

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVAP2023/0002

BETWEEN:

**[1] CANADIAN BANK NOTE COMPANY LIMITED
[2] CBN ST. LUCIA INC.**

Appellants

and

**[1] CAGE ST. LUCIA LTD.
[2] THE NATIONAL LOTTERIES AUTHORITY**

Respondents

Before:

The Hon. Mde. Gertel Thom
The Hon. Mr. Trevor Ward
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Renee T. St. Rose with her Ms. Shari-Ann Walker and Ms. Marie-Ange Symmonds for the Appellants
Mr. Garth Patterson KC with him Mr. Dexter Theodore KC for the 1st Respondent
Mr. Fidel Michel for the 2nd Respondent.

2023: July 27;
October 5.

**Re-Issued:
2023: October 9.**

Civil appeal – Adducing fresh evidence – Inducement of breach of contract – Trial judge’s grant of ex parte interim injunction – Whether Cage guilty of nondisclosure and/or unfair presentation in obtaining the injunction on an ex parte basis – Trial judge’s assessment of serious issues to be tried and damages as an adequate remedy – Whether the learned judge erred in the exercise of his discretion by continuing the injunction

On 29th November 2022, the learned trial judge granted an ex parte interim injunction restraining the appellants, Canadian Bank Note Co. Ltd. and CBN Saint Lucia Inc. (together “CBN”), their servants, agents or otherwise from inducing or procuring or continuing to induce or procure, breaches of contract between the first respondent, Cage St. Lucia Ltd., (“Cage”) and the second respondent, the National Lotteries Authority, (“NLA”) and from carrying on the operation of video lottery terminals or games in Saint Lucia until the hearing and determination of the claim in the lower court or further order of the court.

On 15th December 2022 the learned trial judge heard full arguments from counsel representing all the parties. At the conclusion of the hearing the learned trial judge reserved his decision and ordered that the injunction remain in force in the interim. The learned trial judge duly delivered his decision on 6th January 2023, continuing the injunction until the hearing and determination of the claim or further order of the court.

The appellants appealed against the learned judge’s order continuing the injunction. The following issues arise for determination on appeal: (i) Nondisclosure by Cage in obtaining the injunction on an ex parte basis, (ii) Whether CBN induced the NLA to breach its contract with Cage which includes the issue of exclusivity in relation to the CBN Contract and the Cage Contract, (iii) Damages as an adequate remedy, (iv) The judge’s reliance on an affidavit filed by Mr. Maragh on the morning of the inter partes hearing, (v) The judge’s exercise of discretion in continuing the injunction, and (vi) Costs.

Held: Allowing the appeal, setting aside the orders of the learned trial judge made on 6th January 2023 and ordering that Cage shall pay CBN’s costs of the appeal and in the court below to be assessed if not agreed within 21 days, that:

1. The test for considering whether fresh evidence should be allowed at the hearing of an appeal consists of three stages: (i) it must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial in the lower court, (ii) the evidence is such that if admitted would probably have an important influence on the result of the appeal, though it need not be decisive, and (iii) the evidence must be apparently credible though it need not be incontrovertible. The appellants’ application for permission to adduce fresh evidence satisfies the three limbs of the test as the evidence could not have been obtained with reasonable diligence before the inter partes hearing in December 2022, parts of the new evidence had an important influence on the appeal and there was nothing to suggest that the new evidence was not credible. The new evidence listed in paragraph 4 of Mr. Gooding’s affidavit in support of the application is admitted with the exception of items (i), (v) and (xv).

Ladd v Marshall [1954] 3 All ER 745 followed; **Guy Joseph v The Constituency Boundaries Commission et al** SLUHCVP2015/0013 (delivered 1st October 2015, unreported) followed.

2. The duty of full and frank disclosure on an ex parte application includes making proper inquiries, disclosing all material facts whether for or against the applicant, and presenting the application objectively and fairly which includes presenting both sides of the argument. The duty is owed to the court, not the attorney's former client. Generally, where there is a breach of this duty by the attorney, the court will not allow his client to keep the benefit of the ex parte order regardless of the state of the client's knowledge of the nondisclosure or if he contributed to the breach in any way.

Brink's-MAT Ltd v Elcombe and others [1988] 3 All ER 188 followed; **Boreh v Republic of Djibouti** [2015] EWHC 769 (Comm) and **Hytec Information Systems Ltd v Coventry City Council** [1997] 1 WLR 1666 followed; **Halifax Mortgage Services Ltd v Stepsky and another** [1996] Ch. 207 distinguished.

3. An attorney should withdraw from representing a new client as soon as it becomes apparent to him that he has information acquired from representing a former client that is relevant and material to the ex parte application on which he is now appearing. There was a material nondisclosure and/or an unfair presentation by Mr. Mark Maragh and Cage when Cage applied for the ex parte injunction and did not disclose that Mr. Maragh, who was appearing for Cage as a junior counsel, had previously acted for the NLA in connection with the disputed matters, and that he had information relating to these matters. When there is such a finding, the ex parte injunction should be set aside and not be re-granted unless there are special circumstances. There are no special circumstances in this case.

Behbehani and Others v Salem and Others [1989] 1 WLR 723 followed; **Alexander Tuguchev v Vitaly Orlov and others (No 2)** [2019] EWHC 2031 (Comm) followed; **Ti Cadeau v Sampson Samuel** DOMHCV2015/0257 (delivered 1st July 2016, unreported) considered;

4. In order to succeed in an application for an interim injunction, the applicant must satisfy the court that: (i) there is a serious issue to be tried, (ii) damages will not be an adequate remedy and (iii) the balance of convenience favours the grant of an interim injunction pending the trial of the action. On the assessment of the pleadings and evidence, the Court agreed with the learned trial judge that there were serious issues to be tried. This satisfies the first limb of the test. The Court however disagreed with the judge's finding that the losses to Cage would be immeasurable and irreparable. The issue of quantification would not arise until the end of the trial when the party's rights have been determined. By then there would likely be evidence from Cage about the losses it has suffered and will continue to suffer as a result of the refusal to continue or re-grant the injunction. The evidence of Mr. Gooding includes a method of quantifying the potential losses as and when the need arises. The potential losses to Cage are quantifiable and therefore damages would be an adequate remedy. Cage has failed to satisfy the second principle of the American Cyanamid test, which is another reason for discharging the injunction.

