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

**ANTIGUA AND BARBUDA**

**ANUHCVAP2019/0016**

**BETWEEN**

**SOL AVIATION SERVICES LIMITED**

Appellant

**and**

**RUBIS WEST INDIES LIMITED**

Respondent

**Before:**

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

**Appearances:**

Mr. Douglas Mendes, SC with him, Mr. Satcha Kissoon and
Mr. Rushaine Cunningham for the Appellant
Mr. Leslie Haynes, QC with him, Mr. Clement Bird for the Respondent

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2019: September 12;
October 23.

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*Interlocutory appeal — Interim injunction — Whether judge wrongly exercised her discretion in refusing interim injunction — Whether damages adequate remedy — Whether judge failed to consider reputational damage suffered by Sol Aviation in assessing adequacy of damages — Whether balance of convenience favours grant or refusal of interim injunction — Whether judge failed to consider balance of convenience on the basis of Sol Aviation's contention that JOA was amended by ALC*

Sol Aviation Services Limited ("Sol Aviation") is a company engaged in the business of aircraft refueling. It provides aviation fuel and related products to its customers at the V.C. Bird International Airport (the "airport"). Sol Aviation and Rubis West Indies Limited ("Rubis") are the parties to what is called the Operating Agreement for V.C. Bird International Airport, Antigua, Joint Storage and Into Plane Operation (the "JOA"). Under the JOA, they agreed to pool their rights and assets at the airport in order to jointly service their respective customers. Subsequent to the JOA, Sol Aviation and Rubis entered into

the Agreement for Lease and Concession (the "ALC") with the Antigua and Barbuda Airport Authority (the "ABAA"), which granted them further rights for the use of the Government's facilities at the airport. Rubis was designated the operator of the joint operation under the JOA and Sol Aviation was due to replace Rubis as operator from 1st December 2018. However, Sol Aviation allowed Rubis to continue as operator after 30th November 2018.

Clause 13 of the JOA provides that where there is a change in the effective control of any party, that party must give notice of the change and offer its ownership share to the other parties. In January 2019, Parkland Fuel Corporation acquired 75 percent of the issued and outstanding shares of Sol Investments Limited, which is the indirect parent company of Sol Aviation. Sol Aviation considered the acquisition to be a change in its effective control as contemplated by clause 13 of the JOA and offered to sell its ownership share to Rubis for US$2,225,550.87. It also required that Rubis pay an additional sum of US$439,847.42, which represented Sol Aviation's severance obligations under the JOA. Rubis wrote to Sol Aviation purporting to unconditionally accept the offer and agreed to pay the sums therein. However, Rubis only paid Sol Aviation US$2,225,550.87, which it claimed represented full and final settlement of the purchase price for the ownership share. In its letter, Rubis stated that, based on its interpretation of the JOA, the transfer of the ownership share to it was deemed to have occurred "forthwith", upon receipt by Sol Aviation of Rubis' acceptance of the offer. Rubis also stated that, as Sol Aviation is no longer a participant in the JOA, it was not entitled to supply aviation fuel to the facilities or withdraw fuel therefrom. Sol Aviation replied, stating that Rubis, having not paid the additional sum of US$439,847.42, had not unconditionally accepted its offer in full and had misinterpreted the provisions of the JOA in relation to the timing of the transfer of the ownership share. Sol Aviation maintained that article 25.2 of the ALC modified and superseded clause 13 of the JOA. As a result, there was no requirement for an immediate transfer of its ownership share and a transfer had not occurred.

Sol Aviation claimed that Rubis has given effect to its stated position by preventing it from fulfilling its obligations under its contracts with customers. It therefore commenced proceedings seeking declarations, prohibitory injunctions and damages for contractual breaches and tortious interference. Sol Aviation also filed an application for interim injunctive relief enjoining Rubis from, among other things, denying it access to the facilities under the JOA and interfering with its customers. The learned judge dismissed Sol Aviation's application. She held that the parties' differing opinions as to the interpretation of the JOA suggested that there was a serious issue to be tried. She also held that there was nothing which suggested that damages were not an adequate remedy. She then concluded, based on her determination of the meaning of "forthwith" in the JOA as its plain meaning, that the balance of convenience favoured refusing an interim injunction.

Sol Aviation, being dissatisfied with the learned judge's decision, appealed. Sol Aviation argued that the judge failed to consider the irreparable reputational harm it had suffered in assessing the adequacy of damages. It also argued that she failed to consider the balance of convenience on the basis that the JOA had been amended by clause 25.2 of the ALC. The broad issue arising for this Court's determination is, therefore, whether the

learned judge wrongly exercised her discretion in dismissing Sol Aviation's application for interim injunctive relief.

