

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVP2023/0033

BETWEEN:

TALADRO HOLDINGS VENEZUELA

Appellant

and

BOI BANK CORPORATION

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Eddy D. Ventose
The Hon. Mde. Esco L. Henry

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Dr. David Dorsett and Mr. Jarid Hewlett for the Appellant
Mr. Craig L. Jacas and Ms. Talia DaCosta for the Respondent

2024: May 3;
July 23.

Civil appeal – Summary judgment – Legal relationship between banker and customer – Whether upon making a demand upon the bank for payment, the customer of a bank may sue the banker for the balance standing to the credit of their current account – Whether by an action claiming funds held in a current account a customer had given notice of their desire to terminate their relationship with the bank according to the governing terms and conditions of the banking relationship, thereby entitling the customer a return of their funds – Whether the affidavit evidence filed in support and in opposition to the appellant’s application for summary judgment was sufficient to make any assessment of the strength or weakness of the respondent’s defence

The appellant is a customer of the respondent bank. Their relationship was governed by the “General Terms and Conditions” (“the Agreement”). The appellant held two bank accounts

with the respondent: a current account and a time deposit account. The appellant claimed that the amounts in the two bank accounts were payable by the respondent upon demand. The appellant issued a notice to the respondent on 20th April 2022 terminating their banking relationship with immediate effect, pursuant to clause 30 of the Agreement and demanded settlement within three business days. Two further letters were sent to the respondent demanding settlement; one in April 2022 and the other in June 2022.

The appellant held the view that the failure of the respondent to pay the amounts in the two bank accounts on the appellant's demand, constituted a breach of contract. Consequently, the appellant commenced proceedings against the respondent. On 28th March 2023, the appellant sought summary judgment engaging the court on three issues: (1) whether the appellant, by commencing an action against the respondent, gave notice of its desire to terminate its relationship with the respondent thus satisfying the requirements for the engagement of clause 30 of the Agreement and entitling the appellant to the return of its funds held on account as soon as possible; (2) the sufficiency and validity of the appellant's valid demand for the return of its money; and (3) an order that all funds held in the account of Taladro Holdings Venezuela in an amount to be determined be paid to Taladro Holdings Venezuela by the defendant. The respondent's case was that the amount outstanding on the time deposit account was not payable on demand and that the amount outstanding on the current account was payable on demand, but these sums had to be demanded in a prescribed form. The respondent further contended that since the appellant's business was to provide well-drilling services to companies owned by Venezuela it was subject to the laws of that State.

The respondent suspected that the invoices produced by the appellant in support of its deposits in the two accounts, were fraudulent and thus demanded to have sight of a service contract, which the appellant failed to produce despite the respondent's repeated demands. Additionally, the respondent contended that since 2016, various countries had applied sanctions against the Government and/or citizens of Venezuela and consequently, its correspondent banking relationships had been adversely affected. This, in the respondent's view, was sufficient to trigger the application of clause 19 (*force majeure*) of the Agreement, and consequently, its performance obligations under the Agreement were suspended, or alternatively, it was entitled to rely on the doctrine of frustration.

The master granted the application for summary judgment. Overall, the master was not satisfied that the respondent bank had a realistic prospect of successfully defending against the issues identified by the appellant. The master seemed to have accepted the reasoning in *Joachimson v Swiss Bank Corporation* in which it was held that it is an implied term that the banker does not become liable to repay the customer until a demand is made; and the issuing of a writ by a customer is a sufficient demand to give rise to a cause of action for the recovery of money from a current account.

The respondent, being dissatisfied with the master's decision, appealed to this Court. The Court found that the master failed to appreciate and decide whether summary judgment should be given in respect of the three discrete issues that arose on the summary judgment application, accordingly the Court determined the three issues on appeal.

Held: allowing the appeal, in part, against the decision of the learned master, setting aside the orders made at sub-paragraphs 1-3 of paragraph 40 of the judgment of the learned master and substituting those orders with the orders at paragraph 40, sub-paragraphs 1-4 of this judgment, that:

1. In relation to payments to be made on demand, there must be an express demand for repayment as a condition precedent to the right to sue the banker for the amount standing to the credit of the customer's current account. In many cases in which the question is likely to arise, even if a demand is necessary to complete the cause of action, a writ is a sufficient demand. This principle, though applicable to the appellant's current account, is plainly not applicable to its time deposit account. Therefore, the appellant could have only succeeded in obtaining a declaration that the initiation of the proceedings in the court below was a sufficient and valid demand for the return of its money held by the respondent in its current account. The sums in the time deposit account would only be available to the appellant upon the date of maturity provided that the appellant cancelled the automatic renewal of the deposit account in accordance with the respondent's terms and conditions governing certificates of deposits to which the appellant had agreed. Though the master averred to an aspect of this issue in paragraph 22 of his judgment, he did not properly address and conclude as to whether summary judgment ought to be granted in favour of the appellant on this issue.

