

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCv2020/0107

BETWEEN:

TALADRO HOLDINGS VENEZUELA

Claimant

and

BOI BANK CORPORATION

Defendant

Appearances:

Dr. David Dorsett, Counsel for the Claimant

Ms. Talia DaCosta, Counsel for the Defendant

2023: June 16th;
August 30th

DECISION

- [1] **MICHEL, M.:** The Claimant is a company doing business in Venezuela and has two bank accounts with the Defendant, an international bank doing business in Antigua and Barbuda ("the Bank"). By re-amended claim form and statement of claim filed on 22nd January, 2023 the Claimant seeks a declaration that the contractual relationship between the Parties is terminated by notice with effect from 27th April, 2022 and an order for the repayment of sums held in the accounts of the Claimant with the Bank.
- [2] The Bank in its amended defence avers that the Claimant has not complied with the requirements for the return of money held in a current account in accordance with its General Terms and Conditions and has not made a proper demand for money held on a certificate of deposit. The Bank further avers that due to international sanction and the effect on its correspondent banking relationships, it is entitled to rely on a force majeure clause in its General Terms and Conditions agreed to by the Parties, or alternatively, that the contract between the Parties is frustrated.
- [3] The Claimant has now applied for summary judgment pursuant to rule 15.2 of the **Civil Procedure Rules 2000** ("CPR") on the issues of: (1) the engagement of clause 30 of the General Terms and Conditions between the Parties; and (2) the sufficiency and

validity of the Claimant's demand for the return of its money. The Claimant has applied for summary judgment to be given 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.
- 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.
- 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."

[4] The Claimant's application for summary judgment is supported by the affidavit of Annie Bowen, Senior Legal Clerk. The affidavit of Louise Edwards, Senior Bank Officer of the Defendant Bank was filed in response.

[5] The Claimant has stated the following as the grounds for its application:

- 1. "The relationship between the Parties is governed by General Terms and Conditions.
- 2. Clause 30 of the General Terms and Conditions provides as follows:
 - 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.
- 3. The Claimant is entitled to demand the return of monies held in its account with the Defendant.
- 4. The Claimant has brought a claim seeking the return of monies held in the Claimant's account with the Defendant.
- 5. The return of the said monies has the effect of rendering the Claimant no longer a customer of the Defendant as financial dealings between the Parties would have ended and there is no basis, commercial or otherwise, for a continuation of any relationship between the Parties.
- 6. The issue arising with respect to the engagement of clause 30 is a dispute about a short point of law where the legal issue between the Parties is straightforward."

Approach to Summary Judgment Procedure

[6] The Court's summary judgment procedure is meant to deal with cases which are not fit for trial.¹ It should not be used unless it is apparent that a defendant has no real prospect of successfully defending a claim. The word "real" should be considered on its plain and ordinary meaning, being a realistic as opposed to a fanciful prospect of success.²

[7] In **Myett's Enterprises Limited v Kimberley Cooke Leigh et al**³ Pereira CJ explained that in determining whether a claimant has a real prospect of success, the Court must critically examine the pleadings and any evidence that has been adduced by the Parties but should not conduct a mini-trial and make factual findings on important issues. Pereira CJ explained the Court's task as follows:

"At the outset, the judge or master should identify from the pleadings the real issues in the claim and thereafter determine whether, on the pleadings and the evidence provided, these issues can properly be disposed of summarily. It is only those issues which disclose no real prospect of success that ought to be disposed of using the summary procedure under Part 15 of the CPR...the court should not permit a matter to proceed to trial where the defendant has produced nothing to persuade the court that there is a real prospect that he or she will succeed in defeating the claim brought by the claimant."

[8] Finally, as it relates to factual findings on a summary judgment application, in **Sagicor Bank Jamaica Limited v Taylor-Right**,⁴ the Judicial Committee of the Privy Council stated that:

"There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense."

[9] It is apparent from the authorities on the Court's summary judgment procedure that the Court must identify what are the real issues on a claim and decide whether based on the pleadings and the evidence available to the Court that a claim or defence advanced has a real prospect of success at trial; however, in doing so, the Court should not be making important factual findings on the issues. Thus, the Court is tasked with assessing the prospects of success of the relevant party and not conducting a fact-finding exercise; but where it is evident that a claim justifies the relief sought and that the resolution of a

¹ *Sagicor Bank Jamaica Limited v Taylor-Wright* [2018] UKPC 12.

