EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2016/0009

BETWEEN

NATIONAL COMMERCIAL BANK OF ANGUILLA LTD.

Appellant

and

NATIONAL BANK OF ANGUILLA
(PRIVATE BANKING AND TRUST) LIMITED
(in administration)

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. William Hare with Mr. Alex Richardson for the Appellant
Mr. Patrick Patterson with Ms. Eustella Fountaine for the Respondent

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2016: December 13;
2017: February 28.

Interlocutory appeal – Proprietary claim – Appellant and respondent banks incorporated in Anguilla – Disputed funds in appellant's bank account at Bank of America – Funds in account claimed by respondent – Account frozen by foreign bank at request of administrator of respondent – Application for mandatory injunction by appellant for respondent to withdraw request for freezing of accounts – Conditions for grant of mandatory injunction – Whether there exists serious issues to be tried regarding respondent's claim to disputed funds – Balance of convenience – Whether trial judge erred in refusing application for mandatory injunction – Appellate court's function in reviewing exercise of judge's discretion to refuse injunction

The appellant and the respondent are respectively a commercial bank and a private bank operating in Anguilla. The appellant operates an account at the Bank of America in New York by which it conducts correspondent banking arrangements with its customers ("**the Account" or "the BOA Account**"). Customers wishing to carry out overseas transactions deposit the required funds into the BOA Account which is then used by the appellant to process the transactions.

The respondent was put into insolvent administration in Anguilla on the application of the Financial Services Commission and Mr. William Tacon was appointed administrator. On 6th May 2016, the respondent filed a claim in Anguilla seeking a declaration that such parts of the appellant's funds that constitute funds claimed by the respondent are held on trust for the respondent, and for an account of all such funds to establish how much thereof belongs to the respondent. On 5th July 2016, Mr. Tacon's US lawyers wrote to the Bank of America asserting the respondent's claim to ownership or at a minimum an equitable interest in the funds in the BOA Account and demanding that the bank freeze the Account pending further instructions from the respondent or from a court order. As a result, the appellant has not been able to operate the Account and has had to make alternative arrangements to service its client's transactions at additional expense and inconvenience and possible loss of reputation. The appellant applied to the High Court in Anguilla for a mandatory injunction ordering the respondent to write to the Bank of America instructing them to release the freeze on the BOA Account. The learned judge found that there were serious issues to be tried but the balance of convenience did not favour granting the injunction. She found that even if the appellant had suffered losses that were not necessarily trivial; such losses had not been established to the required standard and in any event could be compensated by an award of damages. Further, that there was no palpable evidence that the respondent would not suffer irreparable harm by the grant of the injunction. She refused the injunction and ordered that each party bear its own costs. The appellant appealed against the judge's refusal of the injunction and the costs order. The respondent filed a counter notice of appeal.

Held: allowing the appeal, dismissing the counter notice of appeal; granting the mandatory injunction and ordering the respondent to pay the costs of the appellant here and in the court below, that:

1. The principles for granting a mandatory injunction are the same as for a prohibitory injunction. What is important is the court's view of whether irremediable harm will be done to one party or the other depending on whether the injunction is granted or refused.

   National Commercial Bank v Olint [2009] UKPC 16 applied.

2. An applicant for an interim injunction must establish that there are serious issues to be tried and that the balance of convenience favours the grant of the injunction. In considering the balance of convenience, the court will take into account whether

the applicant can be compensated by an award of damages if he suffers any damage or harm as a result of the conduct of the respondent to the application.

American Cyanamid v Ethicon Ltd [1975] 1 All ER 504 applied.

3. The function of the appellate court, as the reviewing court, is to uphold the exercise of the judge's discretion unless it was based on a misunderstanding or misapprehension of the law or of the evidence, or there is new evidence or a material change of circumstances since the hearing before the judge, or the decision of the judge is so aberrant that no reasonable judge mindful of his duty to act judicially would have reached it. The learned judge having found that the appellant had suffered damage that is 'not necessarily trivial', albeit unparticularised, should have gone on to deal with the respondent's insolvency or potential insolvency. There is no indication that the judge considered that the appellant could suffer irremediable harm as a result of the respondent's inability to pay an award of damages. She did not take into account or give sufficient weight to the impact of the respondent's insolvency on its ability to compensate the appellant for any losses that it has suffered and continues to suffer. This is a material irregularity and in principle this Court can set aside the exercise of the judge's discretion and exercise its own discretion. Accordingly, this Court makes its own finding that the balance of convenience favours the appellant and grants the mandatory injunction.