Joachimson v Swiss Bank Corporation [1921] 3 KB 110 applied

2. The initiation of the proceedings in the court below meant that the appellant had issued a sufficient and valid demand for the return of its money held by the respondent in the current account. This was sufficient notice of the termination of the banker and customer relationship pursuant to clause 30 of the Agreement and thereupon there must be settlement of the position between the parties. In the proceedings relating to its summary judgment application, the appellant cannot rely on any other notice other than the valid demand made for the return of its money that was made when it filed its re-amended claim form and statement of claim on 23rd January 2023. However, the pleadings and evidence show that there had been no settlement as required upon the engagement of clause 30 of the Agreement.
3. Clause 19 of the Agreement did not excuse the respondent from performing any of its obligations under the Agreement. Clause 19 served to exempt the respondent from any liability for any loss suffered by a customer, including the appellant, if any of the circumstances outlined in clause 19 occurred. It also provided that if any of those circumstances occur, the respondent would take those measures that could be reasonably required of it in order to limit the adverse consequences for the customer resulting from that occurrence. The Court found that clause 19 is not a *force majeure* clause as suggested by the respondent, and the Court disagreed with the master's statement that clause 19 was sufficiently wide so as not to exclude the imposition of an international sanction as constituting *force majeure*. However, in relation to the issue of frustration, the Court agreed with the master that if the respondent's position is that its inability to perform its contractual obligation is

temporary, meaning that while the sanctions are in place it cannot return the monies to the appellant and that it can only do so when circumstances permit, the respondent would not be able to rely on the doctrine of frustration which, if successful, would bring the contract to an end or discharge the contract.

Chitty on Contracts 27th Ed. Ch 14 at 14-121 applied; **JP SPC 4 and another v Royal Bank of Scotland International Ltd** [2023] AC 461 considered.

4. However, as it relates to the time deposit account, the sums would only be available to the appellant upon the date of maturity provided that the appellant cancelled the automatic renewal of the time deposit account in accordance with the respondent's Terms and Conditions governing Certificates of Deposits. The question of whether there was any automatic renewal of the Deposit Account is not a matter that can be determined on a summary judgment application; it is a matter that must be determined at trial.
5. The question whether there exists a relationship between the return of the funds to the appellant and the requests for information on the two bank accounts and when this information was requested are all matters that cannot be resolved in this summary judgment application. These are matters that can only be determined at trial.
6. It follows logically that since the appellant is not to be granted the declaration that it is entitled to the return of its funds held on account as soon as possible, the appellant is likewise not entitled to an order that the funds held in the current account and the time deposit account should be paid to the appellant by the respondent.

JUDGMENT

- [1] **VENTOSE JA:** This is an appeal filed by the appellant on 8th February 2024 against the decision of the learned master dated 30th August 2023, in which the learned master dismissed the appellant's application for summary judgment and made a costs order in the respondent's favour.

Background

- [2] In its re-amended statement of claim filed on 23rd January 2023, the appellant averred that it is a company doing business in Venezuela and a customer of the respondent which is an international bank doing business in Antigua and Barbuda. The appellant is a customer of the respondent. The relationship between the

appellant and the respondent is governed by the “General Terms and Conditions” of the respondent bank containing 40 clauses.

- [3] The appellant has two bank accounts with the respondent. The first is a current account with a balance at 31st December 2019 of €2,995,249.96 (the “Current Account”) and the second is a time deposit with a balance at 31st December 2019 of US\$2,000,000.00 with interest at 4.75% per annum from 21st September 2018 (the “Deposit Account”). The appellant claimed that the amounts in the two bank accounts were payable by the respondent to the appellant upon demand. The appellant also claimed to have made various requests to the respondent but that the respondent has, to date, failed to pay to the appellant the sums in the two bank accounts.
- [4] The appellant stated that by failing to honour its demands, the respondent committed a breach of contract. The appellant further contended that by notice issued on 20th April 2022, it terminated the banking relationship with the respondent with immediate effect pursuant to clause 30 of the “General Terms and Conditions” agreement between the parties and demanded that there be settlement within three (3) business days, that is, by 26th April 2022. Having received no response from the respondent, the appellant wrote to the respondent on 27th April 2022 informing the respondent that the appellant took its non-response as a repudiation of the contract governing their banker/customer relationship and demanded the return of funds held by the respondent in the two bank accounts. This demand was repeated in a letter sent by the appellant to the respondent on 20th June 2022. The appellant also averred that, to date, the respondent had not settled with the appellant, and that since there was no settlement, the appellant brought proceedings seeking the payment of all sums due and owing by the respondent to the appellant.
- [5] In its amended defence filed on 15th February 2023, the respondent admitted that the appellant had two bank accounts with it and confirmed as correct the amounts outstanding in the two bank accounts. The respondent however denied that the

