succeed at a trial on this issue". In coming to this conclusion, he reasoned that the right of a bank to decide with whom to do business cannot be seriously challenged, and that the bank has a right to rely on the Bank of Jamaica Guidance Notes On The Detection and Prevention of Money Laundering and Terrorists Financing Activities. He regarded the bank's knowledge of its customers and the source of funds placed on deposit with it as an important step in establishing compliance under the Proceeds of Crime Act 2007.

8. The appellant, through Mr. Gordon Robinson and Mrs. Georgia Gibson-Henlin, contends that there are serious issues to be tried in relation to the following:

(a) whether the maintenance of an account is merely a matter of a contract for personal services;

(b) the reasons behind the respondent's decision to close the accounts;

(c) whether the appellant has been operating its accounts in accordance with good banking practice; and

(d) whether under the ne w statutory scheme, a bank has the authority to close an account by giving reasonable notice, without more;

Mr. Michael Hylton, Q.C., in his oral submissions as well as in the written submissions made by himself and Ms. Carlene Larmond, has contended that the injunction sought is mandatory in nature, and that for it to be granted, the judge must have a high degree of assurance that at the trial a similar injunction would probably be granted. He argued that at common law, the bank can terminate the banker/customer relationship by giving reasonable notice. The only question would be if there is a statutory provision that alters or qualifies that situation. In this regard, he said, the appellant has relied on the Banking Act and the Fair Competition Act. In his view, the matter is a purely legal issue and there is no better place than the Court of Appeal for the determination to be made. This seems to be an invitation for this Court to take the bull by the horns and make a decision which would forestall the trial in the Supreme Court.

9. In respect of the issue of the Fair Competition Act, the main point being advanced by the appellant is that there is collusion involving the respondent and other banking institutions to limit the supply of banking services to the appellant. The learned judge pointed out that the only evidence presented to support this claim is a letter dated March 8, 2006, showing that RBTT closed its account on that date. However, he said, the fact that the appellant was allowed to open a

new account with the respondent in June, 2007 negates collusion. He concluded that there was no serious issue to be tried, by saying this:

> " In any event, the other parties to the collusion are not a party to this action. Any finding by the court on this matter would be bound to have adverse effects on the other conspirators. It would be difficult to make a finding on this issue as the Claimant requests without giving them an opportunity to be heard."

The appellant has submitted that the respondent has conceded that there is an issue here for trial, and has in its defence put the appellant to strict proof of the averment of tacit collusion in the amended particulars of claim.

10. The main aspect of the third sub-head that formed the judge's reasons on the question of serious issue to be tried was the inducing of breach of contract and causing loss by unlawful means. The learned judge found that there was no evidence that the respondent has caused the appellant to breach its contracts with its club members; nor is there any evidence of any loss as a result of the threatened closure of the accounts. Consequently, there was no serious issue to be tried, he said.

11. The learned judge, having decided that there is no serious issue to be tried, said that for completeness he would go on to deal with the second issue, that of the adequacy of damages. This approach has been criticized by Mr. Robinson, perhaps with some justification, as it ought to be the end of the matter if there is no serious issue to be tried. On the adequacy of damages, the

judge said that the risks faced by the respondent cannot be compensated in damages whereas damages would be adequate for the appellant. He reasoned that the assets of the respondent amounted to more than $179 billion which should cover any damages the appellant may be awarded, if successful at trial.

12. The House of Lords in ***American Cyanamid Co. v. Ethicon Ltd.*** [1975] 1 All ER 504, has provided guidance as to the relevant considerations in dealing with applications for interlocutory injunctions. The first consideration is that the Court must be satisfied that the claim is not frivolous or vexatious. In other words, there must be a serious question to be tried. In the instant case, I find myself unable to agree with the learned judge that there is no serious issue to be tried. It seems unrealistic to hold at this stage that the claim as framed and articulated is in the realm of the frivolous or vexatious. Notwithstanding the case ***Prosperity Ltd v Lloyds Bank Ltd*** [1923] 39 TLR 372 on which the respondent has placed some reliance, the scenario here presented poses a serious issue for trial. After all, ***Prosperity*** was decided eighty-five years ago in England when no one contemplated the technological advances that obtain today. It is reasonable to say that the days of the horse-and-buggy are no more. In 1923, the nature of banking was much different from the touch-button features of today. The serious question is: can a bank in Jamaica in the twenty-first century, by merely giving reasonable notice, lawfully close an account that is not in debit, where there is no evidence of that account being operated in breach of the law? The serious question to be tried becomes more palpable when it is

considered that the appellant has accused the respondent of being improperly involved with other institutions in a conspiracy to deny legitimate banking services to the appellant. The fact that other banks have closed accounts operated by the appellant is a matter for assessment at trial as to whether there is any basis for the accusation. I do not agree with the learned judge that the fact that the other banks are not parties to the suit prevents a Court from determining whether the respondent has conspired to deprive the appellant of banking services.

13. There being sufficient material for a trial, the next step is the consideration of where the balance of convenience lies. If the bank were to succeed at trial, it is my view that any loss it may have suffered by the accounts being opened until trial would be quantifiable. I hasten to add that I see no reason why there should be any loss. One expects entities here as well as abroad to recognize and respect the fact that Court proceedings are being conducted. The bank, whether it succeeds or not, will no doubt remain in business. On the other hand, if the accounts were to be closed now and the appellant were to succeed at trial, the loss it would have sustained may well be immeasurable. It would have lost the facility of doing business, and there would have been severe damage to its business reputation.

14. In the circumstances, I would allow the appeal and grant the injunction as prayed. I would add the usual condition that the appellant gives an undertaking

as to damages. I would dismiss the counter – notice of appeal, and direct that there be a speedy trial of the action, given its stated importance to the parties and to the business community generally.

COOKE, J.A:

I agree.

MORRISON, J.A.

Introduction

1. This interlocutory appeal is from an order made by Jones J on 18 April 2008 dismissing the appellant's application for the extension of interim injunctions previously granted by Pusey J until the trial of this action.

2. Jones J also refused to grant an injunction pending the hearing of an appeal of his order. However, on 30 April 2008, an appeal having been duly filed in this court on 21 April 2008, Harrison JA granted the appellant's application for an injunction pending the hearing of the appeal.