JUDGMENT

- [1] **WEBSTER JA (AG):** On 29th November 2022, the learned trial judge (“the Judge”) granted an ex parte interim injunction restraining the appellants, Canadian Bank Note Co Ltd and CBN Saint Lucia Inc. (together “CBN”), their servants or agents or otherwise from inducing or procuring or continuing to induce or procure, breaches of contract between the first respondent, Cage St. Lucia Ltd. (“Cage”), and the second respondent, the National Lotteries Authority (“NLA”), and from carrying on the operation of video lottery terminals or games in Saint Lucia until the hearing and determination of the claim in the lower court or further order of the court (“the Injunction”). The return date for the Injunction was set for 15th December 2022 when the judge heard full arguments from counsel representing all the parties. At the conclusion of the hearing the Judge reserved his decision and ordered that the Injunction remain in force in the meantime. The Judge delivered his decision on 6th January 2023, continuing the Injunction until the hearing and determination of the claim or further order of the court. CBN appealed against the Judge’s order continuing the Injunction. The appeal was heard by this Court on 27th July 2023, and this is the Court’s decision.

Background

- [2] It is necessary to set out the factual and legal background to the Injunction to fully appreciate the challenge to the Judge’s orders that has been launched by CBN.
- [3] The NLA is a body corporate established by the National Lotteries Authority Act (“the Act”).¹ Section 4(2)(a) authorises the NLA to “organise, provide, conduct and control the operation of lotteries in or outside Saint Lucia...”. Section 5 empowers

¹ Cap 13.20 Revised Laws of Saint Lucia, 2013.

the NLA to, “[E]nter into management contracts with any other entity to conduct lottery operations in Saint Lucia.” In August 2004 the NLA and CBN signed a written contract for the management and operation of all lottery games in Saint Lucia (the “CBN Contract”) for an initial term of approximately twenty years ending on 31st December 2024. Clause 6.5 of the CBN Contract provides that:

“During the Term of this Agreement and during every Renewal Term NLA shall not conduct or license or permit any company, firm, corporation, entity, charity or person other than CBNS, CBN or one of its subsidiaries to operate, manage or conduct Lottery Games in St. Lucia ...”

CBN contends that by this clause, the CBN Contract as a whole as amended from time to time, and the circumstances that prevailed up to and including 2010 gave it the exclusive right to operate all lottery games in Saint Lucia.

- [4] By the year 2010, the NLA and the Government of Saint Lucia were desirous of expanding the lottery games system in Saint Lucia by introducing a system of online video lottery terminals and associated games (“VLT’s”). To do this they entertained proposals from CBN, the existing provider of lottery games, and Cage which was desirous of entering the market to provide this new type of service. The NLA eventually decided to offer the right to establish VLT’s to Cage and by a written contract dated 12th August 2010 granted Cage the authority to design, install, implement, administer, deploy and operate on behalf of the NLA, “a route-based network of up to 1,000 video lottery terminals” in Saint Lucia “on an exclusive basis”² (“the Cage Contract”). Clause 1.2 of the Cage Contract provides that:

“[Cage] shall have exclusive authority to design, install, implement, administer, deploy and operate the Online Video Lottery System. The NLA shall not contract for or purchase other online services, materials or equipment for use as part of, or adjunct to, the Online Video Lottery System or establish another Online Video Lottery processing system during the original ten (10) year Term of this Professional Services Contract or any extensions or renewals as contemplated hereunder without the express prior approval, in writing, of [Cage].”³

² Hearing Bundle Part 3, e-page 70: penultimate recital of the Cage Contract.

³ Hearing Bundle Part 3, e-page 76.

- [5] The intention of the parties to give Cage exclusivity in the supply and operation of the VLT's is apparent from the two passages cited above and from other references to exclusivity throughout the Cage Contract. CBN does not agree that Cage has an exclusive right to operate VLT's. CBN's position is that it has the exclusive right to operate all lottery systems, including VLT's, in Saint Lucia. In an apparent attempt to address the tension between the CBN Contract and the Cage Contract on the issue of exclusivity to operate lottery systems in Saint Lucia, CBN and the NLA signed an amendment to the CBN Contract in or about 25th March 2010 ("the 5th Amendment") which recited that:

"... the NLA has entered into an agreement with [Cage] dated 12th day of August, 2010 authorising Cage to establish a route-based network of up to 1000 Video Lottery Terminals in Saint Lucia (the Cage agreement) which impacts the exclusivity provisions in the original agreement."

The 5th Amendment also amended the CBN Contract by deleting clause 6.5 and substituting the following:

"With the singular exception of the Cage Agreement, or some substitute agreement of identical terms, during the Term of this Agreement and during every Renewal Term NLA shall not conduct or license or permit any company, firm, corporation, entity, charity or person other than CBNS, CBN or one of its subsidiaries to operate, manage or conduct Lottery Games in St. Lucia..."

The issue of exclusivity appears to have been addressed by CBN agreeing to a carve out for Cage to establish and operate the VLT systems contemplated by the Cage Agreement.

- [6] The lottery business in Saint Lucia continued on this modified basis until 2018 when CBN decided to expand its operations by opening and operating entertainment centres with VLT's. To this end they presented a proposal to the NLA dated 8th June 2018 outlining the details of the proposed changes to their operations (the "CBN Proposal"). I will have more to say about the CBN Proposal when I come to deal with the application to adduce fresh evidence and the issue of nondisclosure by Cage. There is no evidence that the CBN Proposal was approved by the NLA but

the position of CBN is that they were not applying for approval; what they were proposing to do fell within the terms of the 2004 CBN Contract and they were simply advising the NLA of their plans and setting out the potential financial implications of the new operation.

- [7] In October 2019 and July 2021, the Cage Contract was amended to increase the scope of the services that it could offer. The new services included virtual sports, sports betting and mobile gaming devices. The amendment also included a restriction on the NLA against offering similar services to any other person during the 10-year term of the original Cage Contract and any extension of the said contract. The amendments were made by the NLA and Cage without reference to CBN which CBN contends is a breach of the 2004 CBN Contract and the 5th Amendment.
- [8] Between December 2021 and March 2022 CBN imported into Saint Lucia a quantity of VLT's and other electronic games and devices for the proposed entertainment centres. They also acquired leasehold premises on Brazil Street in Castries to operate the first entertainment centre, developed software for the games and generally made preparations to open the first entertainment centre. A soft opening was scheduled for 30th November 2022 with the grand opening on 2nd December 2022.
- [9] On 28th November 2022 Cage applied ex parte for the Injunction. The Judge granted the Injunction thereby preventing the opening of the first entertainment centre. The inter partes hearing was held on 15th December 2022 when Cage, CBN and the NLA were represented by counsel. The Judge delivered his decision on 6th January 2023 finding that:

(a) there was a serious issue to be tried;

- (b) damages was not an adequate remedy because the damages that Cage would suffer is immeasurable and CBN would suffer minimal damages by the continuation of the Injunction;
- (c) the balance of convenience favours Cage; and
- (d) costs of the application to Cage.