**Held:** dismissing the appeal; and ordering that Sol Aviation pay Rubis' costs on the appeal amounting to $2,000.00, being two-thirds of the amount awarded in the court below, that:

1. An applicant seeking injunctive relief must establish that damages would not be an adequate remedy. In the circumstances, any irreparable reputational damage suffered by Sol Aviation was because of its unilateral decision to offer its ownership share to Rubis, which it was obliged to do under clause 13 of the JOA because of the change in its effective ownership. It would have been obvious to Sol Aviation that a departure from the JOA would have ramifications for its business in Antigua and Barbuda and across the region. In addition, any losses arising from Sol Aviation being denied access to the facilities and from supplying fuel to its customers are capable of being compensated by damages. Further, considering the promptness of Rubis' acceptance of Sol Aviation's offer and the quantum of payment made, it is likely that Rubis would be in a financial position to pay damages. There is therefore no basis for interfering with the judge's conclusion that damages would be an adequate remedy.

2. In assessing the balance of convenience, the question to be answered is which course of action, whether granting or refusing injunctive relief, is likely to cause the least irremediable harm. The status quo is that Rubis has been the operator throughout the period of the JOA and has been providing all airlines (possibly with one exception) which were serviced by Sol Aviation with an uninterrupted fuel supply. Further, over 9 months have elapsed since Sol Aviation gave notice of its effective change of control to Rubis and, by its own account, would be required to leave the facilities by January 2020. Any question of compensation for interference with commercial rights will be a question of damages. Therefore, Sol Aviation has not demonstrated that the balance of convienience favours the grant of an injunction. Accordingly, there is no basis for concluding that the judge's exercise of discretion in refusing the injunction exceeded the generous ambit within which reasonable disagreement is possible or is clearly wrong, warranting this Court's interference with the exercise of her discretion.

   **American Cyanamid Co. v Ethicon Ltd.** [1975] 1 ALL ER 504 applied; **National Commercial Bank Jamaica Ltd. v Olint Corporation Ltd** [2009] UKPC 16 applied; **Michel Dufour and others v Helenair Corporation Ltd** (1996) 52 WIR 188 followed; **Hadmor Productions Ltd. and Others v Hamilton and Another** [1983] 1 AC 191 applied.

3. There is no requirement for every factor which weighed with the judge in her appraisal of the evidence to be identified and explained. However, the issues, the resolution of which were vital to the judge's conclusion, should be identified and the manner in which she resolved them explained. A review of the judge's reasoning reveals that the judge had regard to the ALC in arriving at her conclusions, notwithstanding that she did not expressly address in her judgment the balance of convenience on the basis that the ALC modified the JOA.

Accordingly, there is no basis for concluding that the judge failed to consider whether the ALC amended, modified or superseded the JOA in her assessment of the balance of convenience.

**English v Emery Reimbold & Strick Ltd.** [2002] EWCA Civ 605 applied.

## JUDGMENT

[1] **MICHEL JA:** This is an appeal by Sol Aviation Services Limited ("Sol Aviation") against the decision of Wilkinson J, dismissing an application for an interim injunction against the respondent, Rubis West Indies Limited ("Rubis").

### Background

[2] Sol Aviation is a company engaged in the business of aircraft refueling and holds contracts with its customers for the provision to them of aviation fuel and related products at the V.C. Bird International Airport in Antigua (the "airport"). The company also provides similar services to its customers in other Caribbean countries.

[3] Sol Aviation and Rubis are/were parties to an agreement called the Operating Agreement for V.C. Bird International Airport, Antigua, Joint Storage and Into Plane Operation (the "JOA"), entered into on 30th November 2013. Under the JOA, the parties agreed to jointly operate and make use of their various rights, entitlements, facilities and other assets, to receive, store and distribute aviation fuel to the aircraft of the parties' customers. The rights which were joined under the JOA included Rubis' rights under a licence to the land on which the facilities are constructed and their plant and equipment and Sol Aviation's buildings and structures at the airport. Essentially, the parties agreed to pool their rights and assets at the airport in order to jointly service their respective customers.

[4] Subsequent to the JOA, an Agreement for Lease and Concession ("the ALC") was entered into by Sol Aviation, Rubis and the Antigua and Barbuda Airport Authority (the "ABAA") on 1st March 2015. The ALC granted Sol Aviation and Rubis further

rights for the use of the Government's facilities at the airport. The JOA and the ALC collectively provide for the shared infrastructure of fuel storage, operations, delivery systems and related matters at the airport.