amount outstanding on the Deposit Account was payable on demand as contended by the appellant; and stated that while the amount outstanding on the Current Account was payable on demand, the sums had to be demanded in the form prescribed by the respondent, as agreed by the parties. The respondent stated that the appellant provided well-drilling services to companies owned by the Venezuelan State and was subject to the laws of Venezuela as it pertained to public procurement, including the Public Contracts Act of Venezuela. The respondent also stated that the appellant produced what the respondent suspected to be fraudulent invoices to support the legitimacy of the deposits to the two bank accounts. The respondent averred that, despite its demands, the appellant failed to produce any contract in support of the well-drilling services and failed to comply with demands to submit documents to the respondent in an effort to comply with the requirements of the United States Office of National Drug Control Policy (the "ONDCP"). The respondent also averred that the appellant issued proceedings against the respondent to circumvent the requirement to issue a demand in the prescribed form so as not to produce the documents required by the ONDCP to facilitate enhanced due diligence.

- [6] The respondent stated that: (1) clause 30 of the "General Terms and Conditions" provides that the General Terms and Conditions shall remain in full force during settlement; (2) clause 38 provides that the respondent may request information from the customer to process any request or transaction and that the appellant had not yet provided the respondent with the requested contracts in support of its drilling services; (3) since 2016, countries such as the United States, Canada, and others in the European Union, have applied sanctions against the Government and/or citizens of Venezuela, and that because of the sanctions, the respondent's correspondent banking relationships have been adversely affected; (4) it relies on clause 19 (force majeure) of its General Terms and Conditions by virtue of which its performance obligations under the contract with the appellant have been suspended; and (5) alternatively, it is entitled to rely on the doctrine of frustration.

The Decision in the Court Below

[7] On 28th March 2023, the appellant filed an application for summary judgment to be entered in its favour on the following grounds: (1) the engagement of clause 30 of the General Terms and Conditions between the parties; and (2) the sufficiency and validity of the appellant's valid demand for the return of its money. The appellant sought summary judgment in the following terms:

- "A. It is declared that the Claimant by an action claiming funds held in its account with the Defendant has given notice of its desire to terminate its relationship with the Defendant thus satisfying the requirements for the engagement of clause 30 of the General Terms and Conditions between the parties and entitling the Claimant to the return of its funds held on account as soon as possible. [the "First Issue"]
- B. It is declared by the initiation of the instant proceedings that the Claimant has issued a sufficient and valid demand for the return of its money held by the Defendant. [the "Second Issue"]
- C. An order that all funds held in the account of Taladro Holdings Venezuela in the amount of US\$ be paid to Taladro Holdings Venezuela by the Defendant." [the "Third Issue"]

[8] The learned master in a written judgment delivered on 30th August 2023 appeared to have accepted at paragraph 22 that the decision of the Court of Appeal of England and Wales in **Joachimson v Swiss Bank Corporation**¹ decided that: (1) it is an implied term in the banker customer contract that the banker does not become liable to repay the customer the monies in the customer's bank account until a demand is made; and (2) that the issuing of a writ by a customer is a sufficient demand so as to give rise to a cause of action for recovery of money from a current account. The critical part of the reasoning of the learned master is as follows:

"[24] Considering the foregoing, it would be difficult to see how, without more, the Claimant could get the declaration it seeks on its application for summary judgment for determination of the issue of clause 30 and for an order for return of sums held in accounts with the Bank. The Court is unable to conclude that the Parties' relationship is at an end on the mere filing of the claim and that the Bank cannot rely on the provisions of the General Terms and Conditions in defending the claim."

¹ [1921] 3 KB 110.