² SLUHC VAP2009/0008 (delivered 11th January 2020, unreported) at para. 21.

³ BVIHC VAP2020/0005 (delivered 19th May 2021, unreported) at para. 14.

⁴ [2018] UKPC 12 at para. 17.

factual dispute does not affect the relief sought by a Claimant, it would be appropriate to grant summary judgment on that issue on the Claimant's claim. Conversely, if the pleaded case of the Parties indicates that there is a factual issue to be tried, which, if proved in favour of the Respondent to a summary judgment application might result in a decision in that Respondents' favour, then the summary judgment power should not be used.

- [10] I will now consider the Parties pleaded case and the evidence available to the Court.
- [11] In its re-amended statement of claim, the Claimant stated that it has money deposited in two accounts with the Bank: a current account with €2,995,249.96 standing to the credit of the Claimant as of 31st December, 2019 and a certificate of deposit account with the principal sum of US\$2,000,000.00 standing to the credit of the Claimant as of 31st December, 2019. The Claimant further alleged that notwithstanding various requests, the Bank has failed to pay to the Claimant the sums held in its accounts with the Bank and that the failure of the Bank to honour the demands of the Claimant constitutes a breach of contract.
- [12] The Claimant further alleged that on 20th April, 2022 it issued a notice to the Bank terminating its banking relationship with the Bank with immediate effect as provided by 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. The Claimant further alleged that on 27th April, 2022 it wrote to the Bank informing it that it took its non-response as repudiation of the contract and demanded the return of funds held by the Bank and that a further letter to the same effect was sent to the Bank on 20th June, 2022. The Claimant alleged that to date, the Bank has not settled with the Claimant, and there being no settlement, it has pursued a court action to enforce payment of all sums due and owing by the Bank to the Claimant.
- [13] The Bank in its amended defence first denied that the sums standing to the Claimant's credit on the certificate of deposit are payable on demand. The Bank averred that such sums will only be available to the Claimant upon the date of maturity thereof, provided that the Claimant cancels its automatic renewal in accordance with the Bank's Terms and Conditions governing certificates of deposits, to which the Claimant has agreed.
- [14] As it relates to the sums standing to the Claimant's current account, the Bank admitted that such sums are payable upon demand, but that the sums must be demanded in the form prescribed by the Bank as agreed by the Parties. The Bank alleged that Claimant has produced what it suspects to be fraudulent invoices to support the legitimacy of its deposits and despite demands of the Claimant, the Claimant has failed to produce any contract in support of its services. The Bank alleged that the Claimant has failed to produce certain documents to comply with the requirements of the Office of National Drug and Money Laundering Control Policy (ONDMP). The Bank further averred that the Claimant, having issued proceedings against it, has attempted to circumvent the

requirement to issue a demand in the prescribed form to get away without producing documents required by the ONDCP to facilitate enhanced due diligence.

- [15] The Bank has also averred that notwithstanding the Claimant purporting to terminate its relationship with the Defendant Bank, pursuant to clause 30 of the General Terms and Conditions, the General Terms and Conditions remain in full force during settlement. The Bank has relied on a number of provisions of the General Terms and Conditions which it contended that the Claimant has not complied with in seeking to obtain funds deposited with the Defendant Bank.
- [16] The Bank has further averred in its amended defence that since in or about the year 2016, countries such as the United States, Canada, and some within the European Union have applied sanctions against the Government and/or Citizens of Venezuela. The Bank averred that as a result of the foregoing, its correspondent banking relationships have been adversely affected which has compromised the foregoing and relied on Clause 19 (Force Majeure) of its General Terms and Conditions by virtue of which it contended performance of obligations under the contract have been suspended. Alternatively, the Bank averred that it is entitled to rely on the doctrine of frustration.

Discussion

- [17] The relationship between the Bank and the Claimant is that of banker and customer and it is settled law that the banker to customer relationship is one of contract.⁵ The often-cited description of the contract constituted by the relationship of banker and customer can be found in the statement of Atkins LJ in **Joachimson v Swiss Bank Corporation**.⁶

“The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such a 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.”