[10] CBN appealed against the Judge's decision. The notice of appeal lists 12 grounds of appeal. With no disrespect to the drafting of the grounds of appeal I extract the following issues for determination on the appeal:

- (i) nondisclosure by Cage in obtaining the Injunction on an ex parte basis – grounds 5 and 7;
- (ii) whether CBN induced the NLA to breach its contract with Cage which includes considering the issue of exclusivity in relation to the CBN Contract and the Cage Contract – grounds 1 and 3;
- (iii) damages as an adequate remedy – ground 4;
- (iv) the Judge's reliance on an affidavit filed by Mr. Maragh on the morning of the inter partes hearing – ground 6;
- (v) the Judge's exercise of discretion in continuing the Injunction – grounds 9, 10, 11 and 12; and
- (vi) costs – ground 8.

Before analysing the issues in the appeal, I will make brief comments on the role of an appellate court in reviewing the Judge's decision and then deal with the application by CBN for permission to adduce fresh evidence in the appeal.

Appellate review

- [11] The grant or refusal of an interim injunction is an exercise of discretion by the judge hearing the application. The leading authority in the Eastern Caribbean on the approach of an appellate court to reviewing decisions based on the exercise of discretion by a trial judge is **Dufour and Others v Helenair Corporation Ltd and Others**,⁴ where Chief Justice Sir Vincent Floissac laid down the guiding principles in a dictum that has been cited on numerous occasions by this Court. He said:

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and consideration; and (2) that, as a result of the error or degree of the error, in principle the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

In short, an appellate court should not interfere with the decision of the trial judge unless the judge erred in principle and as a result, his or her decision exceeded the generous ambit of reasonable disagreement or was blatantly wrong. In the absence of this kind of error, an appellate court should not substitute its view for that of the judge because its members would have exercised discretion differently. There is no place for judicial activism when reviewing the exercise of discretion by the trial judge.

- [12] I will bear these principles in mind when considering the issues raised by the grounds of appeal.

The fresh evidence application

- [13] On 16th May 2023 CBN applied for permission to adduce and rely on fresh evidence on the hearing of the appeal. The application is supported by the affidavit of Stuart Gooding, an officer of CBN, filed on 16th May 2023. It exhibits the documents sought

⁴ (1996) 52 WIR 188 at pp. 190-191.

to be admitted as fresh evidence. The fresh evidence consists of documents in the following categories:

- (a) letters showing that CBN had an exclusive contract for providing lottery games in Saint Lucia and that Cage was aware of CBN's exclusivity even before it signed the Cage Contract in 2010;
- (b) minutes of meetings of the board of the NLA showing that Mr. Mark Maragh who appeared for Cage at the hearing of the ex parte application for the Injunction represented the NLA in relation to the issues in the claim and therefore had a conflict of interest representing Cage;
- (c) email correspondence between Mr. Maragh and the NLA in connection with his representation of the NLA during the period December 2018 to February 2021;
- (d) cause lists for sittings of the High Court in Saint Lucia in June and July 2016; and
- (e) photographs showing that Cage is operating an entertainment centre.

[14] Leading counsel for CBN, Ms. Renee T. St. Rose, outlined in her written and oral submissions the test in **Ladd v Marshall**⁵ for considering whether fresh evidence should be allowed at the hearing of an appeal. The test is in three stages or limbs: (i) it must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial in the lower court; (ii) the evidence is such that if admitted it would probably have an important influence on the result of the appeal, though it need not be decisive; and (iii) the evidence must be apparently credible though it need not be incontrovertible.

⁵ [1954] 3 All ER 745.

- [15] Ms. St. Rose also referred to the case of **Guy Joseph v The Constituency Boundaries Commission et al**⁶ and reminded the Court that the principles in **Ladd v Marshall** are relaxed when the Court is considering interlocutory appeals (as in this case) when the issues are yet to be determined on the merits.
- [16] Learned counsel for Cage, Mr. Garth Patterson, opposed the application on the grounds that the documents could have been obtained earlier with reasonable diligence and that they would not have an important influence on the result of the appeal. The Court heard full submissions from counsel and reserved its decision on the application until the delivery of the decision on the appeal. In ruling on the application at this stage, the Court has had the benefit of considering the new evidence in the context of the appeal.
- [17] The background to the application is set out in Mr. Gooding's affidavit. He deposed that several days after the inter partes hearing and the delivery of the Judge's decision continuing the Injunction on 6th January 2023, CBN became aware of a letter dated 23rd January 2023 from the NLA to Mr. Maragh enclosing a draft affidavit which exhibited the documents that CBN now seek to admit as fresh evidence (with the exception of the cause lists). However, CBN did not have sight of the documents until 3rd March 2023, when the NLA filed its defence to Cage's claim with documents attached to the defence. It was only then that CBN had copies of the documents and became aware of their contents. The documents that CBN seeks to admit as fresh evidence are listed as items (i) – (xv) of paragraph 4 of Mr. Gooding's affidavit. I will use this numbering system for dealing with documents. Item 4(v) (the cause lists) was not attached to the NLA defence.
- [18] Ms. St. Rose submitted that the application complied with the first limb of the **Ladd v Marshall** test because CBN was not aware of the documents at the time of the hearing in December 2022 and only had access to them in March 2023 when Cage

⁶ SLUHCVP2015/0013 (delivered 1st October 2015, unreported).

filed its defence, which was long after the inter partes hearing. There is no evidence to seriously contradict this position and I accept her submission that the fresh evidence could not have been obtained with reasonable diligence before the hearing in December 2022. In fact, CBN did not become aware of the existence of the documents until the end of January 2023 and saw them for the first time in March 2023. This is sufficient to satisfy the first limb of the test in **Ladd v Marshall** that the documents could not have been obtained with reasonable diligence before the inter partes hearing in December 2022.

[19] The second limb of the **Ladd v Marshall** test is that the fresh evidence is such that if admitted it would probably have an important influence on the result of the appeal, though it need not be decisive. Applying this limb of the test I find that:

- (a) Item (i) is listed as a letter dated 16th September 2009 from Cage to the NLA. I did not find a letter with these details but there is a letter of intent dated 19th September 2009 from the then Prime Minister of Saint Lucia to Cage that is exhibited to Mr. Gooding's affidavit which refers to Cage's proposal to be granted the exclusive right to manage and operate a VLT route system. This letter did not have a significant influence on the result of the appeal and I would refuse its admission.
- (b) Item (iii) is an opinion dated 29th January 2010 from Mr. Nicholas John to Cage regarding, among other things, the interpretation of the 2004 CBN Contract. Mr. John advised Cage, among other things, that the CBN Contract gave CBN the exclusive right to operate lottery games in Saint Lucia throughout the term of the Contract and the consequences of the NLA granting similar rights to any other person. This opinion had an important influence on the appeal and I would admit it as fresh evidence.