[9] The learned master then proceeded in paragraph 25 to consider whether, if he were to accept that there was a valid demand made by the appellant, the respondent could succeed in invoking clause 19 (*force majeure*) of its General Terms and Conditions and the doctrine of frustration. The learned master considered both of these in paragraphs [26] to [38] of the judgment, explaining, in relation to “force majeure” in clause 19 of the General Terms and Conditions, that:

“[31] In *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC and another*, it was stated that ‘whether a force majeure clause in a contract is triggered depends on the proper construction of the wording of that clause; “force majeure” is not a term of art.’ The Claimant in its re-amended statement of claim pleaded that the failure of the bank to honour its demands constitutes a breach of contract and on account of the bank’s actions it has suffered loss and damage. Clause 19 of the General Terms and Conditions relieves the bank of liability or responsibility for damage in certain circumstances. Having examined clause 19 of the General Terms and Conditions, it appears to be sufficiently wide so as not to exclude the imposition of an international sanction as constituting force majeure. Clause 19 refers to “governmental orders and measures” and “interruptions of or disturbances in companies whose services the Bank makes use of”. In my view, the bank would have a real prospect of success in arguing that the clause is capable of covering the circumstances it has pleaded in its defence to the Claimant’s claim. At any trial of the matter, the burden will rest on the bank to prove the facts bringing the case within the force majeure clause. Thus, this being a fact-sensitive issue requiring the testing and evaluating of the evidence presented to the Court, it would not be appropriate to grant summary judgment to the Claimant for an order that the bank pay over sums on its accounts.”

[10] In respect of the respondent’s reliance on the doctrine of frustration, the learned master explained that:

“[36] The doctrine of frustration is similar to that of force majeure but can be invoked without being referred to in a contract. The Bank relies on frustration as an alternative to force majeure and in so doing relies on the same factual assertions grounding force majeure. Thus, the above considerations of the court in relation to force majeure would also be applicable to frustration. I note however that in paragraph 9 of its amended defence, the Bank, in pleading the force majeure clause contained in the General Terms and Conditions, stated that pursuant to that clause, its obligations under the contract are suspended. This would suggest a temporary inability to perform its obligations under the contract which would run counter to the legal position as it relates to frustration.

[37] It has recently been reinforced on a summary judgment application in the English case of Bank of New York Mellon (International) Ltd v Cine UK Ltd that there is no such legal concept as ‘temporary frustration’ of a contract. The effect of frustration is to discharge the contract in its entirety and bring it to an end. There is no ability for frustration to suspend a contract so that it is capable of being re-instated. As was stated by the learned master, the contract is brought to an end, full stop. In the present case, it is unclear from the Bank’s arguments whether it is the Bank’s position that its inability to fulfill its obligation is temporary. If this were the case the Bank would be unable to rely on the doctrine of frustration.”

[11] The learned master’s overall conclusion was as follows:

“[38] It should be noted that despite this claim having been filed since 2020, because of several interlocutory applications made and an unsuccessful attempt at mediation, the [p]arties have yet to receive case management directions for disclosure and the filing of witness statements. The matter has been unable to progress beyond the case management stage. Further, the affidavit evidence filed in support and in opposition to the Claimant’s application for summary judgment is not sufficient to make any assessment of the strength or weakness of the Defendant’s defence. However, the Bank has mounted a defence of force majeure or alternatively, frustration, where if the Court makes findings in its favour, it would affect its obligations under the contract, or in the case of frustration discharge the obligations under the contract and bring the contract to an end.

[39] Considering all the above, I am unable to conclude that the Claimant’s application for summary judgment should be granted. The Court is not satisfied that the Bank has no realistic prospect of successfully defending on the issues identified by the Claimant in its application. The Bank, having been successful in resisting this application, is also entitled to its costs.”

The Appeal

[12] As mentioned earlier, the appellant filed its Notice of Appeal on 8th February 2024 against the decision of the learned master. The grounds of the appeal are as follows:

“(1) The learned master erred in refusing to enter summary judgment in favour of the appellant on the footing that he was “not satisfied that the Bank has no realistic prospect of successfully defending on the issues identified by the claimant in its application” when as a matter of law, the respondent had no defence to a claim to act upon the instructions of the applicant to pay out the funds in its account and/or to terminate the customer-banker relationship.

(2) The learned master erred in refusing to enter summary judgment in favour of the appellant by failing to treat with, or otherwise make a determination on the issues he was required to make a determination on, which issues do not require the parties to adduce further evidence.”

- [13] The issue that arises for consideration in this appeal is whether the learned master was correct in dismissing the application for summary judgment because: (1) of his finding that the respondent would have a real prospect of success in arguing that clause 19 (*force majeure*) of the General Terms and Conditions is capable of covering the circumstances pleaded by the respondent in its defence to the appellant’s claim; and (2) the affidavit evidence filed in support and in opposition to the appellant’s application for summary judgment was not sufficient to make any assessment of the strength or weakness of the respondent’s defence.