Hadmor Productions Ltd v Hamilton [1983] 1 AC 191 applied.

JUDGMENT

[1] **WEBSTER JA [AG.]:** This is an appeal by the National Commercial Bank of Anguilla Ltd.("**the appellant**"), against the judgment of the learned judge dismissing its application for a mandatory injunction against the National Bank of Anguilla (Private Bank and Trust) Limited (in administration) ("**the respondent**").

Background

[2] The appellant is a bank operating in Anguilla. It was formed in 2016 to provide banking services to the people of Anguilla following the collapse of the National Bank

of Anguilla ("**the National Bank**") and the reorganisation of the banking system in Anguilla.[1] The appellant is owned by the Government of Anguilla.

[3] The 1st and 2nd defendants in the court below are the National Bank and Caribbean Commercial Bank (Anguilla) Limited ("**CCB**"). Between 12th August 2013 and 22nd April 2016, the National Bank and CCB were under the control of the Eastern Caribbean Central Bank ("**the Central Bank**") through a process of conservatorship.

[4] The respondent and the 2nd claimant in the court below, Caribbean Commercial Investment Bank Limited ("**CCIB**"), are private banks operating in Anguilla. The National Bank was the sole shareholder of the respondent. During the period of the conservatorship of the National Bank, the Central Bank replaced the board of directors of the respondent with its own appointees and thereby controlled the respondent.

[5] On 22nd February 2016, the High Court appointed Mr. William Tacon as the administrator of the respondent. The application was made by the Financial Services Commission of Anguilla in separate proceedings.

[6] On 22nd April 2016, the conservatorship of the National Bank ended and the Bank was placed into receivership. It ceased carrying on business and its assets and operations were transferred to the appellant. The transferred assets included the National Bank's correspondent banking arrangements with overseas banks including the Bank of America. The respondent contends that the assets that were transferred to the appellant included substantial amounts of cash belonging to the respondent that were deposited with the National Bank during the period of the conservatorship and wrongly paid to the appellant.

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[1] See second affidavit of Mr. Martin Dinning filed on 20th July 2016.

[7] On 6th May 2016, the respondent commenced the claim in the court below seeking relief that included a declaration that such parts of the appellant's assets that constitute funds claimed by the respondent are held on trust for the respondent, and for an account of the all such funds to establish how much thereof belongs to the respondent. It is common ground that this is a proprietary claim.

[8] The statement of claim alleges that during the conservatorship of the National Bank, the respondent did not have its own correspondent banking arrangements and cash deposited into the respondent by its customers was placed by the conservator directors with the National Bank in breach of their duties to the respondent. Such deposits were held in one or more accounts in the name of the National Bank at Bank of America ("**the BOA Account**" or "**the Account**"). The statement of claim is consistent in stating that the claim relates to monies paid to the National Bank during the conservatorship and wrongfully transferred to the appellant during and at the end of the conservatorship. There is no allegation that the respondent continued placing funds with the National Bank or the appellant after the conservatorship. The statement of claim further alleges that the creditors of the respondent who deposited funds during the conservatorship have outstanding claims for US$9,100,000 against the appellant in respect of those funds.

United States proceedings

[9] On 26th May 2016, Mr. Tacon, acting pursuant to his powers as the administrator of the respondent, applied to the United States Bankruptcy Court for the Southern District of New York ("**the Bankruptcy Court**") under chapter 15 of the United States Bankruptcy Code for recognition in the United States of the Anguillan administration of the respondent as a foreign main proceeding. The application was granted which gave Mr. Tacon status to make further applications to the Bankruptcy Court in respect of the respondent. On 22nd June 2016, Mr. Tacon applied to the Bankruptcy Court for a voluntary bankruptcy order of the respondent which resulted in the bankruptcy of

the respondent and, on the respondent's case, an automatic stay of all of its assets in the United States.