- (c) The minutes of meetings of the board of the NLA listed as items (ii), (vi), (vii), (viii), (ix) and (xiv) in varying degrees go to the issues of exclusivity of the contracts and Mr. Maragh's role in the proceedings and had an important influence on these issues in the appeal. I would admit all of these documents.
- (d) The email correspondence listed as items (x) – (xiii) had an important influence on the appeal on the issue of nondisclosure and I would admit these documents.
- (e) The cause lists listed as item (v) show that Mr. Maragh's firm, Amicus Legal, was listed as appearing for Cage in various matters in the High Court in 2016. There is insufficient evidence to suggest that this was improper or created a conflict of interest on the part of Mr. Maragh and the cause lists did not have an important influence on the appeal. I would not allow the cause lists.
- (f) Finally, I would not admit the photographs showing that Cage is operating an entertainment centre at Baywalk Mall. The fact that Cage has opened and is operating an entertainment centre is not disputed and the pictures would not assist in resolving any issue relating to the opening of the centre.

[20] The third element of the **Ladd v Marshall** test is satisfied in this case. There is no evidence to suggest that the evidence to be admitted is not credible, even if it is not incontrovertible.

[21] To sum up, with the exception of items: (i) (Government's letter of intent), (v) (cause lists) and (xv) (photographs), I would admit the evidence listed in paragraph 4 of Mr. Gooding's affidavit as fresh evidence in the appeal.

Interim injunctions

[22] An injunction is an equitable remedy granted by the court ordering a person to do or not to do something. Injunctions can be granted before trial on an interim basis pursuant to the court's equitable jurisdiction and in accordance with part 17 of the **Civil Procedure Rules (Revised Edition) 2023**.

[23] The principles for granting an interim injunction are well known and are taken from the case of **American Cyanamid Co v Ethicon Ltd**.⁷ The applicant must satisfy the court that: (1) there is a serious issue to be tried; (2) that damages will not be an adequate remedy; and (3) the balance of convenience favours the grant of an interim injunction pending the trial of the action. I will deal with the issue of whether Cage satisfied these principles in this case but first I must deal with the preliminary issue of whether Cage was justified in applying for the interim injunction ex parte and in doing so, whether it complied with the rules relating to full and frank disclosure on an ex parte application.

Proceeding ex parte and nondisclosures by Cage – Grounds 5 and 7

[24] A claimant who applies for an interim injunction on an ex parte basis is asking the court to exercise two very important privileges that go against the normal practice of the courts. Firstly, he is asking the court to grant an order that usually has an important effect on the defendant and/or his property and/or his business before trial and before the issues are dealt with on the merits. Secondly, he is asking the court to grant this extraordinary relief against a person who is not before the court and therefore the court will be acting without the benefit of hearing from the person whose activities are to be restrained by the court's interim order. It is for these reasons that an application for an interim injunction without notice should be the rare exception and not the rule, and an applicant should proceed ex parte only if giving notice to the defendant will have the effect of defeating the purpose of the injunction

⁷ [1975] UKHL 1.

or if there is no time to give notice before the threatened act.⁸ In this case, the judge exercised his discretion by allowing the matter to proceed ex parte (and there is no appeal against his decision to proceed in this way).

[25] A good starting place for the principles relating to nondisclosure on an ex parte application for an interim injunction is **Commercial Injunctions** by **Stephen Gee KC** where the learned author states:

“Any applicant to the court for relief without notice must act in the utmost good faith and disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, and if so what terms. This is a general principle which applies to all applications for relief to be granted on an application made without notice, or on short notice...

It applies not just to disclosure of the facts but to absolutely anything which the judge should consider. It is a part of the duty of an applicant for a without notice relief to present the application fairly.”⁹

[26] Ms. St. Rose elaborated on the principles to be applied and observed in paragraph 94 of her written submissions, referring to the well-known judgment of Gibson LJ in **Brink’s-MAT Ltd v Elcombe and others**,¹⁰ that:

- (a) there must be full and fair disclosure of all material facts;
- (b) materiality is to be decided by the court not by the applicant or their legal advisers;
- (c) proper inquiries must be made before making the application, and the duty of disclosure applies not only to the facts known to the applicant but to those which they would have known if they made proper inquiries;

⁸ National Commercial Bank Jamaica Limited v Olint Corporation Limited [2009] UKPC 16 per Lord Hoffman at paragraph 13.

⁹ Steven Gee QC, *Commercial Injunctions* (6th Edn, Sweet & Maxwell 2016) para 9-0016.

¹⁰ [1988] 3 All ER 188.

- (d) the extent of the inquiries which are necessary must depend on the nature of the case, the probable effect of the order on the respondent, the degree of legitimate urgency and the time available for making inquiries;
- (e) the court will be astute to ensure the applicant is deprived of any advantage they may have derived from breach of duty;
- (f) whether the undisclosed fact is sufficiently material to justify immediate discharge of the order without examination of the merits depends on its importance; the fact that nondisclosure was innocent in the sense that the fact was not known to the applicant or not perceived to be relevant, is an important consideration, but not decisive, because of the need to make proper inquiries; and
- (g) there is a discretion to continue the order, or to grant a new one on terms, notwithstanding proof of material nondisclosure. The discretion however is to be exercised sparingly.

[27] An additional principle is that of fairness in the presentation of the application. In **Alexander Tuguchev v Vitaly Orlov and others (No 2)**,¹¹ Carr J listed fairness in the presentation of the application as one of the requirements of the duty of disclosure on an ex parte. The learned judge said:

“Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents.”

Stephen Gee KC made the same point in the passage quoted above at paragraph 25.

¹¹ [2019] EWHC 2031 (Comm) at 7(iii).

[28] In summary the duty of full and frank disclosure on an ex parte application includes making proper inquiries, disclosing all material whether for or against the applicant, and presenting the application objectively and fairly which includes presenting both sides of the argument. I will apply these principles when considering the allegation of nondisclosure by Cage and/or its counsel.

Background to the allegation of nondisclosure

[29] The allegations of nondisclosure against Cage concern the role of its junior counsel, Mr. Mark Maragh, in the proceedings. Mr. Maragh is an attorney of 24 years standing practising in Saint Lucia. He is the managing partner of the firm Amicus Legal which represents Cage in this matter. The allegation against Mr. Maragh is that he represented the NLA from at least June 2018 when CBN submitted the CBN Proposal to the NLA and he was aware of the details of their intention to open entertainment centres and use VLT's. Nonetheless, he appeared as junior counsel at the hearing of the ex parte application for the Injunction on 28th November 2022 when Cage was taking steps to prevent CBN from opening the first entertainment centre on Brazil Street. CBN submitted that when Mr. Maragh appeared for Cage he had a clear conflict of interest and was duty-bound to advise the court of his representation of the NLA and disclose to the court the information that he had acquired in the course of such representation.