Discussion

- [14] In **Didier and others v Royal Caribbean Cruises Ltd, Royal Caribbean Cruises Ltd v Medical Associates Ltd and others**,² this Court explained the summary judgment procedure as follows:

“[21] The legal tests for entering summary judgment under Pt 15 of CPR and for striking out a party’s statement of case under r 26.3(1)(b), while closely worded, are not the same. They should not be confused with each other. CPR 15.2 states as follows:

‘15.2 The court may give summary judgment on the claim or on a particular issue if it considers that the—
(a) claimant has no real prospect of succeeding on the claim or the issue; or
(b) defendant has no real prospect of successfully defending the claim or the issue.’ (Emphasis added.)

...

[22] Either a claimant or a defendant may apply for summary judgment to be entered on a claim or a particular issue pursuant to CPR 15.4(1) and (2), or the court may exercise its powers and deal with the claim or issue summarily at any case management conference pursuant to CPR 15.4(3). A party who applies to have summary judgment entered on a claim must file affidavit evidence in support of the application and so too must a respondent who wishes to rely on evidence. This filing of affidavit evidence

² (2016) 89 WIR 277.

is a crucial part of the summary judgment procedure and forms the basis for the court's application of the legal test for entry of summary judgment.

[23] While a claimant's pleaded case may be properly constituted, it may very well be completely hopeless in the face of a defendant's defence, and therefore, the claimant will have no real prospect of succeeding. Similarly, a defendant who puts forward a defence which clearly cannot stand up to a claimant's pleaded case will have no real prospect of successfully defending the claim. In either of these instances, it would be appropriate for the court to enter summary judgment on the claim pursuant to Pt 15 of the CPR provided that the issues in the claim are ones which are suitable to be dealt with using the summary procedure. In disposing of a claim summarily, the court would essentially consider the legal issues in the case, determine, on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim and enter judgment accordingly. This will be a judgment on the merits." (Citations omitted)

- [15] It was incumbent on the learned master to determine, on the balance of probabilities, whether in respect of the three issues raised in the summary judgment application, the respondent had no realistic prospect of succeeding on each issue and enter judgment accordingly: **Royal Caribbean Cruises** (at paragraph [23]). The learned master failed to appreciate and decide whether summary judgment should be given in respect of the three discrete issues that were raised in the application for summary judgment. Considering the way in which the summary judgment application was made, and the way the appeal was presented and argued, it is appropriate to first consider the second issue before examining the first issue and consider the third issue last.

The Second Issue

- [16] The learned master did not deal directly with the second issue, namely, whether a declaration that the initiation of the proceedings in the court below meant that the appellant had issued a sufficient and valid demand for the return of its money held by the respondent. In **Joachimson**, the Court of Appeal of England and Wales accepted that, in relation to payments to be made on demand, there must be an express demand for repayment as a condition precedent to the right to sue the banker for the amount standing to the credit of the customer's current account.

Bankes LJ explained at p. 115 that, “most of the cases in which the question is likely to arise, even if a demand is necessary to complete the cause of action, a writ is a sufficient demand.” (emphasis added) Warrington LJ stated at p. 126 that:

“All these matters seem to me to distinguish the contract between banker and customer from the ordinary case of a loan of money, and having regard to the state of the authorities I think we are at liberty to hold, and ought to hold, that a demand, either by the issue of a writ or otherwise, is an essential ingredient in the cause of action, and that without such demand no cause of action accrues. In the present case there was no demand on or before August 1, 1914. It may be suggested that the view we take is inconsistent with the operation of a garnishee order upon a banking account. I do not think so. In my opinion, the service of the order nisi would be a sufficient demand.” (Emphasis added)

[17] Atkins LJ stated at p. 127 that “it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept.” So while the dicta by Bankes LJ and Warrington LJ in **Joachimson** might be applicable to the Current Account, it is plainly not applicable to the Deposit Account. The respondent, in its defence, stated that the sums in the Deposit Account will only be available to the appellant upon the date of maturity which was 21st September 2020, provided that the appellant cancelled the automatic renewal of the Deposit Account in accordance with the respondent’s Terms and Condition governing Certificates of Deposits, to which the appellant had agreed.

[18] The learned master did not expressly decide whether to grant summary judgment in favour of the appellant on the second issue. Considering the reasoning of Bankes LJ and Warrington LJ in **Joachimson**, the appellant could only have succeeded in obtaining a declaration that the initiation of the proceedings in the court below was a sufficient and valid demand for the return of its money held by the respondent in its Current Account. No such declaration would be possible in relation to the Deposit Account. The Deposit Account does not fall within the scope of the principle enunciated in **Joachimson**. The master failed properly to address and conclude on the second issue although he averted to an aspect of it in paragraph [22] of his written judgment.