[10] The pleadings in the bankruptcy proceedings repeated the allegation in the statement of claim that during the conservatorship, monies belonging to the respondent were wrongfully transferred to the National Bank and that "As a result of such wrongful conduct, approximately $9.1 million in the Account [at Bank of America] is held in constructive trust for the Debtor [the respondent]."[2]

[11] On 5th July 2016, the New York attorneys for Mr. Tacon wrote to Bank of America informing them of the Chapter 11 bankruptcy and the respondent's claim to ownership or at least an equitable interest in the funds in the BOA Account ("**the demand letter**"). The demand letter went on to instruct the Bank that:

> "As the Debtor has ownership, or at a minimum, an equitable interest in the funds in the Accounts, such funds constitute property of the Debtor's estate and the automatic stay serves to prevent, inter alia, the dissipation of the funds. Accordingly, this correspondence serves as a demand to immediately freeze the Accounts and take any and all actions as necessary to prevent withdrawal, removal, or dissipation of the funds until you receive further direction from the Debtor or pursuant to court order. Please confirm to us in writing on or before July 8, 2016 that the Bank has frozen the Accounts.

Bank of America acceded to the demand and froze the BOA Account on the stipulated date of 8th July 2016.

[12] On 20th June 2016, the appellant applied in the High Court in Anguilla in the claim started by the respondent for a mandatory injunction ordering the respondent to deliver a letter to Bank of America withdrawing the demand letter and to cease from corresponding with the Bank in connection with the BOA Account except with the court's permission.

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[2] The respondent's Motion for Enforcing the Automatic Stay and other relief dated which is exhibited to the first affidavit of Kurt Gwynne filed on 29th July 2016.

[13] The appellant later applied to the judge in Anguilla for an anti-suit injunction to restrain the respondent from pursuing an application that it had filed in the Bankruptcy Court in New York to restrain the appellant from pursuing its application in Anguilla for the mandatory injunction.

Judgment in the court below

[14] The learned judge heard both applications on 10th August 2016. She granted the application for the anti-suit injunction and there is no appeal against that part of her order.

[15] The judge refused the application for the mandatory injunction. In coming to her decision she referred to the advice of the Privy Council in **National Commercial Bank v Olint Corp Limited**[3] that there are no special considerations for mandatory injunctions as distinct from prohibitory injunctions. She relied on the following passage of Lord Hoffman at paragraph 19 of the Privy Council's advice -

> "In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other...What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1970] 3 All ER 402 at 412, 'a high degree of assurance that at the trial it will appear that at the trial [sic] the injunction was rightly granted'."

I agree with the judge's approach that the principles for the granting of a mandatory injunction are the same as for a prohibitory injunction and what is important is the court's view of whether irremediable harm will be done to one party or the other depending on whether the injunction is granted or refused.

[3] [2009] UKPC 16.

[16] The judge then applied the principles in **American Cyanamid v Ethicon Ltd**[4] that an applicant for an interim injunction must establish that there are serious issues to be tried and that the balance of convenience favours the grant of the injunction. In considering the balance of convenience, the court will take into account whether the applicant can be compensated by an award of damages if he suffers any damage or harm as a result of the conduct of the respondent to the application.

[17] The judge found that there was a serious issue to be tried but that the balance of convenience did not tilt in favour of granting the injunction. She also found that even though the appellant may have suffered damage and harm that were 'not necessarily trivial', the damage and harm '…had not been sufficiently established to the required standard…'[5] and in any event such losses could be compensated by an award of damages. She dismissed the application and having decided that each party succeeded on one injunction she ordered that each party bear its own costs.

Grounds of appeal

[18] The appellant's grounds of appeal can be summarised as follows:

(1) The judge was wrong to find that the evidence of loss to the respondent was insufficient.[6]

(2) The judge erred by finding that the harm to the respondent could be avoided by making alternative arrangements.