[30] Mr. Maragh's response to the allegation of conflict of interest and nondisclosure was to file an affidavit at 8:30 on the morning of the hearing of the inter partes application on 15th December 2022, in which he deposed that Mr. Gooding was gravely mistaken when he said in his affidavit that Mr. Maragh represented the NLA on the "issue", that Mr. Maragh would have known CBN's position, and that Mr. Maragh deliberately and intentionally misled the court by failing to disclose that information.¹² Mr. Maragh continued, "I have never been requested to advise, nor have I advised, the [NLA] on the legal issues arising in respect of [CBN's] stated

¹² Hearing Bundle Part 3, e-page 425 at paragraph 9.

intention of operating and conducting video lottery terminals and associated lottery games.”¹³ In light of the allegation of conflict of interest and nondisclosure, Mr. Maragh sought leave in paragraph 10 of the affidavit to withdraw from the proceedings. He exhibited the CBN Proposal as exhibit “MDM 1” that was sent to him by the NLA on 26th June 2018 and stated that his opinion was not sought or provided and no work was done in relation to the CBN Proposal, and there was no further communication with the NLA on the matter.

[31] It is apparent that the application to adduce fresh evidence was brought to Mr. Maragh’s attention. He responded by filing his own affidavit on 24th May 2023 which he said was in response to Mr. Gooding’s affidavit in support of the fresh evidence application. In the affidavit, he confirmed that he had not given the NLA any opinion or advice in relation to the subject matter of the dispute (paragraph 4(i)); that he recalls that he was told that CBN had VLT machines in Saint Lucia and expressed alarm that they were housed at the offices of the NLA (paragraph 4(iii)); and that he was forced to disclose the CBN Proposal in order to set the record straight in the face of incorrect statements made by Mr. Gooding and in deference to his overriding obligation as an officer of the court (paragraph 4(iv)).

[32] Ms. St. Rose relied on the evidence in the proceedings, including the fresh evidence, to refute statements made by Mr. Maragh in his affidavit. The email correspondence shows that from as early as June 2018 Mr. Maragh was advising the NLA on matters related to the issues in this appeal:

- (a) On 26th June 2018, the NLA sent a copy of the CBN Proposal to Mr. Maragh “for his perusal”. This is the email that is exhibited to Mr. Maragh’s affidavit as “MDM 1”.¹⁴

¹³ *ibid.*

¹⁴ Exhibit “MDM 1” to the affidavit of Mark Maragh filed 15th December 2022.

- (b) On 11th March 2019 Ms. Mellisa Augustin, general manager of the NLA, sent an email to Mr. Maragh captioned “Legal Opinion on Proposals to NLA” and stating “Good day Mark, As per our discussion earlier, I await the legal opinion from you, by tomorrow March 12th, 2019, on the proposals submitted to the NLA from its partners CAGE and CBN. This matter has been delayed for some time now, so [y]our assistance will be greatly appreciated.”¹⁵
- (c) On 2nd October 2019, at 12 noon the chairman of the NLA, Mr. Caron Serieux, sent Mr. Maragh an email captioned “Opinion – CBN/CAGE Contracts” and continued, “Hi Mark, The Board would like you to present an opinion on the abovementioned contracts to include any possible conflicts regarding “exclusivity” as well as other potential issues which may be inherent. The opinion should also consider possible defense (sic) in the event that both entities were to enter the VLT market and ensuing litigation.”¹⁶
- (d) Mr. Maragh replied to the chairman at 12:04 pm on 2nd October 2019, “Just to ensure that I have all current contracts of Cage and CBN, would you be able to have all the relevant contracts and any relevant correspondence and cabinet conclusions relating to same sent to me as soon as possible?”¹⁷
- (e) On 2nd October 2021, Ms. Augustin emailed Mr. Maragh, “Good day Mark, As per a previous conversation with you, based on our current agreements with CBN and CAGE, is it at all possible for another organization to operate other types of lotteries in St. Lucia?”¹⁸

¹⁵ Exhibit “SG 10” to the affidavit of Stuart Gooding filed 16th May 2023.

¹⁶ Exhibit “SG 11” to the affidavit of Stuart Gooding filed 16th May 2023.

¹⁷ Exhibit “SG 12” to the affidavit of Stuart Gooding filed 16th May 2023.

¹⁸ Exhibit “SG 13” to the affidavit of Stuart Gooding filed 16th May 2023.

[33] Ms. St. Rose also relied on the minutes of the meetings of the NLA to show the extent of Mr. Maragh's representation of the NLA and the knowledge that he acquired about the CBN Proposal as a result of such representation. The relevant extracts from the minutes include:

- (a) At the meeting held on 19th July 2018 it was recorded under the heading "Cage" that, "Deputy Director Charles stated that in a discussion with our Legal Counsel Mark Marahj, (sic) Cage has exclusive rights to operate the VLT's and therefore CBN could not introduce VLT's. However, Board members disagreed with that conclusion and it was determined that a meeting be convened with Mr. Marahj (sic) to discuss further."¹⁹
- (b) At the meeting held on 1st November 2018 it was recorded under the heading, "CBN's request to operate VLT's" that, "Based on discussions held with Mr. Mark Maragh, the NLA may agree to the introduction of VLT's and consider proposing amending the existing contract."²⁰
- (c) At a meeting held on 20th December 2018 under the heading, "CBN's Request to Operate Video Lottery Terminals" it was recorded that, "The NLA did not officially agree for CBN to bring in VLT's, so in an effort to demonstrate this, Mr. Emile agreed to respond to CBN's last email on the VLT update, noting that the NLA was awaiting advice from Mr. Maragh prior to confirming/approving their request to bring in VLT's."²¹

[34] The evidence supports CBN's position that Mr. Maragh represented the NLA and his advice was sought on matters directly related to the issues in dispute in this

¹⁹ Exhibit "SG 6" to the affidavit of Stuart Gooding filed on 16th May 2023.

²⁰ Exhibits "SG 7" to the affidavit of Stuart Gooding filed on 16th May 2023.

²¹ Exhibits "SG 8" to the affidavit of Stuart Gooding filed on 16th May 2023.

appeal including the central issues of the interpretation of the CBN Contract and the Cage Contract, and the exclusivity or lack thereof created by these contracts. Mr. Maragh would also have had information about CBN's plans to open entertainment centres with VLT's and that CBN had imported VLT's and related equipment. This is information that was directly relevant and material to the issues in dispute between Cage and CBN and prima facie should have been disclosed at the ex parte hearing for the Injunction. However, Mr. Maragh was in a position of conflict where he was under a duty of confidentiality to his former client, the NLA, not to disclose information that had come to his attention as a result of representing the Authority, and his duty to the court on an ex parte application to disclose all relevant and material information in his possession.

- [35] Leading counsel for Cage, Mr. Garth Patterson KC, did not dispute that Mr. Maragh was in a position of conflict but submitted that there are at least three reasons why Mr. Maragh was not obliged or duty bound to disclose the information: (1) he owed a duty to his former client (the NLA) not to disclose information that came to him in confidence while representing the NLA, (2) in any case the information was not material in that if it had been disclosed it would not have affected the Judge's decision to grant the Injunction and (3) he had an obligation as an officer of the court to correct the allegation of misconduct against him by Mr. Gooding in his affidavit filed on 9th December 2022. I will deal with these three points in turn.