The First Issue

- [19] The first issue is whether the appellant, by an action claiming funds held in its Current Account with the respondent, had given notice of its desire to terminate its relationship with the respondent thereby satisfying the requirements for the engagement of clause 30 of the General Terms and Conditions between the parties and entitling the appellant to the return of its funds held in both the Current Account and Deposit Account as soon as possible. As mentioned earlier, the General Terms and Conditions govern the relationship between the respondent and its customers, including the appellant.
- [20] Clause 30 of the General Terms and Conditions states that:
- “30. Both the Customer and the Bank are at all times entitled to give notice of termination of the relationship; the position shall then be settled as quickly as possible. Time limits shall then be observed, if and insofar as the nature of a transaction entails such. During the settlement, the General Terms and Conditions will remain in full force.”
- [21] It was accepted in the second issue that the initiation of the proceedings in the court below meant that the appellant had issued a sufficient and valid demand for the return of its money held by the respondent in its Current Account. This is sufficient notice of the termination of the banker and customer relationship pursuant to clause 30 of the General Terms and Conditions. Once clause 30 is engaged, the following applies: first, the position must be settled as quickly as possible and, second, during the settlement, the General Terms and Conditions remain in full force.
- [22] In the proceedings relating to its summary judgment application, the appellant cannot rely on any other notice to the respondent other than the valid demand made for the return of its money that was made when it filed its re-amended claim form and statement of claim on 23rd January 2023. The appellant’s application for summary judgment was limited to the institution of these proceedings; it cannot now be enlarged without first amending the application. It is now one year and five months since the re-amended claim form and statement of claim was filed. The pleadings and the evidence before the learned master in the court below indicate

that there has, so far, not been any settlement of the position between the appellant and the respondent.

- [23] The appellant's case is that the respondent has failed to comply with the appellant's instructions which meant that the appellant was entitled to terminate its contractual relationship with the respondent. This submission is not relevant to the summary judgment application because it falls outside of the specific issues identified by the appellant in the application for summary judgment. The issue of the purported basis for the termination of the contractual relationship between the parties is irrelevant to the determination of the first issue. The respondent relies on the following grounds in refusing the appellant's demand to return the funds in the two bank accounts: (1) clause 19 of the General Terms and Conditions; (2) the doctrine of frustration; (3) the failure by the appellant to provide it with information requested; and (4) in respect of the Deposit Account, it renews automatically at the maturity date and that date had not then arrived. These will be considered *seriatim*.

Clause 19 of the General Terms and Conditions

- [24] The respondent submits that Clause 19 of the General Terms and Conditions remains in full force pursuant to clause 30. Clause 19 provides that:

"19. The Bank does not accept any responsibility or liability for damage resulting directly or indirectly from acts of God (*force majeure*), including at any rate governmental orders and measures, international conflicts, violent, terrorist or other armed actions, labor disturbances, also among its own staff and employees, power failures or other failures in communication connections or equipment or software of the Bank or third parties, interruptions of or disturbances in companies whose services the Bank makes use of, measures of supervisory authorities, lock-outs and boycotts. If a circumstance, as referred to in the previous sentence, occurs, the Bank will take those measures that can be reasonably required of it, in order to limit adverse consequences for the Customer resulting from such."

- [25] Relying on clause 19, the respondent argues that: (1) "*force majeure*" and (2) frustration, applies in respect of their contractual obligations to return the funds in both bank accounts to the appellant. As mentioned earlier, the respondent in its amended defence avers that from 2016, countries such as the United States,

Canada, and others in the European Union have applied sanctions against the Government and/or citizens of Venezuela. According to the respondent, this meant that its correspondent banking relationships have been adversely affected and this has compromised the respondent's ability to fulfil transaction requests in a timely manner or at all. The respondent, therefore, claims that because of the sanctions, it is prevented from carrying out its obligations under the contract with the appellant and is therefore unable to comply with the demand for the immediate return of the monies deposited with it by the appellant in both bank accounts.

[26] Clause 19 is arguably not a "*force majeure*" clause as properly understood. The definition of a force majeure clause, accepted by the learned master citing **Chitty on Contracts**³ was a "contractual term by which one (or both) of the parties is excused from performance of the contract, in whole or in part, or is entitled to suspend performance of the contract or to claim an extension of time for performance, upon the happening of a specified event or events beyond his control." Clause 19 did not excuse the respondent from performing any of its obligations under the contract with the appellant. All it seeks to do is to exempt the respondent from any liability for any loss suffered by any customer, including the appellant, if any of the circumstances outlined in clause 19 occurs. It also provides that if any of those circumstances occur, the respondent will take those measures that can be reasonably required of it, in order to limit any adverse consequences for the customer resulting from that occurrence.