(3) The judge failed to give any or any proper weight to the fact that:

[4] [1975] 1 All ER 504.
[5] Para. 16[6] of lower court judgment.
[6] This characterisation of the judge's finding is inaccurate. The judge found that the damage and harm to the appellant had not been established to the required standard.

(a) The injunction would not cause any harm to the respondent and therefore there is nothing to balance against the harm to the appellant by the refusal of the injunction.

(b) The respondent is in insolvent administration and is unlikely to pay any damages.

(c) The fact that the respondent has no answer to the application on the merits and no right to freeze the National Bank's bank accounts at the Bank of America.

(4) The judge erred in not granting the injunction and costs to the appellant.

[19] The respondent filed a counter notice of appeal contending that the learned judge's decision was correct because the appellant had not met the threshold for the grant of a mandatory injunction, in that: (a) the balance of convenience did not lie with granting the injunction, and (b) the respondent was acting within his powers (as administrator) and in compliance with an order for discovery in the bankruptcy proceedings in New York. The counter notice further contended that this Court could not feel a high degree of assurance that at trial the injunction would appear to have been rightly granted and that the risk of injustice to the respondent could be avoided if the injunction was granted. The notice also challenged the costs order.

[20] I will deal with the grounds of appeal and the counter notice under the traditional heads for dealing with applications for injunctions in the **American Cyanamid** case set out at paragraph 16 above. Before doing so, I should mention briefly that counsel for the respondent, Mr. Patrick Patterson, reminded us in his written and oral submissions to adhere to the well-known principle in cases such as **Hadmor**

Productions Ltd and others v Hamilton and another[7] that the function of this Court in reviewing the learned judge's discretion to refuse the injunction is not to interfere with the judge's exercise of discretion even if this court, as the reviewing court, would have exercised its discretion differently. The function of the reviewing court is to uphold the exercise of the judge's discretion unless it was based on a misunderstanding or misapprehension of the law or of the evidence, or there is new evidence or a material change of circumstances since the hearing before the judge, or the decision of the judge is so aberrant that no reasonable judge mindful of his duty to act judicially would have reached it.

Serious issues to be tried

[21] The learned judge found that there are serious issues to be tried. The respondent's claim is for a declaration of ownership of the assets that were wrongfully transferred to the appellant during the conservatorship of the National Bank. Mr. Tacon also asserts parenthetically in paragraph 30 of his affidavit filed on 29th July 2016 that the respondent maintains that it has a constructive trust claim arising under the laws of New York over the BOA Account. The appellant disputes that the transfer of the assets was improper or in breach of the duties of the directors of the National Bank. Further, that the correspondent banking accounts that were taken over by the appellant, including the BOA Account, contain customers' funds that are not owned by the National Bank or the appellant as its successor and therefore cannot be the subject of a proprietary claim. Further, that the respondent cannot possibly have a proprietary interest in the funds paid into the BOA Account by customers of the appellant or the National Bank after the freeze and outside the period of the conservatorship of the National Bank.

[7] [1983] 1 AC 191 at 220.

[22] Having reviewed the evidence and the arguments of counsel, I agree with the learned judge's finding that there are serious issues to be tried.

Balance of convenience

[23] The appellant submitted that the balance of convenience is heavily in its favour. The BOA Account is a US dollar account that is used to process payments for its customers' credit cards and other overseas transactions. As a result of the freeze, when its customers make payments into the Account those funds cannot be released and the appellant has to use its own funds to process the transactions. Failure to do so would result in the transactions being dishonoured and further losses to the appellant including reputational losses. The appellant also incurred additional losses by having to finance these transactions and also by deductions made by Bank of America from the Account to cover the cost of its legal fees relating to the dispute between the parties. The appellant also claims to have suffered serious inconvenience in operating its business by having to make alternative arrangements for dealing with its customers' transactions.

[24] The judge found at paragraph 16(5) of the judgment that the evidence of damage and harm was unparticularised and insufficient to establish credible and real harm, and that there was no palpable evidence that the respondent would not suffer irreparable harm by the grant of the injunction. This is a finding of fact by the judge that this Court must consider carefully and I will return to it when I deal with the issue of damages as sufficient compensation for the appellant.