The facts in outline

3. The appellant and the respondent are both companies incorporated with limited liability under the provisions of the Companies Act. The appellant describes itself as a customer service provider, whose customers are said to be third parties who belong to a private members

club, and which is also engaged in "various social and charitable programmes and training programmes relating to technical analysis." The respondent is a licensed commercial bank, which offers commercial banking facilities to the public and is regulated under the provisions of the Banking Act and supervised by the Bank of Jamaica.

4. The appellant has been a customer of the respondent since 2005, operating three current accounts at its Hagley Park Road branch, two United States dollar denominated accounts opened in November 2005, and June 2007 respectively, and a Jamaican dollar denominated account also opened in November 2005.

5. At the outset of its banking relationship with the respondent, the appellant advised the respondent of its source of funds and the purpose of the account, which was said to be "to facilitate payment to and receive funds from Club members and meeting operational expenses." While substantial balances appear to have been maintained in the accounts throughout the relevant period, the respondent became concerned at what it described as the appellant's "failure and/or refusal to supply requested information and documents including in particular audited financial statements". As a result, the respondent contends that it was unable to ascertain the source/s of funds deposited into the accounts and the status of the "club members", having regard to

relevant legislation (such as the Proceeds of Crime Act) and regulatory guidance (such as Guidance Notes issued by the Bank of Jamaica).

6. The upshot of all this was that, after an exchange of correspondence between the parties, the respondent wrote to the appellant on 14 November 2007 to advise that the appellant's accounts would be closed on 17 December 2007. The respondent's letter also advised that "effective November 21, 2007, we will not be accepting any deposits to the accounts."

7. The appellant immediately protested by letter dated 21 November 2007, expressing surprise that the respondent was taking this step in the light of the fact that, according to the appellant, it had already supplied all information required to satisfy any regulatory or perceived prudential concerns. The appellant also stated that the "short notice to close the accounts and establish new banking relationships would cause dislocations and major inconvenience to our club members, many of whom are also your customers." The appellant accordingly requested an additional three (3) months to 14 March 2008 for the continued operation of the accounts so as to enable it to use its best efforts to establish alternative banking relationships without disruption and as quickly as possible.

8. The respondent in its reply challenged the assertion that all information required had been supplied, but pointed out that it was

entitled to make its own assessment of "the liabilities, risks and benefits of the continuing relationship", and was not obliged in any event to give reasons for its decision. However, it indicated that it was prepared to extend the period of notice of closure of the accounts to 14 January 2008.

9. There followed a series of further correspondence between the parties, with the appellant protesting that 14 March 2008 was the minimum time that it would require to make alternative banking arrangements, if it were to be able to contain the loss of US$1 million per month that the delays in making proper arrangements would cause, and the respondent for its part indicating that it wished to be "fair and reasonable" on the question of time, but that it was not able to appreciate what these delays might be and how these would result in a loss of US$1million per month. As a consequence, the respondent refused to extend the time for the closure of the accounts beyond 14 January 2008. By letter dated 19 December 2008, the appellant provided documentation and detailed calculations in an attempt to demonstrate how the alternative banking arrangements would result in a loss of US$1 million per month and referred as well to the "serious business dislocation" and the "air of uncertainty around our Jamaican operation, which can jeopardize our overseas activities if our club members panic".

10. By letter dated 24 December 2007 the respondent stated that no basis had been shown by the appellant for it to alter its stance and that it

was therefore insisting on a 14 January 2008 closure of the accounts, prompting the appellant on that same day to lodge a complaint with the Bank of Jamaica that the respondent was acting in breach of the Banking Act by prejudicing the interests of depositors and acting oppressively and /or capriciously.

11. On 11 January 2008, the appellant filed action in the Supreme Court, obtaining on that date an ex parte order granting certain interim injunctions preventing closure of its accounts by the respondent. That order was subsequently extended to 17 March 2008, when the inter partes application before Jones J commenced.

12. On 11 January 2008, the appellant had also filed its Particulars of Claim and on 23 January 2008 filed and served Amended Particulars of Claim, which ran to 29 pages, supported by several attachments. On 15 February 2008, the respondent filed and served a Defence and Counterclaim, which itself ran to 25 pages, together with an Ancillary Claim Form, and on 27 February 2008 the appellant filed its Reply to the Defence. Finally on 28 March 2008 (after the completion of the inter partes hearing), the appellant filed its Defence to the Ancillary Claim.

The appellant's case

13. The appellant's claim against the respondent is for several declarations in support of a permanent injunction to prevent the closure of the accounts, damages (including exemplary damages) and further or

other relief. For the purposes of this judgment, it may be summarized as follows:

(i) The Banking Act, and in particular section 4(3)(c), which was introduced by way of amendment in 1997 as a response to the financial crisis in Jamaica in the 1990's, contains provisions designed to safeguard the interests of depositors and the financial sector in general. The effect of these provisions has been to modify the traditional banker/customer relationship by imposing on commercial banks a fiduciary duty to act in the best interests of depositors. The respondent by seeking to close the appellant's accounts in the manner in which it has done in this case is acting in breach of its fiduciary obligations to the appellant and/or against the interests of the financial system in Jamaica;

(ii) the respondent is in breach of a number of provisions of the Fair Competition Act, in particular abuse of a dominant position (section 19), a refusal to supply services (section 34(1)(b), and conspiracy to limit the supply of services (section 35 (1)).

(iii) the respondent's conduct in threatening to close the appellant's accounts constitutes the torts of intimidation, inducing breach of contract and causing loss by unlawful means.

14. The respondent for its part contends as follows:

(i) That the concerns which led it to give notice of closure of the accounts to the appellant were credible, rational and commercially reasonable, in the light of regulatory requirements and the legal obligations arising out of the banker/customer relationship;

(ii) the respondent did not act in breach of the Banking Act, nor was it guilty of any unsafe or unsound banking practices. Section 4(3) of the Banking Act, in particular, does not purport to impose any new fiduciary duty on banks;

(iii) the evidence put forward by the appellant does not support the contention that there were any breaches of the Fair Competition Act;

(iv) the appellant is in breach of an implied term of the contract governing the banker/customer relationship by failing to provide information reasonably required and the respondent is in any event entitled by virtue of a further implied term to terminate the contract at any time by reasonable notice, which was in fact given in this case.

The hearing before Jones J

15. It is against this pleaded background, supplemented by copious affidavit evidence, that Jones J embarked on the hearing of the contested application to extend the interim injunctions until the trial of the

action. For the purpose, he was supplied with extensive written submissions by both parties and heard submissions from counsel over two days. In his written judgment delivered 18 April 2008, after a detailed review and analysis of the material before him, he came to the conclusion that the application should be denied.