[27] Having noted (correctly, in my view), that clause 19 of the General Terms and Conditions relieves the respondent of liability or responsibility for damage to customers including the appellant in certain circumstances, I do not agree with the learned master's further statement that clause 19 appeared to be sufficiently wide so as not to exclude the imposition of an international sanction as constituting *force majeure*. Clause 19 does not excuse performance by the respondent of any of its obligations under the contract with the appellant. Consequently, the learned master

³ 27th Ed. Ch 14 at 14-121.

was also wrong to conclude: first, that, at any trial of the matter, the burden will rest on the respondent to prove the facts bringing the case within the *force majeure* clause; and second, since this was a fact-sensitive issue requiring the testing and evaluating of the evidence presented to the court, it would not be appropriate to grant summary judgment to the appellant for an order that the respondent pay over sums in both bank accounts.

The doctrine of frustration

[28] The respondent also relies on the doctrine of frustration to excuse the non-performance of its contractual obligation to pay the appellant the sums in both accounts once a demand is properly made. The respondent asserts that it is entitled to rely on the doctrine of frustration, which it mentioned in its amended defence, and which it bases its claim on the same circumstances regarding Clause 19. In submissions filed on 12th May 2023 in the court below, the respondent merely restates that the sanctions have adversely affected its correspondent banking relationships which has compromised the respondent's ability to fulfil transaction requests in a timely manner or at all, and that because of these circumstances it is prevented from paying the monies from the two bank accounts to the appellant. In any event, if the respondent was correct that clause 19 of the General Terms and Conditions applied to the facts in this appeal, then, the doctrine of frustration of contract would not be applicable because the doctrine clearly cannot apply where express provision has been made in the contract for the circumstances it is alleged to have frustrated the contract.

[29] The learned master accepted the definition of frustration from Halsbury's Laws of England as occurring where the contract has become impossible of performance due to an unforeseen act which is beyond the control of both parties and that, in such a situation, the parties' rights and obligations are terminated without any liability for breach on either side. It is noteworthy that in its affidavit in response to the application for summary judgment, the respondent does not explain in any detail: (1) why it claims that it was prevented from carrying out its obligations under the

contract; (2) exactly how the correspondent banking relationships had been affected and the manner in which this affected its banking business; (3) how exactly it was unable to fulfil transaction requests in a timely manner or at all; (4) the way in which the adverse effects on its correspondent banking relationships had prevented it from carrying out its contractual obligations; and (5) exactly why it was unable to carry out its obligations under the contract by returning the monies in the two accounts to the appellant. The respondent provided no evidence of what steps, if any, it took to attempt to return the monies from the two bank accounts to the appellant. These are critical facts only known to the respondent and the onus was on it to put forward detailed explanations in its affidavit in response to the application for summary judgment.

[30] The learned master, at paragraph 30, noted that the respondent explained that the matter must be case managed where further evidence, including expert evidence, might be deployed by the parties for the court's evaluation and fact finding at trial. While the learned master did not expressly state this as a positive consideration, it is important to remember the statement of the UK Supreme Court in **JP SPC 4 and another v Royal Bank of Scotland International Ltd**⁴ at pg. 485 that it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the issue. In this case, by the time the respondent filed its response to the appellant's application for summary judgment it would have had all the information that it needed properly to respond, explaining in detail the bases of its alleged inability to return the monies in the two bank accounts to the appellant.

[31] The learned master noted that the respondent's submission that under clause 19 that its obligations under the contract were therefore suspended was inconsistent with the respondent's reliance on the doctrine of frustration. The respondent's argument seems to be that while the sanctions are in place, it cannot return the monies to the appellant and that it can only do so when circumstances permit,

⁴ [2023] AC 461.

suggesting that at some point in the future if the sanctions are lifted it may then be able to return the monies in the two bank accounts to the appellant. The respondent repeats, in submissions made before this Court, its argument in the court below that the effect of invoking clause 19 in the circumstances is to suspend the performance of its contractual obligations until such circumstances end.

- [32] The learned master, in my view, correctly observed that if the respondent's position was that its inability to perform its contractual obligation was only temporary, the respondent would not be able to rely on the doctrine of frustration which, if successful, would bring the contract to an end or discharge the contract. The learned master should have continued his analysis to find that the respondent's arguments concerning the sanctions and their effect on its obligations as "prevailing circumstances" (suggesting some future change), meant that the respondent could not rely on the doctrine of frustration to excuse its obligation to pay to the appellant the monies in the two bank accounts.