⁵ *Foley v Hill* (1848) 2 HL Cas 28.

⁶ [1921] 3 KB 110 at 127.

- [18] There is no dispute that the Claimant as a customer of the Bank agreed to the Bank's General Terms and Conditions. Clause 30 of the General Terms and Conditions provides:

“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.”

- [19] Learned Counsel for the Claimant argued orally that the Claimant has given the Bank full and proper notice that it sought to terminate its relationship with the Bank. He argued that the Claimant is not suing the Defendant on the contract as the contract is at an end and that a debt has arisen and the Claimant is entitled to recover the debt.
- [20] From the outset, it should be noted that one of the remedies sought by the Claimant on its claim against the Defendant is a declaration that the contractual relationship between the Parties was terminated by notice with effect from 27th April, 2022. This issue has not yet been determined and does not form part of the Claimant's summary judgment application. Instead, on its present summary judgment application, the Claimant seeks a declaration that by an action claiming funds held in its account with the Bank, it has given notice of its desire to terminate its relationship with the Bank 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.
- [21] As noted above, the Claimant has grounded its summary application on its contention that it is entitled to demand the return of monies held in its accounts with the Bank and has brought a claim seeking the return of the said monies. It argues that by the filing of its claim it has given notice of its desire to terminate its relationship with the Bank, satisfying the requirements for engagement of clause 30 of the General Terms and Conditions. Noteworthy is the Claimant's contention on its application that the **return** of the monies has the effect of rendering the claimant no longer a customer of the defendant as financial dealings between the Parties would have ended and that there is no basis, commercial or otherwise, for continuation of any relationship between the Parties. (My Emphasis) There has been no return of money by the Bank. This is the very reason for which the Claimant has brought this action against the Bank. Therefore, in the same breath that the Claimant argues that the relationship between the Parties has ended, it avers that it is the return of monies that renders the Claimant no longer a customer of the Bank, which, as is evident from the very filing of its claim, this return of monies has not yet occurred. Nonetheless, I will consider the Claimant's further arguments.

- [22] The Claimant, relying on the case of Joachimson v Swiss Bank Corporation⁷ argues that by the filing of the present action, it has made a valid and sufficient demand for the return of its money held by the Bank. Having considered the case of Joachimson v Swiss Bank Corporation, in my view it appears to decide that it is an implied term in the banker customer contract that the banker does not become liable to repay the customer until a demand is made. Therefore, a demand by a customer for monies held on a current account is a condition precedent for a cause of action against a bank to seek to recover those sums. The House of Lords also appeared to accept⁸ 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. Therefore, as far as legal proceedings by a customer against a bank for the return of money are concerned, the position appears to be that the issuing of a claim is a sufficient demand to give rise to a cause of action.
- [23] In my view, all that can be taken from the above is that to have a cause of action against a bank for return of monies, a customer must have made a demand. The Claimant, however, has not provided the Court with any material to conclude that because a demand has been made, this terminates the relationship with the Bank and disentitles either party from relying on the contract on which their relations are based. It must be kept in mind that the Claimant's claim for a declaration that the relationship between the Parties has been terminated by notice in April 2022 has not been determined. There is also no finding or determination in these proceedings of the issue of any breach of contract arising on the Claimant's claim. These matters also did not form part of the Claimant's present application for summary judgment. Thus, in my view, all the resolution of the issue of demand does is give rise to a cause of action for recovery of the sums against the Defendant pursuant to the contractual relationship between Bank and customer.
- [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.
- [25] The Claimant does argue, however, that a demand has been made and the Bank must pay. If, for a moment, the Court were to accept the position that a valid demand has been made by the filing of claim against the Bank so as to defeat any contention in the Bank's defence that the Claimant has not made a proper demand for the return money held in accounts with the Bank, the Defendant in its amended defence has also invoked the force majeure clause in its Terms and Conditions agreed to by the Claimant and in

⁷ [1921] 3 KB 110.

⁸ [1921] 3 KB 110 at 115 per Bankes LJ.

the alternative the Defendant has pleaded that the contract between the Parties was frustrated.

[26] Much of the remainder of the Claimant's arguments on this application focused on the doctrine of frustration and I will therefore focus the rest of my consideration of the application on the force majeure clause and frustration.