16. The learned judge, correctly in my view, identified the issues for determination by him as follows:

(i) Is there a serious issue to be tried?

(ii) If so, would damages be an adequate remedy?

(iii) If damages would not be an adequate remedy, would the claimant's (appellant's) undertaking as to damages adequately protect the defendant (respondent)?

(iv) Where does the balance of convenience lie?

17. The judge at the very outset accepted a submission made to him by counsel for the respondent that, on the first issue, the injunctions in this case were not merely restrictive or prohibitory, but mandatory in nature, in consequence of which the appropriate threshold at the interlocutory stage was not whether "there is a serious issue to be tried" (***American Cyanamid v Ethicon*** [1975] AC 396 per Lord Diplock at 406), but whether the available material at this interlocutory stage leads the court to "feel a high degree of assurance" of the likelihood of success of the claimant's case at trial (see ***Shepherd Homes v Sandham*** [1970] 3 All ER 406, per

Megarry J, as he then was, at 412). Thereafter the judge considered the material before him in respect of each of the bases of the appellant's case identified at paragraph 14 above and came to the conclusion in respect of each that he did not feel a high degree of assurance that the appellant would be able to establish its right to permanent injunctions at trial. However, despite his having accepted the submission that this was the appropriate standard to be applied, Jones J also concluded that there was no serious issue to be tried in respect of the heads of claim. That conclusion, applying either test, was of course sufficient to dispose of the matter, but the judge nevertheless went on to consider briefly ("for completeness") the adequacy of damages and concluded that damages, which the respondent was patently in a position to pay, would in any event be an adequate remedy for the appellant.

The appeal

18. The appellant filed some twenty two grounds of appeal, while the respondent filed a counter-notice of appeal contending that the decision of Jones J should be affirmed on the additional grounds of alleged non–disclosure and/or misrepresentation by the appellant. For the purposes of this judgment, I will approach the matter basically in the same order as counsel on both sides did:

(i) Is this an application for a prohibitory or a mandatory injunction?

(ii) Is there a serious issue to be tried?

(ii) Would damages be an adequate remedy?

(iv) The balance of convenience/special factors.

(v) The counter-notice of appeal.

19. I should, however, remind myself at the outset of what Lord Diplock described as "the limited function of an appellate court in an appeal of this kind" in ***Hadmor Productions Ltd. and others v Hamilton and others*** [1982] 1 All ER 1042. In accordance with settled principles governing the approach of an appellate court to the exercise by a judge of discretionary powers, this court should only interfere with the decision of Jones J in exceptional circumstances, such as where his decision is shown to have been based on a misunderstanding of the law or of the evidence before him. It must be borne in mind, in particular, that this court cannot otherwise exercise any independent discretion and it is therefore not enough that this court might have exercised its discretion differently (see ***Hadmor Productions,*** per Lord Diplock at page 1046 and see also ***National Commercial Bank Jamaica Ltd. v Rousseau and Rousseau*** (1985) 27 JLR 39, per Kerr JA at pages 45-46.)

Are the injunctions sought prohibitory or mandatory?

20. Mr. Gordon Robinson for the appellant described the view that the injunctions sought in this case were in effect mandatory, as "attractive but illusory". The injunctions, he contended, seek to prevent the respondent from taking the positive step of closing the accounts and the application

for the injunctions was based on a clear notification by the respondent of its intended action. Thus while the language of every restrictive injunction can be manipulated so as to make it appear mandatory, the injunctions sought in this case were plainly restrictive in nature and effect, subject only to the usual factors which would inform the court in deciding whether or not in its discretion to grant or refuse an injunction.

21. Mr. Michael Hylton QC submitted, as he had to Jones J, that the injunctions were mandatory in that if granted they would "force the respondent to continue offering banking services to the appellant", involving a number of positive acts such as accepting the appellant's deposits and honouring its cheques. In addition to ***Shepherd Homes,*** to which the judge had referred specifically, Mr. Hylton also referred us to ***London Borough of Hounslow v Twickenham Garden Developments Ltd.*** [1970] 3 All ER 326 (also a decision of Megarry J) and the Canadian case of ***B-Filer Inc. v Bank of Nova Scotia*** [2005] A.W.L.D. 3734 (not cited in the court below). Mr. Robinson did not dissent from the proposition, based on ***Shepherd Homes***, that a higher threshold is to be applied in considering the grant of a mandatory interlocutory injunction, but contended that this was not such a case. As for ***B-Filer Inc.,*** he submitted that it was distinguishable from the present case.

22. In ***Shepherd Homes*** Megarry J identified what he described as "important differences" between prohibitory and mandatory injunctions (at page 409):

> "By granting a prohibitory injunction, the court does no more than prevent for the future the continuance or repetition of the conduct of which the plaintiff complains. The injunction does not attempt to deal with what has happened in the past; that is left for the trial, to be dealt with by damages or otherwise. On the other hand, a mandatory injunction tends at least in part to look to the past, in that it is often a means of undoing what has already been done, so far as that is possible. Furthermore, whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction, requires the taking of positive steps, and may (as in the present case) require the dismantling or destruction of something already erected or constructed. This will result in a consequent waste of time, money and materials if it is ultimately established that the defendant was entitled to retain the erection."

23. That learned judge then went on to state that "at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think that the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to establish a contractual obligation" (page 809). At this stage, the court "is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction" and in a normal case "the court must inter alia, feel a high degree of assurance

that at the trial it will appear that the injunction was rightly granted" (page 412).

24. As Jones J pointed out (at paragraphs 23 – 25 of his judgment) the principle of this decision has been approved and applied by the English Court of Appeal in subsequent cases. I am also prepared to accept for the purposes of this appeal, particularly as Mr. Robinson did not seek to challenge it, that it describes the correct approach to be followed by the court on an application for a mandatory interlocutory injunction, (though I readily confess a reservation along the lines expressed by Hoffman J, as he then was, in ***Films Rover International Cannon Film Sales*** [1986] 3 All ER 772, 781, when he observed that Megarry J's oft quoted statement in ***Shepherd Homes*** "was plainly intended as a guideline rather than an independent principle").