The duty of confidentiality

- [36] The basic principle that an attorney is under a duty not to disclose confidential information imparted to him by his client is not in doubt. The principle applies with equal force where the attorney/client relationship has ended and the attorney is now representing another client in connection with the same matter. The information acquired from representing the first client cannot be used in the representation of the new client except with the express consent of the first client. The law and the rules relating to an attorney's duty to maintain the confidential information relating

to his client, present or former, is clearly set out in the judgment of Ramdhani J in **Guy Joseph v The Constituency Boundaries Commission and Others**.²² These principles are not seriously disputed by Mr. Patterson KC and I will not repeat them in this judgment.

- [37] Mr. Patterson's primary submission on the issue of confidentiality is that the information gained from representing a former client cannot be attributed to the new client. Applied to this case, the information that came to Mr. Maragh's attention while representing the NLA cannot be attributed to his new client Cage, and Cage was not under an obligation to disclose this confidential information of which it was not aware at the ex parte hearing. In other words, Mr. Maragh was seeking to eat the proverbial cake and still have it by being able to appear at the ex parte hearing armed with information about CBN's business gained from representing the NLA, and yet having a solid basis for not disclosing the information. In support of Cage's position Mr. Patterson KC relied on the decision of Edward Nugee QC sitting as a deputy High Court judge of the Chancery Division in **Halifax Mortgage Services Ltd v Stepsky and another**.²³ The principle in **Halifax** is not in doubt. A brief summary of the facts is that the same firm of solicitors represented both the borrowers (who were husband and wife) and a bank in a mortgage transaction. The stated reason for the loan in the loan application form was to purchase shares in a family business. However, the solicitors were aware from their representation of the borrowers that the real reason for borrowing the money was to pay off the existing mortgage and the husband's business debts. The solicitors did not inform the bank of the real reason for the loan or that the wife was not benefitting from the loan proceeds. The husband defaulted on the loan payments and the bank sought possession of the mortgaged property. The master granted the orders sought by the bank and the wife appealed. She contended on appeal that the loan was not for her benefit and the information about the real purpose for the loan was known to the

²² SLUHCV2019/0129 headnote and paragraphs 50-57.

²³ [1996] Ch. 207.

bank's solicitors and should therefore be imputed to the bank. The judge found that the solicitors' duty to disclose all information in their possession to their new client (the bank) was superseded by their duty to their other clients (the borrowers) not to disclose information imparted to them without the borrowers' consent and the solicitors' knowledge of the real purpose for the loan could not be imputed to the bank. The appeal was dismissed.

[38] I agree with Ms. St. Rose that **Halifax** is distinguishable. The duty of confidentiality in that case was the duty that exists between attorney and client when the attorney is representing both parties in a transaction. In this situation the duty of confidentiality applies with full force and the attorney cannot disclose the confidential information of one client to another client without the first client's consent, and the confidential information cannot be imputed to the new client.

[39] The duty of a party applying for an ex parte order is different. It is a duty to disclose all information that is material to the application and to conduct the application fairly.²⁴ The duty is owed to the court and not to the attorney's former or present client. Generally, when there is a breach of this principle by the attorney, the court will not allow the litigant to keep the benefit of the ex parte order regardless of the state of the litigant's knowledge of the nondisclosure or if he contributed to the breach in any way.²⁵

[40] What then is an attorney to do when he has information acquired from representing a former client that is relevant and material to the ex parte application on which he is now appearing? The answer is simple – he should withdraw from representing the new client as soon as it becomes apparent to him that he has this information. The one thing that the attorney cannot do is to continue representing the new client

²⁴ Details of the duty of disclosure are set out in paragraphs 25 - 28 above.

²⁵ *Boreh v Republic of Djibouti* [2015] EWHC 769 (Comm) per Flaux at paragraph 238; *Hytex Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 per Ward LJ at page 1675(H).

in the ex parte proceedings. If he does, he will be obliged to disclose to the court the information from his previous representation which would be a flagrant breach of the duty of confidentiality owed to his former client. It is that simple.

[41] The case that best illustrates these principles is **Ti Cadeau Inc v Sampson Samuel**,²⁶ a decision of the High Court of Dominica cited by Ms. St. Rose. The relevant facts are that attorneys for the defendant acted for him as real estate agents in the sale of his property in Concord, Dominica. Following the completion of the sale, the defendant instructed the attorneys to transfer the proceeds of sale to the Marigot Credit Union. This was not done and the attorneys continued to hold the proceeds of the sale of \$29,035.00. The said attorneys were subsequently retained by the claimant to bring an action against the defendant seeking the recovery of \$76,339.00 as the balance due on a promissory note. The claimant also applied ex parte for a freezing injunction restraining the defendant from disposing or dissipating the proceeds of sale pending the trial of the claim. The claimant did not disclose to the court that its attorneys acted for the defendant in the land transaction and were holding the proceeds of sale in spite of being instructed to send the funds to the Marigot Credit Union. The learned judge, Stephenson J., granted the injunction. The defendant filed a defence denying liability for the monies claimed and applied to discharge the injunction on grounds, inter alia, that the claimant had failed to disclose material information to the learned judge on the ex parte application. The judge noted that an interim injunction is an equitable remedy and the applicant must come to court with clean hands. Further, that the attorneys' failure to disclose that they had acted for the defendant in the land transaction was a material nondisclosure and it tainted the entire matter.

[42] At paragraph 24 of her judgment Stephenson J stated that she found it interesting that in his affidavit in support of the ex parte application, the claimant did not aver to the fact that its attorneys acted for the defendant in the land transaction and did

²⁶ Claim No. DOMHCV 2015/ 0257 (delivered 1st July 2016, unreported).

not exhibit the letter that the defendant had sent to the attorneys instructing them to transfer the proceeds of sale to the Marigot Credit Union, yet the letters demanding payment on the promissory note that the claimant had sent to the defendant were exhibited. Further, at paragraph 25 she expressed grave concern about what appeared to be something not quite right about the transactions before the court and “[W]hat appeared to be the involvement of the same chambers on both sides of the transaction.”

- [43] Stephenson J reviewed the authorities on the duty of full and frank disclosure when an applicant is making an ex parte application, including authorities which show that the court has a discretion to continue the injunction even if there was a nondisclosure, and concluded that this was a case where the injunction should not be continued because the claimant did not come to the court with clean hands. She accordingly discharged the injunction finding that “[T]he defendant established to the court, that the injunction granted herein should be discharged, based on the non-disclosure by the claimant which to my mind tainted his application.”²⁷ The learned judge ordered the claimant to pay the costs on the application.
- [44] The decision of Stephenson J in **Ti Cadeau** is not binding on this Court but the facts are similar and the reasoning is solid, and the case provides good guidance on how this Court should deal with the nondisclosure by Mr. Maragh.
- [45] Mr. Maragh chose to continue representing Cage, armed with the knowledge that he acquired from representing the NLA. He did not disclose this to the court or to his leading counsel. This of itself is a material nondisclosure. It may have been acceptable if the information that he had was not material to the application but, as it turned out, it was material. The material that was in Mr. Maragh's possession included the CBN Proposal, which he later disclosed, and the various emails between Mr. Maragh and the NLA that have been admitted as fresh evidence. The

²⁷ Paragraph 32 of the judgment.