[25] The respondent's only potential damage is that they claim a beneficial interest in the funds in the BOA Account and if the appellant is allowed to operate the BOA Account it may deplete the funds in it. There is no other allegation of damage, harm, inconvenience or reputational losses by respondent.

[26] The judge found that the balance of convenience favoured the respondent but I think this finding should be examined closely to see if it results in an order that has caused or will cause irremediable harm to the appellant.

[27] As stated in paragraph 24 above, the judge found that the appellant's claim for damage, harm and reputational losses was unparticularised and there is no evidence that the respondent would not suffer irreparable harm by the grant of the injunction. She went on to deal with the alternative arrangements that the appellant has made to service its customers in sub-paragraph 16(6) and found that this would cause some inconvenience, but the damage and harm to the appellant '…while not necessarily trivial, has not been sufficiently established to the required standard.' Further, that there is no evidence of any impact on the appellant by the non-withdrawal of the demand letter that cannot be compensated by an award of damages. Accepting the judge's finding that the damage to the appellant has not been established to the required standard, this does not mean that the appellant has not suffered damage. The judge said as much in sub-paragraph (6) when she said that the harm was '…not necessarily trivial'. I take this to mean that there was damage and harm to the appellant by the issuing of the demand letter and causing the freezing of the Account, but at this interlocutory stage the damage and harm have not been sufficiently particularised.

[28] What concerns me is the part of the judge's finding that there is no evidence that any damage to the appellant cannot be compensated by an award of damages. Put another way, any damage to the appellant can be compensated by an award of damages. The uncontroverted evidence is that the respondent is in insolvent administration. In fact, Mr. Tacon addressed the respondent's insolvency in paragraph 23 of his affidavit filed on 29th July 2016 when he said that during the conservatorship of the National Bank, the conservator directors:

> "…gave insufficient thought to the consequences of the First Claimant's (and NBA's) insolvency, the prospect of each entering [into] insolvent liquidation or insolvent administration, and the First Claimant's own insolvency."

The voluntary filing for Chapter 11 bankruptcy in New York by the respondent is also an indication of its insolvency.

[29] While the respondent's insolvency or potential insolvency does not necessarily mean that it will be unable to pay an award of damages, it does suggest that it may not be able to do so. As such, there is a real prospect that the appellant may not be able to recover any losses it suffers as a result of the demand letter and the resulting freeze of the BOA Account. This is an important factor when the court is considering an application for an interim injunction. Following the guidance from the Privy Council in the **National Commercial Bank v Olint** case[8] set out above, that the court should seek to avoid irremediable damage and harm to either party, I find that the judge, having found that the appellant has suffered damage that is 'not necessarily trivial', albeit unparticularised, should have gone on to deal with the respondent's insolvency. There is no indication that she considered that the appellant could suffer irremediable harm by the respondent's inability to pay an award of damages because of its actual or potential insolvency. The failure to do so means that the judge erred in not considering material evidence and this Court can review and set aside the exercise her discretion and exercise its own discretion. In the **Hadmor Productions Case** Lord Diplock, having set out the test for interfering with the exercise of the judge's discretion, said

> "It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."[9]

[8] See para. 15 above.
[9] At p.220.

In my opinion, the judge did not take into account or give sufficient weight to the impact of the respondent's insolvency on its ability to compensate the appellant for any losses that it has suffered and continues to suffer. This is a material irregularity and in principle this Court can set aside the exercise of the judge's discretion and exercise its own discretion.

This Court's discretion

[30] The respondent has a proprietary claim against the appellant for $9.1 million arising out of payments made by the respondent's customers that were placed with the National Bank during the conservatorship. The uncontroverted evidence of Mr. Martin Dinning, a director and interim chief executive officer of the appellant, is that the amount in the BOA Account on 11th July 2016 when it was frozen was $115,937.91.[10] As the freeze does not prevent payments coming into the Account subsequent payments by the customers of the appellant have increased the amount in the Account. The balance of the account on 11th August 2016, the date after the hearing before the judge, stood at $2,501,975.20. The appellant submitted that even if the respondent's claim applies to the amount in the Account when it was frozen, the subsequent payments into the Account belong to its customers and not the appellant or the National Bank and are therefore beyond the reach of the respondent's proprietary claim. Further, if the Account is frozen, it should be limited to the amount in the account at the time of the freeze which was $115,937.91, and in that case the appellant can pay this amount out of its own resources. Therefore, the respondent's claim does not disclose a proper basis for preventing the appellant from operating the Account in the normal course of its business.