25. So the question that remains is whether the injunctions sought in this case are in fact prohibitory or mandatory. The critical question, Mr. Robinson submitted, is what is the status quo at the time at which the application is made: if the applicant seeks to alter the status quo by means of the injunction, then the injunction is mandatory, but if what the applicant seeks to do is to restrain the defendant from altering the status quo then that is a prohibitory injunction. In the instant case, the status quo is that the appellant's accounts at the respondent's branch are open,

which is the status quo that the appellant seeks to preserve by prohibitory injunctions.

26. Mr. Hylton submitted that this approach is wrong: the true test is whether the injunction sought will require the respondent to do something, in which case it is mandatory, or "does it simply require the respondent not to do something", in which case it is prohibitory. In the instant case, the injunctions sought will force the respondent to continue offering banking services to the appellant, including the doing of a number of positive acts, as a result of which they are plainly mandatory.

27. As a matter of first impression, I would have thought that the injunctions sought in this case were plainly prohibitory: the action which the appellant seeks to prevent is the closing of the accounts, which are still open, and which it contends will be a breach of contract and will trigger the various other wrongful acts of which it complains. Nevertheless, Mr. Hylton pointed out, it is substance rather than form which is important and he submitted that this is a case akin to ***London Borough***, for instance, in which Megarry J applied his own decision handed down a couple days before in ***Shepherd Homes. London Borough*** was a case in which the court treated an injunction which was "prohibitory in its language [as] at least in part mandatory in its substance and effect" (see page 355, per Megarry J).

28. But it is not difficult to see why Megarry J took that view in that case, given that the defendant/contractor whom it was sought to restrain by interlocutory injunction from entering, remaining or otherwise trespassing on a building site was in de facto control of the site (that was the status quo) and "the injunction would in effect expel the contractor from the site" (page 355). Hence the conclusion that the injunction sought was mandatory in effect and likely to result in considerable disruption to the defendant/contractor.

29. It appears to me that in the instant case the effect of the injunctions, if granted, would be to prevent the respondent from disturbing an existing state of affairs, rather than bringing into being a different state of affairs, which is the consideration that gave Megarry J pause in ***London Borough***. In this regard, it is of some interest to note that in **Spry's Equitable Remedies** (6th edition 2001) the adjective "mandatory" in this context is used interchangeably with "restorative" and that the very first pre-condition of the grant of a mandatory injunction is stated to be that "the state of affairs that is complained of must ordinarily be such that earlier, before it arose, the plaintiff could have obtained a prohibitory injunction restraining the defendant from bringing it about..."(page 340).

30. Neither is particularly significant, in my view, again as a matter of first impression, that the grant of the injunctions in this case will have the result of obliging the respondent to continue to provide banking service to

the appellant. In this regard, I would have thought that Mr. Robinson's observation that, worded appropriately, virtually every restrictive or prohibitory injunction can be made to appear mandatory, carries much force. Indeed, during the course of the argument, I put to Mr. Hylton the hypothetical example (which was in fact a slight variation of one given by Mr. Robinson in his skeleton argument) of a landlord of premises exempt from the Rent Restriction Act, with the obligation to maintain and repair under the tenancy agreement, serving a disputed notice to quit on his tenant: would an interim injunction sought by the tenant before the expiry of the notice to quit to forestall any steps by the landlord pursuant to the notice be in effect mandatory, by reason of the fact that the grant of that injunction would oblige the landlord to continue to perform his obligation to keep the premises in good repair pending the hearing of the action? Mr. Hylton's answer was that, on these facts, this would be "on the borderline," but I must confess some difficulty in appreciating what it is in principle that would distinguish the - albeit simplified - facts of that example from a case such as the instant case. In both cases, I would have thought that the injunction sought would plainly be a prohibitory one in so far as its object would be to prevent the respondent from altering the status quo, which is the test contended for by Mr. Robinson.

31. But, Mr. Hylton submitted, the matter is happily covered by the authority of the Canadian case of ***B-Filer Inc. v Bank of Nova Scotia***

(supra), a decision at first instance of Lefsrud J. The facts of that case were that the plaintiffs, who were customers of the defendant bank, operated an internet online banking payment processing service, which allowed a customer to transfer money from his or her account to an internet merchant through the plaintiffs' bank accounts. Another bank notified the defendant bank about a potential fraud involving its accounts and, after investigation, the defendant decided to terminate the plaintiffs' banking services, pursuant to a termination clause in the relevant agreement. The plaintiffs applied for an interlocutory injunction to restrain the defendant from closing their accounts until the trial of their action against the bank. The judge accepted the bank's contention that this was in fact an application for a mandatory injunction and that instead of "simply proving that there is a triable issue, the plaintiff must show a strong prima facie case" (see paragraph 24 of the judgment of Lefsrud J). This, in the opinion of the judge, the plaintiff failed to do, as a result of which, together with other factors relevant to the exercise of his discretion, he refused to grant the injunction. According to Lefsrud J, he was satisfied "that by asking the Court to require Scotiabank to maintain a banking relationship with them, the plaintiffs are seeking a mandatory injunction" and, on the basis of applying the more rigorous threshold test, he was "not prepared to find that Scotiabank is obliged to deal with the Plaintiffs."

32. Mr. Hylton naturally relied heavily on this decision, pointing to "a substantial similarity" between the position of the defendant bank in that case and the respondent in the instant case. Mr. Robinson, on the other hand, described ***B-Filer*** as "wholly distinguishable," pointing out (somewhat dismissively) that it was a decision from "a provincial court in Canada", that there was no evidence that a legislative or licensing regime similar to that applicable to banks in Jamaica existed in Canada, that it was accepted on both sides that there was evidence of some fraud on the plaintiffs' accounts, that there was a termination clause in the agreement between the parties and that there was no indication that there was in force in Canada any or any similar fair competition legislation.

33. While I can readily see on its facts why ***B-Filer*** so attracted Mr. Hylton's attention in this case, as well as why Mr. Robinson was at such pains to distinguish it, I have to say that I have not found it particularly helpful on the point presently under discussion. Beyond the judge's assertion that what the plaintiffs in that case were seeking was a mandatory injunction, I must confess that I have been unable to discern what consideration of principle impelled him to this conclusion. Is it that there is a general principle, as Mr. Hylton contends, that in any case in which the injunction will require that the respondent do "something", the order is to be classified as mandatory in nature, irrespective of what the

status quo immediately before the filing of the action was? Or is the relationship of banker and customer *sui generis,* giving rise to special rules that may not be of general application? While I have found the judgment in ***B-Filer*** of little assistance on these and other questions which immediately came to mind (for example: would the fact that a bank was obliged to update a customer's savings account, kept open by injunction with monthly interest make the injunction mandatory and, if not, what is the dividing line?), it is in fact quite expansive on the adequacy of damages, balance of convenience and other discretionary factors, leading me to think that the refusal of the injunction in that case may in fact have been primarily influenced by those considerations.