CBN Proposal contains material in the executive summary that appears to be favourable to CBN's position that it has the exclusive right to offer all new lottery games in Saint Lucia without NLA approval except on the financial terms. The proposal also appears to favour Cage. The emails give a clear indication of the extent of Mr. Maragh's representation of the NLA on issues relating to the contracts and CBN's proposal to open entertainment centres with VLT's. The materiality of these documents cannot be seriously doubted and is illustrated by the fact that Mr. Patterson KC referred to and relied on the information in the CBN Proposal in his oral submissions at the inter partes hearing.

[46] Mr. Maragh was in a position of conflict and should have withdrawn from any involvement in this case. He continued to represent Cage and breached the duty of full and frank disclosure to the court by appearing at the ex parte hearing and not advising the Judge that he had previously represented the NLA on related matters and that he had material information that was relevant to the application. He should not have appeared, but having appeared he could no longer withhold material information because of his duty of confidentiality to his former client.

[47] This finding disposes of the first reason advanced by Mr. Patterson's why the nondisclosure by Mr. Maragh was justified.

Would disclosure have made a difference?

[48] Mr. Patterson's second submission in relation to Mr. Maragh's role in the proceedings is that even if Mr. Maragh had disclosed the information that he had at the ex parte hearing it would not have made a difference and the judge would still have granted the Injunction. However, this is not a rule or a principle. It is nothing more than a factor that the court will consider when it is deciding whether to regrant an injunction that is being set aside for nondisclosure. The learned editors of **Commercial Injunctions** by **Steven Gee KC**, under the heading "Materiality" state:

"The duty extends to placing before the court all matters which are relevant to the court's assessment of the application, and it is no answer to a

complaint of nondisclosure that if the relevant matters had been placed before the court, the decision would have been the same. The test as to materiality is an objective one, and it is not for the applicant or his advisers to decide the question; hence it is no excuse for the applicant subsequently to say that he was genuinely unaware, or did not believe, that the facts are relevant or important.”²⁸

The learned editors also refer in this passage to the case of **Behbehani and Others v Salem and Others**²⁹ where Woolf LJ said:

“In this connection Mr. Brodie at one stage of his argument submitted that the acid test was whether or not the original judge who granted the injunction ex parte would have been likely to have arrived at a different decision if the material matters had been before him. I do not regard that as being the acid test. Indeed, although I regard it as a relevant matter when considering the question of discharge and re-grant of injunctions, I do not regard it as a matter of great significance unless the facts which were not disclosed would have resulted in the refusal of an injunction.”

In **Tugushev** Carr J stated as one of the principles that can be distilled from the cases that:

“[7] (xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;” (emphasis added)

[49] These passages, and in particular the dictum by Carr J in **Tugushev**, illustrate the importance that the court attaches to the duty of counsel and the persons they represent to disclose all material facts to the court and make a fair presentation of an application for an ex parte order.

[50] Mr. Maragh’s representation of NLA which led to a conflict of interest in the ex parte proceedings is highly material and should have been disclosed. I am not satisfied that if this information was disclosed the Judge would have continued the application on an ex parte basis and go on to grant the Injunction. Alternatively, if it was

²⁸At 9.003.

²⁹ [1989] 1 WLR 723 at 729 Woolf LJ.

appropriate for Mr. Maragh to continue representing Cage (which I doubt) he would have been caught between conflicting duties – to withhold the confidential information or disclose it to the court in breach of his duty of confidentiality to his former client. Neither alternative is tenable and his only real option, as I have said, was to withdraw from the proceedings long before the ex parte application.

Mr. Maragh's obligation

- [51] Mr. Patterson's final submission on Mr. Maragh's role in the proceedings is that Mr. Maragh was obliged as an officer of the court to correct the allegation of misconduct against him by Mr. Gooding in his affidavit filed on 9th December 2022. I am not aware of any duty that Mr. Maragh was under to correct the record by filing an affidavit and exhibiting his former client's confidential information which coincidentally assisted his new client's application for the continuation of the ex parte Injunction. There are other ways of dealing with the matters raised in Mr. Gooding's affidavit including, but not limited to, disclosure and cross examination.

Additional nondisclosures

- [52] Ms. St. Rose submitted that there was also nondisclosure by Cage by failing to inform the court at the ex parte hearing that it intended to open its own entertainment centre. The relevant facts are that towards the end of December 2022, after the inter partes hearing, CBN discovered that Cage had opened an entertainment centre at Baywalk Mall in the quarter of Gros Islet, similar to the CBN Centre on Brazil Street that it had prevented CBN from opening using the injunction procedure. Ms. St. Rose submitted that this was inconsistent with maintaining the status quo pending the trial of the claim and the judge should have been told at the ex parte hearing that Cage intended to open its own entertainment centre. There is no evidence from CBN, on whom the burden lay for this issue, about when the Baywalk Mall Centre was set up which makes it difficult to decide whether Cage was in a position to make a proper disclosure at the ex parte hearing. Mr. Patterson KC submitted that in any

case Cage was not obliged to disclose this information at the ex parte hearing because it was something that they were entitled to do under the Cage Contract as amended.

[53] Based on the lack of evidence I am not satisfied that Cage breached its duty of full and frank disclosure at the ex parte hearing by not disclosing that it had set up or intended to set up an entertainment centre in the Baywalk Mall.

[54] CBN also alleged that there was nondisclosure by Cage at the ex parte hearing in relation to the issue of CBN's exclusive right to supply and operate lottery games in Saint Lucia. CBN's position in a nutshell is that notwithstanding the Cage Contract which gave it the right to deploy VLT's, CBN still had the exclusive right to provide all lottery game services, including VLT's, in Saint Lucia, and Cage failed to bring this to the court's attention at the ex parte hearing. In fact, Cage presented its application as if it was the only person or entity that had the right to provide VLT's in Saint Lucia.

[55] I regard this issue as one that is intimately tied up with the main issue in the appeal of exclusivity which is to be resolved at the trial. The Court is generally reluctant to make a finding of nondisclosure where proof of the non-disclosure depends on proof of facts which are themselves in issue in the action.³⁰ While Cage, as a part of its duty to make a fair presentation, could have said more about CBN's position on exclusivity, I do not think the failure to do so rises to the level of being a breach of the duty of full and frank disclosure.