[5] By clause 15 of the JOA, Rubis was designated the operator of the joint operation. Its appointment as operator was for a period of 5 years, ending on 30th November 2018. As operator, Rubis was obliged by clause 16 of the JOA to operate and maintain the facilities in accordance with the JOA, which meant that it was required to provide fuel to Sol Aviation's customers and to act in the general interest and to the mutual benefit of all parties to the JOA. Sol Aviation was due to replace Rubis as operator under the JOA from 1st December 2018, and would therefore have been entitled to service its own customers directly and would additionally have been obliged to service Rubis' customers. SOL, however, probably because it was aware of its imminent change of control, allowed Rubis to continue as the operator after 30th November 2018.

[6] Under clause 13 of the JOA, where there is a change in the effective control of any party, that party must give notice of the change and offer its "ownership share" to the other parties. In full, clause 13 provides as follows:

> "13. **Change in Interest in a Participant**
> (a) In the event that there should at any time be or be impending a change in the effective control of any Participant, then, unless otherwise agreed:
> (i) that Participant shall forthwith give notice of such change to the Operating Committee;
> (ii) such notice shall contain an offer by that Participant to sell its ownership share to the other Participants at a price equivalent to the greater of fair market value or written-down historical cost net book value of its ownership share in the Facilities in the accounting records of the Facilities; and
> (iii) the provisions of Clause 12(b), (c) and (d) shall apply mutatis mutandis in respect of such offer as follows:
> (aa) for the phrase 'at the appropriate time', at the end of Clause 12(b)(ii) and (c)(ii), read 'forthwith'…"

[7] Clause 13(iii) makes clause 12(b), (c) and (d) applicable to a change of control, subject to certain alterations, which when applied would read as follows:

"12(b)(i) The offer referred to in (a) above shall be on the basis that it is made to the other Participants in proportion to their ownership share, and is for acceptance or rejection in full by each within forty (40) days of the date of the notice.
(ii) if each of the other Participants so accept its ownership share proportion of the withdrawing Participant's ownership shares then the necessary transfer shall be effected forthwith.
(c)(i) if however any of the other Participants does not accept its ownership share proportion of the withdrawing Participant's share in accordance with (b) above, such proportion of the withdrawing Participant's share shall be offered by the withdrawing Participant to the accepting Participants in proportion to their ownership shares and further offers shall be made on the same basis until it is ascertained whether there is any part of the withdrawing Participant's ownership which none of the other Participants wishes to take up. In the case of each such subsequent offer, it shall be for acceptance or rejection in full by each accepting Participant concerned within ten (10) days of the date of the offer.
(ii) if the whole of the withdrawing Participant's ownership share is taken by the other Participants pursuant to the foregoing, then the necessary transfers shall be effected forthwith.
(d) if however none of the Participants accept the original offer in accordance with b(i) above, or if any part of the withdrawing Participant's ownership share is not taken up pursuant to (c) above (in which case the other Participants shall be deemed to have rejected the offer) the withdrawing Participant shall be free to sell the whole of its ownership share to any marketer of aviation fuel ("the purchasing company") other than one of the other Participants provided:
(i) that the price is not effectively less than the price referred to in (a) above;
(ii) that the transfer of the withdrawing Participant's share to the purchasing company takes place within twelve (12) months from the date of the last offer to any of the other Participants pursuant to the foregoing provisions of this Clause;
(iii) that the sale is subject to the purchasing company obtaining approval from the Airport Authority to do business at the Airport; and
(iv) that the purchasing company meets the conditions set out in Clause 10(c)(iii), (iv), (v) hereof and the purchasing company becomes a party to this Agreement and the Agreements referred to in Clause 10(c)(iv)."

[8] On 8th January 2019, Parkland Fuel Corporation acquired 75 percent of the issued and outstanding shares of Sol Investments Limited, which is the indirect parent company of Sol Aviation. The board of directors of Sol Aviation formed the view that the acquisition constituted a change of control of Sol Aviation as contemplated by

clause 13 of the JOA. As a consequence, on 10th January 2019 Sol Aviation caused a notice of change of interest to be issued to the operating committee established under the JOA. This included an offer to Rubis to sell Sol Aviation's 'ownership share in the Facilities' to Rubis for US$2,225,550.87. One of the terms of the offer was the requirement that Rubis also pay to Sol Aviation the sum of US$439,847.42, which represented Sol Aviation's severance obligations under the JOA. The total payment amount proposed by Sol Aviation in its 10th January offer was therefore US$2,665,398.29. Clause 5 of the offer explicitly stated that any acceptance of the offer by Rubis must be unconditional.