34. While I would ordinarily be prepared to accord great respect to the judgment in ***B-Filer*** (even given the hierarchical limitations of the court), I do not find it helpful or at all persuasive on the question of why, contrary to what they appear to be on their face, the injunctions sought by the appellant in the instant case should have been treated as anything other than prohibitory in substance, as well as in form. The injunctions sought will, if granted, require that the respondent abstain from acting on the notice of termination, rather than the taking of positive steps, other than those that the status quo already obliges it to undertake. On this threshold question, I therefore find myself in agreement with the appellant that the injunctions sought in this case are purely prohibitory.

Is there a serious issue to be tried?

35. It is common ground that the threshold question on an application for a prohibitory interlocutory injunction is that propounded by Lord Diplock in his justly celebrated judgment in ***American Cynamid,*** that is to say, that the court must be satisfied that the claim is not frivolous or vexatious or, in other words, that there is a serious question to be tried.

36. Mr. Robinson submitted that on the issues joined in the parties' statements of case alone, there were plainly serious issues to be tried in relation to at least the questions arising under the amendments to the Banking Act, the Fair Competition Act and the torts of inducing breach of contract, intimidation and causing loss by unlawful means. Where Jones J had fallen into error, he submitted, was in devoting much time and effort to what was effectively a mini-trial of the issues. Mr. Robinson's further submission was that in order for a claimant to fail this test, as Jones J found that the appellant had done, the claim must be such that it should be struck out, which the claim in this case patently was not.

37. As pointed out at paragraph 18 above, Jones J, despite his finding that the injunctions sought were mandatory in nature and that the "high degree of assurance" test accordingly applied, also concluded that the appellant had not passed "even the lower test", as Mr. Hylton put it, and that there was no serious issue to be tried. Mr. Hylton in his detailed skeleton argument analysed the causes of action pleaded in reliance on

the Banking and Fair Competition Acts, in the light of the relevant evidentiary material, and submitted that the judge was correct in finding that there was no serious issue to be tried in respect of either of them. As to the economic torts pleaded, Mr. Hylton submitted further, that there were no grounds of appeal in relation to them and that there was therefore no challenge to Jones J's findings in this regard. Finally, Mr. Hylton submitted, "the courts have repeatedly emphasized... that where the facts and the law are clear, the court should hold that there is no serious issue to be tried and refuse the injunction," citing as a recent example of this robust approach the decision of the Privy Council (on appeal from Bermuda) in ***Commissioner of Police v Bermuda Broadcasting Co. Ltd.*** (Privy Council Appeal No. 48 of 2007, judgment delivered 23 January 2008).

38. It is important, I think, (as Mr. Robinson reminded us) to place the decision of ***American Cyanamid*** in its context. Before that decision, the rule was that a plaintiff seeking an interlocutory injunction had to show "a strong prima facie case that the right which he seeks to protect in fact exists" (per Atkin LJ in ***Smith v Grigg Ltd.*** [1926] 1KB 655, 659 and see ***Cream Holdings Ltd. and Another v Banjeree and Others*** [2004] UKHL 44, especially per Lord Nicholls at paragraph 13.)

39. It is this so-called rule that ***American Cyanamid*** was primarily concerned to dispel and in ***Cream Holdings*** (at paragraph 14), Lord

Nicholls described the decision in ***American Cyanamid*** as having freed the courts from the "fetter" of the prima facie rule. ***American Cyanamid*** and the liberated approach it mandated have been routinely applied by judges in this jurisdiction and, in the instant case, Jones J accepted that ***American Cyanamid*** applied to prohibitory injunctions (at paragraph 19 of his judgment).

40. The learned judge's method was to analyse the evidence and the law in respect of each of the main bases of the appellant's claim against the respondent, to assess the respondent's position in respect of each of them and thereafter to come to a conclusion on each one.

41. So, for instance, on the Banking Act issues, after reviewing the statute and the authorities, he concluded that section 4(3)(c) of that Act "does not create a fiduciary relationship between the bank and its customers nor does it create fiduciary obligations" (paragraph 31), that the respondent's stated reasons for seeking to close the appellant's accounts were "credible, rational and commercially reasonable" (paragraph 37) and that the respondent "acted lawfully and within the terms of the banker customer relationship and cannot be in breach of its contract with the customer or of the Banking Act" (paragraph 48).

42. And similarly on the Fair Competition Act issues, he concluded from the evidence that the respondent was one of six commercial banks operating in Jamaica and competing against each other for business,

that the respondent was the second largest with over 30% of total loans and deposits (as against the Bank of Nova Scotia with over 40%) and that there could therefore be no serious issue that the respondent occupied a dominant position in the market for the purposes of section 19 of the Act. As to section 34(1)(b) of the Act (refusal to supply), the learned judge considered the respondent's stated reasons for seeking to close the appellant's accounts in the light of the provisions of the statute and concluded that they constituted valid business reasons for doing so.

43. And finally with regard to the claims based on the economic torts, the learned judge undertook an assessment of strength of the appellant's claim in the light of the law and the evidence and again concluded that there was no serious issue to be tried.

44. In my view, with the greatest of respect to the obvious industry and erudition on display in Jones J's carefully reasoned judgment, his approach to this aspect of the matter was not in keeping with the ***American Cyanamid*** prescription. What the learned judge did, in effect, was to conduct a preliminary trial on this interlocutory application, even if not resolving conflicts of evidence, certainly deciding on such evidence as was available at this very preliminary stage of the litigation some "difficult questions of law which call for detailed argument and mature considerations" (***American Cyanamid,*** per Lord Diplock at page 407, and see also ***Global Trust Limited and another v Jamaica Re-***

development Foundation Inc. and another, SCCA 41/04, judgment delivered 27 July 2007, per Cooke JA at page 13 and per Harris JA at page 21)

45. While it can happen that even at this stage of the litigation an experienced judge may have some sense of where a claimant's case may be more, or less strong, it is not permissible in my view to undertake an exploration of the issues in anything like the detail that Jones J did in this case. From some of the very material referred to by the judge himself on the competition issues, for instance, it is clear that this area, still relatively new to our jurisdiction, is one that will require the most careful consideration, both in respect of the evidence and the law. Refusal to supply, as Professor Richard Whish observed in a comment referred to by the learned judge at paragraph 59 of his judgment, "is a difficult and controversial topic in competition law", making this on the face of it, it seems to me, an area in which detailed argument and mature consideration will surely be required at the trial of this matter. And so too on the question of abuse of dominance, I would certainly be more diffident than the learned judge was in concluding on the limited material before him that there could be no serious issue that the respondent, with a market share in excess of 30% might in fact occupy (with only one other bank similarly circumstanced in a field of six banks), "such a position of

economic strength as will enable it to operate without effective constraints from its competitors" (section 19 of the Fair Competition Act).