[27] As previously indicated, the Bank has averred in its amended defence that international sanctions imposed by the United States, Canada and some countries of the European Union has adversely affected its correspondent banking relationships. The Bank pleaded therefore that by virtue of clause 19 of its General Terms and Conditions, its performance obligations under the contract have been suspended. Clause 19 provides:

"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."

[28] Chitty on Contracts⁹ defines a force majeure clause as:

"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."

[29] In the contractual relationship between customer and bank, a bank's obligation is to return sums deposited by a customer when a valid demand for such sums has been made. What I understand the Bank to be saying in its defence is that its obligation pursuant to the customer to banker contract cannot be fulfilled because of the imposition of international sanctions on Venezuelan citizens and the resulting effect on its correspondent banking relationships and its ability to carry out transactions; thus it contends, its obligation under the contract has at a minimum been suspended.

[30] In its affidavit in response to the application, the Bank simply restates its assertion in its defence about the lack of correspondent banking relationships but has provided no further evidence to ground this assertion. The Bank does note that the Parties still have

⁹ 27th Ed. Ch 14 at 14-121.

to go through pre-trial proceedings where further evidence, including expert evidence will no doubt be deployed by the Parties for the Court's evaluation and fact finding.

[31] In **Tandrin Aviation Holdings Ltd v Aero Toy Store LLC**¹⁰ 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.

[32] The Bank has also pleaded frustration of contract as an alternative defence to the claimant's claim. Frustration of a contract arises in circumstances where, without fault of either party, a contractual obligation becomes incapable of being performed. Halsbury's Law of England explains the general concept:

"Frustration occurs where the contract has become impossible of performance due to an unforeseen act which is beyond the control of both parties. In such a situation the parties' rights and obligations are terminated without any liability for breach on either side.

[33] The doctrine of frustration was explained by Lord Radcliffe in **Davis Contractors Ltd v Fareham Urban District Council**:¹¹

"...frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do."

[34] The Claimant submitted that the defence of frustration does not avail the Bank. Learned Counsel for the Claimant submitted that the doctrine of frustration is not a

¹⁰ [2010] EWHC 40 (Comm) (19 January 2010).

¹¹ [1956] AC 696 at 729.

panacea to be invoked as a “get out of jail card” when a party has a difficulty performing a contract. The Bank however argues that a loss of correspondent banking relationships is not simply a mere inconvenience but renders the bank’s operations impossible.

- [35] In determining whether a contract is frustrated the Court must have regard to the terms of the contract and the obligations of the Parties under the contract in the context of when the contract was made and the events which have occurred. The learned authors of Chitty on Contracts state this point as follows:

“From this construction the court should reach an impression of the scope of the original obligation, that is, the court should ascertain what the Parties would be required to do in order to fulfil their literal promises in the original circumstances. This impression will depend on the Court’s estimate of what performance would have required in time, labour, money and materials, if there had been no change in the circumstances existing at the time the contract was made. The Court should then examine the situation existing after the occurrence of the event alleged to have frustrated the contract, and ascertain what would be the obligation of the Parties if the words of the contract were enforced in the new circumstances. Having discovered what was the original “obligation” and what would be the new “obligation” if the contract were still binding in the new circumstances, the last step in the process is for the court to compare the two obligations in order to decide whether the new obligation is a “radical” or “fundamental” change from the original obligation. It is not simply a question of whether there has been a radical change in circumstances, but whether there has been a radical change in the “obligation” or the actual effect of the promises of the parties construed in light of the new circumstances. What “performance ... fundamentally different in a commercial sense”?

- [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**¹² 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,

¹² [2021] EWHC 1013 (QB).

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.

[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 Parties 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.

[40] In light of the forgoing, I shall make the following orders:

1. The Claimant's application for summary judgment is dismissed.
2. The Claimant shall pay the Defendant's costs of this application to be summarily assessed at the next case management conference if not agreed within 28 days of the date of this Order.
3. The matter shall be listed for further case management on a date to be fixed by the Registrar of the High Court.

[41] I wish to thank learned Counsel on both sides for their helpful oral and written submissions.

Carlos Cameron Michel
High Court Master

By the Court

Registrar