[10] See 4th affidavit of Martin Dinning filed on 12th August 2016.

[31] The respondent submitted that it has a claim for a constructive trust over all the money in the BOA Account. That is a matter that will have to be resolved by the High Court in Anguilla or the Bankruptcy Court in New York. In the meantime, the respondent has the benefit of relief that is tantamount to a freezing injunction on the entire amount in the Account without having to apply for a proprietary or a freezing injunction. Further, it has not had to give an undertaking in damages or put up any form of security for the damage that the appellant has suffered and continues to suffer. If the respondent's claim in Anguilla fails and it is ordered to pay damages as a result of its conduct in causing the freezing of the Account, the appellant may not be able to recover those damages because of the respondent's actual or potential insolvency.

[32] As stated above in paragraph 25, the only potential damage to the respondent is that the grant of the injunction could result in the release of the freeze on the Account which effectively means that it will lose the benefit of what is in substance a freezing injunction over the Account that was obtained by writing the demand letter to the Bank of America.

[33] I have also considered the expert evidence of Mr. Kurt Gwynne in his first affidavit that the BOA Account falls under the Bankruptcy Court's jurisdiction and is caught by the automatic stay.[11] As a result, another letter from Mr. Tacon withdrawing the demand letter may not have the effect of undoing the freeze. The judge accepted the evidence that the demand letter was only a factor in Bank of America freezing the Account and that the Bank itself appeared to be saying that the letter showed that there was a dispute over the funds. The judge found that the effect of the withdrawal of the demand letter would be equivocal and that it had not been demonstrated that the withdrawal would result in the restoration of the Account.[12]

[11] Affidavit of Kurt Gwynne filed on 29th July 2016.
[12] Para.16[4] of lower court judgment.

[34] The evidence also shows that the appellant can apply to the Bankruptcy Court to release the freeze on the Account. This is an option that is open to the appellant.

[35] Taking all the evidence into account, I find that the judge erred in not considering the respondent's insolvency in deciding that the damage to the appellant could be compensated by an award of damages. If an award of damages is made that cannot be recovered from the respondent, the appellant will suffer irremediable harm in the sense contemplated by Lord Diplock in **Hadmor Production v Hamilton**.[13] This finding allows this Court to exercise its own discretion and in doing so I find that the balance of convenience favours the grant of the mandatory injunction and I feel a high degree of assurance that at trial the injunction will appear to have been rightly granted.

[36] Applying these findings to the grounds of appeal, I find that grounds 2, 3(a), 3(b) and 4 succeed for the reasons that that the respondent has not suffered any proven loss and the appellant has suffered and continues to suffer 'non-trivial' harm and damage which the respondent may not be able to compensate because of its actual or potential in insolvency. The balance of convenience favours the grant of the injunction. It follows from these findings that the grounds of the counter notice of appeal are rejected and the counter notice should be dismissed. I would allow the appeal, grant the mandatory injunction and order the respondent to pay the costs of the appellant here and in the court below.

[37] For all of the above reasons, I would make the following order:

(1) The appeal is allowed.

(2) The counter notice of appeal is dismissed.

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[13]Supra at para. 20.

(3) The respondent is ordered to write to the Bank of America formally withdrawing the demand letter and its request for a freeze on the BOA Account and refrain from taking any action with respect to the Account without the permission of a judge of the High Court of Anguilla. Failing agreement on the terms of the letter the parties shall submit their respective drafts of the letter to the Deputy Chief Registrar of the Court of Appeal for settlement by this Court. The settled letter shall be dispatched to Bank of America by the respondent within 3 days of being agreed or settled.

(4) Costs of the appeal and in the court below to the appellant.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur
Mario Michel
Justice of Appeal

By the Court

Deputy Chief Registrar