46. Competition law is a field in which there is a clear intersection, even in the language of the statute itself, between the disciplines of law and economics (see, for example, Professor Whish's chapter in the 4th edition of his text on Competition Law, referred to by the learned judge at paragraph 54, on "Horizontal Agreements (2) – oligopoly, tacit, collusion and collective dominance"). I have no doubt that at the trial of this matter both sides may need to elucidate for the court by expert evidence the concepts of "a position of economic strength" and "effective constraints", neither of which can be described as legal terms of art.

47. I have therefore come to the view that the learned judge fell into error on this aspect of the matter by treating the application for the interlocutory injunctions as if it were a trial and straying beyond the requirement to discover as a purely preliminary matter if there are serious issues to be tried. In coming to this conclusion, I have not lost sight of Mr. Hylton's submission "that where the facts and law are clear, the court should hold that there is no serious issue to be tried and refuse the injunction," citing the recent decision of ***Commissioner of Police v Bermuda Broadcasting Co. Ltd.*** (supra) as an example of this principle in action. However, in that case, as Mr. Robinson pointed out, the interlocutory injunction was held to have been rightly refused, not on the

serious issue question (in respect of which the learned Chief Justice of Bermuda had expressed himself satisfied that there was a serious issue to be tried – see paragraph 4 of the judgment of the Privy Council), but on the balance of convenience (which is the respect in which the Privy Council agreed with the Chief Justice "that further evidence adduced at trial could not be expected to alter the competing interests"- see paragraph 10 of the judgment). In any event, I do not think that it can be said that the facts and law are clear in all respects in the instant matter.

48. It follows from all of the foregoing, in my view, that the appellant has demonstrated that Jones J proceeded on a misapprehension of the correct legal principles to be applied both with respect to the nature of the injunction sought and the correct approach to determining the question whether there is a serious issue to be tried, therefore leaving it open to this court to interfere. In my view, the appellant has clearly done enough to show that the claim in this matter is neither frivolous nor vexatious and that there is accordingly a serious issue to be tried.

Adequacy of damages

49. Despite his finding that the appellant's case had not met either threshold test, Jones J nonetheless went on ("for completeness") to deal, albeit somewhat perfunctorily, with the question of the adequacy of damages, (which was Lord Diplock's next step in the process of

considering the granting or refusing of an application for an interlocutory injunction: see ***American Cyanamid***, at page 408).

50. Jones J concluded that damages would be an adequate remedy to the appellant, that the respondent would be able to pay them and that the risk of loss to the respondent would be uncompensatable under the appellant's undertaking as to damages. In any event, the judge also found that, with respect to the claim under the Fair Competition Act, "section 48 provides that damages are the only remedy for breaches under the Act", (emphasis mine) and that the power to apply for an injunction is given to the Fair Trading Commission itself under section 47 (paragraph 74).

51. Several of the appellant's grounds of appeal related to this aspect of the matter, challenging all of the judge's findings summarized in the previous paragraph. Mr. Robinson in his submissions complained that the judge failed to analyze the factual material placed before him, to take into account the potential for disruption in the appellant's business, the impact of the closure of the accounts on the rights of the third party club members and the reputational risks to the appellant which would arise from the closure of the accounts. Mr. Robinson submitted further that the supposed risk of damage to the respondent by the grant of an injunction was purely illusory and that both in principle and on authority the court

could grant an injunction in respect of a breach of a statutory right given by the Fair Competition Act.

52. Mr. Hylton submitted that Jones J was correct and that on the evidence it had not been shown that such losses as the appellant would be exposed to could not be adequately compensated by damages. He pointed out that the appellant had itself quantified its damages in the amount of US$1 million per month, being the cost of making alternative banking arrangements, and that this was an amount that the respondent would clearly be able to pay. As far as the alleged risk of damage to the appellant's reputation is concerned, Mr. Hylton submitted that there was no evidence to support this and that in any event it was the appellant who had brought the matter of the closure of the accounts into the public domain by filing this action. With regard to the Fair Competition Act, Mr. Hylton also submitted that the learned judge was correct in his conclusion that damages were the only remedy available for its breach. He finally drew attention to the grave risks to the defendant, from both a regulatory and a business point of view, of the grant of an injunction.

53. Mr. Hylton relied heavily on the case of ***Prosperity Limited v Lloyds Bank Limited*** (1923) 39 TLR 372, a case in which a permanent injunction against a bank to restrain the closure of a customer's bank account was refused, in part because the court took the view "that damages would be adequate to meet the position of the plaintiffs" (per McCardie J, at page

375). He also relied on a passage from **Paget's Law of Banking** (13th edition, 2007) in which the adequacy of damages is described as a "substantial hurdle to a successful application for an injunction" (at paragraph 7.13.)

54. As is almost invariably the case when an assessment of the adequacy of damages takes place at the time when an interlocutory injunction is sought on an emergency basis, the available evidence in the instant case is hardly as developed as it will no doubt become if or when the matter goes to trial. Such material as there is, comes from Mr. Gilbert Wayne Smith, the appellant's Chief Executive Officer, whose affidavits dated 11 January 2008 and 21 January 2008 were before Jones J.

55. Mr. Smith confirmed that the appellant is "a customer service provider" whose customers are third parties "who belong to a private members club." The substantial funds passing through the appellant's accounts on a monthly basis (an average of US$5 - 20 million per month through the US$ savings account between March 2005 and June 2007) are club member funds and the respondent's threat not to accept further deposits from the appellant would to the knowledge of the respondent, jeopardize these services, impacting on club members and causing them to panic.