The Deposit Account

- [33] As mentioned earlier, the respondent, in its defence, stated that the sums in the Deposit Account would only be available to the appellant upon the date of maturity provided that the appellant cancelled the automatic renewal of the Deposit Account in accordance with the respondent's Terms and Conditions governing Certificates of Deposits. The question of whether there was any automatic renewal of the Deposit Account is not a matter that can be determined on a summary judgment application. Moreover, the appellant has not contradicted the respondent's defence that the appellant has not complied with the contractual method of closing the Deposit Account. This is a matter that must be determined at trial.

Request for Documents

- [34] The respondent raised the non-compliance by the appellant of the respondent's request for documents to enable the respondent to comply with the requirements of the ONDCP. The respondent's reliance on clause 38 is a matter for trial to determine

whether any alleged non-compliance by the appellant is a condition precedent to the respondent's obligation to pay over the monies in the two bank accounts to the appellant once a demand is properly made. The question whether there exists a relationship between the return of the funds to the appellant and the requests for information on the two bank accounts and when this information was requested are all matters that cannot be resolved in this summary judgment application. These are matters that can only be determined at trial.

- [35] In conclusion on the first issue, the appellant is not entitled to the return of its funds held in both the Current Account and Deposit Account as soon as possible because there is a live issue concerning the request for documents that can only be determined at trial. Additionally, in respect of the Deposit Account, the issue of whether it was renewed or not in accordance with its terms cannot be determined on a summary judgment application, but at any substantive trial.

The Third Issue

- [36] It follows logically that since the appellant is not to be granted the declaration that it is entitled to the return of its funds held in both the Current Account and the Deposit Account as soon as possible in answer to the first issue, the appellant is likewise not entitled to an order that the funds held in the Current Account and the Deposit Account should be paid to the appellant by the respondent.

Conclusion

- [37] In his written judgment, the learned master concluded that, first, the affidavit evidence filed in support and in opposition to the appellant's application for summary judgment was not sufficient to make any assessment of the strength or weakness of the respondent's defence; and, second, the respondent had mounted a defence of *force majeure* or alternatively, frustration, where if the court made findings in its favour, it would affect the respondent's obligations under the contract, or in the case of frustration, discharge the obligations under the contract and bring the contract to an end. In respect of the first point, the obligation always rested on the respondent

to file sufficient evidence to allow the court to assess its case in determining whether to grant summary judgment. The respondent had the opportunity to file evidence in response to the application for summary judgment, and they did do so. The application for summary judgment required the learned master to determine the answers to the issues as outlined in the application for summary judgment based on all the evidence before him, including the defence and evidence filed by the respondent in response to the summary judgment application. The second point made by the learned master cannot be deployed to refuse the appellant relief because the respondent is not able to rely on any alleged *force majeure* in clause 19 or the doctrine of frustration to excuse the non-performance of its contractual obligations to the appellant. This would simply be the effect of a successful application for summary judgment.

[38] The respondent's reliance on the part of clause 30 which states that the position should be settled "as quickly as possible" seeks to turn the clause on its head. The respondent submits that that part of clause 30 should be read as only requiring the respondent to "settle payment in the shortest amount of time that circumstances permit." This would indeed be a strained reading of that part of clause 30 which relates to the time within which the position should be settled rather than any circumstances surrounding the actual settlement itself.

[39] Considering the above, the appellant is only entitled to a declaration that by an action claiming funds held in both of its accounts with the respondent, it has given notice of its desire to terminate its relationship with the respondent, thereby satisfying the requirements for the engagement of clause 30 of the General Terms and Conditions between the parties. However, since there are triable issues in relation to the request by the respondent for the appellant to submit certain documents and whether the Deposit Account was automatically renewed, the appellant is not entitled to the declaration that it is entitled to the return of its funds held in both the Current Account and the Deposit Account as soon as possible.

Disposition

[40] Accordingly, I would allow the appeal in part against the decision of the learned master, set aside the orders made at sub-paragraphs 1-3 of paragraph 40 of the judgment of the learned master and substitute the following:

- (1) In respect of the first issue, the application for summary judgment in respect of the: (1) Current Account is allowed; and (2) Deposit Account is dismissed.
- (2) The application for summary judgment on the Second and Third Issues is dismissed.
- (3) The respondent is entitled to 75% of its costs (and the appellant 25% of its costs) in the appeal to be assessed if not agreed within 21 days of the date of this judgment.
- (4) The matter shall proceed in accordance with **Civil Procedure Rules (Revised Edition) 2023**.

[41] I am grateful for the assistance provided by learned counsel.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Esco L. Henry
Justice of Appeal

By the Court

Chief Registrar