Conclusion on nondisclosure

³⁰ Per Carr J in Tugushev at paragraph 7(viii).

- [56] I find that there was a material nondisclosure by Cage when it applied for the ex parte injunction and did not disclose to the court that Mr. Maragh, who was appearing for Cage as junior counsel, had previously acted for the NLA in connection with the disputed matters, and that he had information relating to these matters. This was a deliberate nondisclosure by Mr. Maragh and by extension his client Cage, for which there has been no proper explanation. Mr. Maragh compounded the situation by filing an affidavit on the morning of the inter partes hearing disclosing the CBN Proposal which his leading counsel then used to support Cage's position.
- [57] The guidance from the authorities in similar situations is that the ex parte injunction should be set aside and not be re-granted. In **Tugushev** Carr J said that "[I]t will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged."³¹ However, discharge is not automatic and the court can, in exceptional circumstances, continue the injunction or discharge the injunction and impose a fresh injunction despite a failure to disclose. Based on the facts and relevant legal principles, I find that there are no exceptional circumstances in this case. Important information regarding Mr. Maragh's conflict of interest was kept from the Judge at the ex parte hearing and only released selectively by Cage on the morning of the inter partes hearing.
- [58] I would set aside and not re-grant the Injunction on the ground of deliberate nondisclosure of material facts by junior counsel for Cage, and by extension Cage. This finding is sufficient to allow the appeal and set aside the Injunction, but out of deference to the fulsome submissions of counsel I will deal summarily with the other issues in the appeal.

Breach of the Cage Contract and exclusivity – Grounds 1 and 3

³¹ *ibid.* at paragraph 7(x).

[59] Grounds 1 and 3 involve issues of exclusivity, breach of the Cage Contract by the NLA, and an allegation that CBN induced the said breach of contract. CBN argued before the Judge and this Court that notwithstanding that the NLA permitted Cage to operate the VLT's in 2010, it retained the exclusive right given to it in the 2004 by the CBN Contract to provide all forms of video games in Saint Lucia, including VLT's, without further approval by the NLA. Cage disputed this. Its position is that it was granted the exclusive right to deploy all VLT's in Saint Lucia and that right was expanded by the 2019 and 2021 amendments to its contract to allow it to import and operate other forms of electronic lottery and video games. Further, that the NLA breached its contract with Cage by allowing CBN to import VLT's and similar equipment into Saint Lucia and opening an entertainment centre, and CBN induced NLA to commit this breach.

[60] On my assessment of the pleadings and the evidence at this preliminary stage I agree with the Judge that there are serious issues to be tried.³² This satisfies the first requirement in **American Cyanamid**.

Adequacy of damages – Ground 4

[61] The second principle in **American Cyanamid** is that the court will not grant an interim injunction if damages would be an adequate remedy for the claimant if he is successful at the trial. Cage's position is that if the Injunction was not granted and CBN was allowed to open the entertainment centre with VLT's it will suffer immeasurable and irreparable financial losses and loss of goodwill. The Judge accepted that these losses would occur and it would be difficult to assess them at this stage in the absence of empirical evidence. The Judge seemed to be focused on the difficulty of quantifying the potential losses at this stage. But the issue of quantification would not arise until the end of the trial when the party's rights have been determined. By then there would likely be evidence from Cage about the

³² Paragraph 62 of the judgment.

losses it has suffered and will continue to suffer as a result of the refusal to re-grant or continue the injunction.

- [62] In this case there is uncontradicted evidence that the potential losses to Cage can be quantified. Mr. Gooding said in his affidavit filed on 9th December 2022 that, “The applicant can ascertain its loss per diem by establishing the net win per terminal after prizes have been paid out ...”. Without making a finding on the viability of this method, it seems to be a reasonable way to calculate the potential losses as and when the need arises. I also take into consideration that if Cage is successful in its claim it will once again become the sole provider of VLT’s in Saint Lucia and any business that was lost to its only competitor (CBN) will inevitably return to Cage.
- [63] If the Injunction is set aside and Cage is successful in the trial the period for calculating damages will be from the date of the set-aside until the end of the trial when damages will be assessed. I assume that Cage has kept and will continue to keep accurate records of these profits and that there will be additional evidence at the trial as to how those profits are calculated. Cage will then have to prove how its profits have been affected by the setting aside of the Injunction using the method suggested by Mr. Gooding or such other method as will become apparent from the evidence during the trial. No doubt the evidence will deal with the issue of goodwill if necessary.
- [64] The cases cited by Ms. St. Rose illustrate that the difficulty of assessing losses in the context of competing businesses can be an important factor for consideration but it is not a reason by itself to grant an injunction restraining a person’s freedom of contract.³³

³³ **Aljose Fashions Ltd v Alfred Young & Co and another** [1978] F.S.R 364; **Polaroid Corporation and others v Eastman Kodak Company and another** [1977] R.P.C 379; **Rubis West Indies Ltd v Minvielle & Chastanet Limited** SLUHCV2013/0524.

[65] I disagree with the judge's findings at paragraphs 76 and 77 of his judgment that, "[I]t is not unimaginable that the loss to CAGE would be immeasurable if not irreparable" and that, "[CBN's] expansive undertaking is likely to result in the loss of goodwill and the erosion of CAGE's customer base notwithstanding that it may be difficult to assess at this stage, in the absence of empirical evidence, what the extent of that likely loss would be." I disagree because of my previous finding that the potential losses that Cage may suffer are not immeasurable or irreparable and, in any event, would not be assessed "at this stage" but at the end of the trial.

[66] I find that damages would be an adequate remedy for the potential losses that Cage could suffer if the injunction is discharged. As such, Cage has failed to satisfy the second principle in **American Cyanamid** and this is another reason for discharging the Injunction.

Balance of convenience

[67] Having found that the Injunction should be dismissed on two different bases it is not necessary to deal with the issue of the balance of convenience. In any case, there was no appeal against the Judge's finding that the balance of convenience favoured Cage and continuing the Injunction.

Discretion – Grounds 6, 8 and 9-12

[68] Ground 6 deals with the Judge's admission into evidence, the affidavit of Mr. Maragh filed at the start of the inter partes hearing, ground 8 challenges the costs order, and grounds 9-12 deal with the Judge's exercise of discretion in granting the Injunction. Based on my findings above and the proposed order no further comment or decision is necessary on these grounds.

Disposal

- [69] I would allow the appeal and set aside the Injunction with no re-grant based on the deliberate nondisclosure by Cage and Mr. Maragh and also because damages would be an adequate remedy for Cage.

Order

- [70] The appeal is allowed and the orders of the Judge made on 6th January 2023 are set aside. Cage shall pay CBN's costs of the appeal and in the court below to be assessed if not agreed within 21 days.

I concur.

Gertel Thom

Justice of Appeal

I concur.

Trevor Ward

Justice of Appeal

By the Court

Chief Registrar