56. The threatened closure of the accounts, in circumstances where the appellant's access to alternative banking facilities in Jamaica is

already being severely curtailed, will oblige it to maintain accounts overseas contrary to the interests of club members. As a result of all of this, the "prejudice to the [appellant] will be great as it will result in the stopping of its operations which cannot be compensated for in damages as well as damage to third party rights which can be incalculable". The closure of the accounts "will effectively destroy the [appellant's] operations in Jamaica [creating] an air of suspicion and uncertainty... which will further serve to impact negatively on the [appellant's] reputation and operations."

57. And finally, Mr. Smith concludes, the appellant will be in a position to honour any undertaking as to damages, pointing to current assets of J$4.8 million and in excess of US$265,000.00.

58. The respondent, on the other hand, pointed out that it had "substantial assets", which put it in a position to pay any damages awarded to the appellant. Further, Mr. Hylton submitted, there is no evidence from the appellant that it will suffer harm that is uncompensatable in damages, pointing out that, in response to the respondent's enquiry, the appellant had in fact quantified its losses in the estimate it put forward of what would be the cost to it to make alternative banking arrangements on an urgent basis (see paragraph 9 above).

59. Mr. Hylton also submitted that in view of fact that the appellant had indicated that an extension to March would have been sufficient for it to

make alternative arrangements, and in view of its subsequent communication to its club members, any damages suffered by the appellant would be minimal. On its own evidence, the appellant's business would not be destroyed or disrupted and it would be able to continue its operations using its overseas banking facilities if the respondent were to close its accounts.

60. The respondent also called attention to the threat to its overseas correspondent banking relations of its continuing to do business with the appellant, to its fear of regulatory disapproval from the Bank of Jamaica and to the fact that in any event section 48 of the Fair Competition Act provides that the damages are the appropriate remedy for breaches of the Act, given that the right to apply to the court for an injunction is given by section 47 to the Fair Trading Commission itself.

61. In my view, it cannot be said on the material that was before Jones J, that the claim by the appellant that it stands to suffer irreparable damage, uncompensatable in damages, to its business and to its reputation if the respondent is allowed to close its accounts at this stage is unsustainable. I was initially attracted during the course of the argument to Mr. Hylton's submission that the fact that the appellant had been able to provide an estimate at the respondent's request of what would be the cost to it of making alternative banking was a clear indication that any damages caused by the closure of the accounts were

not only easily quantifiable, but already known. However, on further reflection, it is clear that the appellant was doing no more than it had been asked to do by the respondent at very short notice, which was to state how it arrived at its estimate of the amount of losses it would incur as a result of the delays expected to be caused by the closure and the making of alternative arrangements. It also seems clear on its face that the estimate thus provided did not seek in any way to address issues of potential damage to the appellant's reputation and business disruption generally.

62. In arriving at the conclusion that damages would provide an adequate remedy to the appellant, Jones J appears in my view to have focused primarily on the respondents' unchallenged ability to pay such damages, rather than on any factors peculiar to the appellant, such as the sensitive nature of its business, which were put forward by it as limiting the efficacy of damages as a remedy.

63. And, on the other hand, in concluding as he did that "the risks faced by the [respondent] from continuing to operate the [appellant's] account without compliance with the regulatory guidelines, clearly cannot be compensated in damages"(paragraph 25), the learned judge failed to consider at all in my view whether those risks might not be significantly mitigated, if not eliminated, in the short run by the fact that, if the injunction were granted, the respondent would not be acting

voluntarily, but purely in obedience to an order of the court. There was in my view no evidence before Jones J - and I do not see a basis for inferring - that either the Jamaican regulatory authorities or the respondent's correspondent banks overseas, would react to the respondent's keeping the appellant's bank accounts open in obedience to a court order in any manner in respect of which the respondent could not be compensated in damages. Neither was there any evidence that the appellant would be unable to satisfy its undertaking as to damages in this regard.

64. And, finally, on this aspect of the matter, on the question of the remedies available under the Fair Competition Act, it is certainly not as plain to me, as it was to Jones J, that "section 48 provides that damages are the only remedy for breaches under the Act" (paragraph 74).

65. While it is obviously correct that the only reference to an injunction in the Act is in section 47(1)(b), which gives the court the power to grant an injunction at the instance of the Fair Trading Commission in respect of uncompetitive conduct in breach of certain provisions of the Act, it does not necessarily follow from this in my view that a citizen whose statutory rights have been infringed is precluded from seeking injunctive relief under the court's general equitable jurisdiction in a proper case (see ***Duchess of Argyll v Duke of Argyll*** [1967] Ch 302, per Ungoed Thomas J at page 346: "I see no reason why the court should refuse to protect a right by injunction merely because it is a statutory right"). Such an, arguably,

counter-intuitive conclusion would require in my view a clear and unequivocally manifested legislative intention, which it is not easy to derive, on the face of it, from the provision in section 48 that every person who engages in uncompetitive conduct in breach of the statute "is liable in damages for any loss caused to any person by such conduct." At the very least, this must, surely, be another serious issue to be tried.

66. In my view, therefore, it cannot be said with any certainty that damages would be an adequate remedy for the claimant, neither can it be said with any certainty that, in the event the respondent ultimately prevails in the litigation, it cannot be adequately compensated under the appellant's undertaking as to damages.

67. In arriving at this conclusion, I have not ignored ***Prosperity***, in which one of the grounds on which the customer's application for an injunction to prevent the closure of its account by a banker was refused was that, in the circumstances of the case, damages were considered to be an adequate remedy. However, I would distinguish ***Prosperity***, primarily on the ground that it was a decision after trial at which the plaintiff must be taken to have put its case for a permanent injunction at its highest. I cannot therefore regard it as having decided anything in respect of an application for an interlocutory injunction. The statement in **Paget** based on ***Prosperity***, that "damages remain as adequate a remedy as they ever were" is a very general comment which cannot be given the virtually

legislative effect for which the respondent contends. In considering whether to grant an injunction, which is a discretionary remedy, this kind of general statement must be subject, in my view, to the circumstances of particular cases.

The balance of convenience

68. There being at least doubt in my mind as to the adequacy of the respective remedies of the parties in damages, the question of the balance of convenience therefore arises (***American Cyanamid***, per Lord Diplock, at page 408).

69. Mr. Hylton submitted that the balance of convenience also lies in favour of the respondent on this application, bearing in mind that the grant of the injunctions "would put the respondent at the many risks disclosed in the evidence", on the one hand, and that, on the other, "it would appear that the appellant has already made alternate arrangements and is merely awaiting the decision to fully implement them, and would consequently suffer little inconvenience if the accounts were closed".

70. Mr. Robinson submitted that the balance of convenience favoured the grant of the injunction and that the fact that the appellant was obliged by the respondent's threat of unlawful closure of its accounts to explore alternative banking arrangements could not be counted against it in striking the balance of convenience.

71. Perhaps understandably in the light of his primary conclusion, Jones J dealt with this issue fairly summarily, stating that the risk of injustice to the respondent if the injunctions were not extended, "does not effectively offset the risk of injustice to the [respondent] if it is extended until the trial of this matter." The learned judge made specific reference in this context to the fact that keeping the appellant's accounts open by injunction might invite sanctions for failure to comply with regulatory guidelines. With regard to the risk of injustice to the appellant by the injunction not being granted, Jones J's laconic comment was "it is easy to avoid injustice: comply with the request" (presumably a reference to the requests for customer information from the appellant said to be outstanding by the respondent; however, the relevance of this comment to the issue of balance of convenience is not readily apparent to me).

72. I have already commented on the question of potential regulatory sanctions against the respondent for complying with an order of the court (see paragraph 64 above). With regard to the respondent's overseas correspondent banks, I am not persuaded by the expression of concern by one of those banks in relation to the appellant, or the views of the International Monetary Fund in relation to "schemes" such as the appellant's operations, that the maintaining of a banking relationship with the appellant will put the respondent at "significant risk", as Mr. Hylton contends.

73. On the other hand, it does not appear to me that Jones J gave any, or any sufficient, consideration to the appellant's contention that the respondent's threatened closure of its accounts represented "the last of several such closures by colleague commercial banks" and could cause a disruption of its business.

74. Taking all things into account, it is my view that this is a case in which the various factors affecting the balance of convenience appear to be at least evenly balanced, in which case, "it is a counsel of prudence to take such measures as are calculated to preserve the status quo." (***American Cyanamid*** at page 408). For these purposes, the "relevant" status quo is the state of affairs existing during the period immediately preceding the filing of the action in which the injunction is sought (***Garden Cottage Foods Ltd. v Milk Marketing Board*** [1985] 2 All ER 770, per Lord Diplock at pages 774-775.) The balance of convenience in my view therefore supports the grant of the injunction sought by the appellant.

The respondent's counter-notice of appeal

75. By its counter-notice of appeal dated 30 April 2008, the respondent contends that the decision of Jones J should be affirmed on the additional grounds that the appellant at the time of obtaining the ex parte injunctions on 11 January 2008 had been guilty of material non-disclosure in relation to whether there had been a significant increase in

activity in its accounts, had been guilty of misrepresentation when it stated that its accounts were opened in December 2005 and that at all material times thereafter the respondent knew that the appellant was engaged in a business which involved on estimated monthly throughput of US$30 million", and at the inter partes hearing had misrepresented to the court that between March 2005 and June 2007 its accounts had an average monthly throughput of US$5-20 million, "characterized by a gradual trend upwards throughout the period."

76. The respondent had in fact filed in the court below an application to discharge the ex parte injunctions on the ground of non-disclosure, but this application was withdrawn when the inter partes hearing came on before Jones J. There is some disagreement between the parties, as reflected in the rival contentions in the skeleton arguments, as to the circumstances of the withdrawal of the application, but I do not think that this as a matter with which this court need concern itself. It is sufficient to state that Mr. Hylton contends that the grant of an injunction is a discretionary remedy, in respect of which the conduct of the applicant is always relevant, and that this court should also uphold Jones J's refusal to grant the injunction on the additional bases of material non-disclosure and misrepresentation. Mr. Robinson on the other hand contends that these concepts are relevant only to an application to discharge an ex parte injunction and have no place in the inter partes hearing.

77. Both counsel referred to a decision of Rattray J in ***Kingston Telecoms v Zion Dahari et al*** (2003 HCV 2433, Supreme Court, judgment delivered 27 July 2004), Mr. Robinson for the proposition that the concepts of misrepresentation or material non-disclosure have no relevance in an inter partes hearing in assessing the balance of convenience, and Mr. Hylton in response to say that the judge "did not make any such wide pronouncement... [but held] that he was satisfied with the explanation given for the failure to disclose at the ex parte stage and that he would not refuse an interlocutory injunction on that basis."

78. With regard to what was actually held in ***Kingston Telecoms*** on this point, it appears to me that both counsel are to some extent correct, in that while Rattray J did say that he was satisfied with the explanation given for the alleged failure to disclose, he also appears to have accepted the further submission (of one Mr. Robinson) that there was no application to discharge the ex parte order on the ground of non-disclosure and that at the inter partes hearing "the material facts are before the Court for consideration as to whether or not this should be continued until the trial of this action" (per Rattray J at page 21).

79. It is indeed a commonplace of the equitable jurisdiction of the court that a claimant seeking equitable relief by way of injunction or otherwise must have clean hands (Spry, pages 409-414). It is also clear that the rule that an injunction will be refused or discharged for material

non-disclosure or misrepresentation is particularly relevant to ex parte applications and that most of the discussions in the authorities on this aspect of the jurisdiction in fact take place in that context (see, for instance, ***Half Moon Bay Ltd. v Levy,*** suit no. C.L. 1996/H-012 a decision of Wolfe CJ, judgment delivered 7 May 1997). Which is not to say, however, that the concepts have no further relevance on the inter partes hearing, but the true rule, it appears to me, must be that at that stage they are among the various considerations which the court will take into account as part of the discretionary mix (see Spry, pages 494-500).

80. In the instant case, all of the matters complained of were part of the material that was before Jones J on the inter partes hearing, and he dealt with the matter after careful consideration on the bases set out in his written judgment. For my part, I am accordingly prepared to assume that these matters were in fact subsumed in that consideration. I would accordingly dismiss the counter-notice of appeal.

Conclusion

81. On the basis of all of the foregoing, I would therefore conclude as follows:

(i) that the appeal should be allowed and interlocutory injunctions granted until the trial of the action in this matter in the terms sought (upon the usual undertaking as to damages);

(ii) that the counter–notice of appeal should be dismissed; and

(iii) that the appellant should have its costs of the appeal, to be taxed, if not sooner agreed.

PANTON, P.

ORDER

1. Appeal allowed.
2. Interlocutory injunctions granted as prayed until the trial of the action .
3. Appellant to give the usual undertaking as to damages.
4. Counter-notice of appeal dismissed.
5. Speedy trial ordered.
6. Costs to the appellant to be agreed or taxed.