[9] On 31st January 2019, Rubis wrote to Sol Aviation describing the offer as being one for US$2,225,550.87. The letter, however, also contained Rubis' agreement to reimburse Sol Aviation the amount of US$439,847.42. Rubis undertook to make both payments, which would total US$2,665,398.29, upon receipt of Sol Aviation's US bank account details. Enclosed with Rubis' 31st January letter was a copy of Sol Aviation's 10th January letter, which copy was signed by Rubis purporting to unconditionally and irrevocably accept the offer. In addition, Rubis indicated that, based on its interpretation of the JOA, it considered that the transfer of the ownership share to Rubis was deemed to have occurred upon the receipt by Sol Aviation of Rubis' acceptance of the offer.

[10] Sol Aviation failed to provide Rubis with its bank details. As a result, Rubis wrote to Sol Aviation on 7th February 2019 enclosing a cheque in the amount of US$2,225,550.87 representing full and final settlement of the purchase price for the ownership share. In that letter, Rubis stated that: 'since Sol Aviation Services Limited is no longer a Participant in the JOA, it is no longer entitled to supply aviation fuel to the Facilities or to withdraw any fuel therefrom for the purpose of delivering aviation fuel from the facilities to its customers'. On 8th February 2019, Sol Aviation wrote to Rubis stating that Rubis had not unconditionally accepted its offer in full. Sol Aviation also stated that Rubis had misinterpreted the provisions of the JOA as there is no requirement for an immediate transfer of its ownership share and such a

transfer has not occurred. Sol Aviation took the view that article 25.2 of the ALC modifies and supersedes the obligation under clause 13 of the JOA in relation to the timing of the transfer of the ownership share where there is a change of control. Article 25 of the ALC provides as follows:

> "25. **CHANGE OF PARTICIPANTS**
> 25.1 Where the Grantees individually shall withdraw from its use and occupation of the Licensed Premises and/or withdraw from the Joint Operating Agreement prior to the expiration or termination of this Agreement, the Agreement shall continue to subsist and be binding against such of those Participants as continue to use and occupy the Licensed Premises and/or remain a party to the Joint Operating Agreement and the term "Grantees" shall refer to these remaining Participants.
>
> 25.2 The Grantees, either individually or collectively shall give the Grantor at least twelve months' notice of the withdrawal. ("the Withdrawing Participant")
>
> 25.3 Without prejudice to any obligations or liabilities of a Withdrawing Participant, as have accrued up to the date of withdrawal, the terms and conditions of this Agreement shall cease an (sic) no longer be binding on the said Withdrawing Participant."

[11] Sol Aviation's position is therefore that if it withdraws from the JOA prior to the expiration of the ALC, it shall give the ABAA twelve months' notice of the withdrawal, and the transfer of ownership to Rubis shall be effected within at least 12 months.

[12] Sol Aviation alleged that Rubis, as operator, has control of the facilities at the airport and was therefore able to give effect to its positon that Sol Aviation is no longer a participant under the JOA and no longer entitled to supply fuel to its customers. Sol Aviation claimed that Rubis has approached its customers directly and solicited their business, and in one instance has refused to service Sol Aviation's customers. Sol Aviation alleged that it has effectively been shut out of the operations and prevented from fulfilling its obligations under its contracts with its own customers.

[13] As a consequence of Rubis' actions, Sol Aviation on 8th March 2019 commenced proceedings in the court below seeking a number of declarations, prohibitory injunctions and damages. Sol Aviation alleged, amongst other matters, contractual breaches and tortious interference in existing contracts arising out of the JOA and

the ALC in relation to the parties' joint organisation, construction, operation and maintenance of the aviation fuel storage facility and use of the aviation fuel supply system at the airport. Sol Aviation also alleged that it had suffered irreparable harm, economic loss and incurred expenses. Further, Sol Aviation alleged that its long-standing reputation will be harmed, it will lose its customers in Antigua and Barbuda, and its regional business will be negatively impacted.

[14] On that same day, 8th March 2019, Sol Aviation also filed an application for interim injunctive relief which was supported by the affidavit of Andrew Niles, then general manager of Sol Aviation. The application for injunctive relief sought to enjoin Rubis from:

(1) Denying Sol Aviation access and use of the underground fuel hydrant distribution system for the purpose of withdrawing and delivering aviation fuel to its customers at the airport;

(2) Denying and/or preventing Sol Aviation from accessing and/or using the shared assets falling under the JOA for the purpose of servicing its customers at the airport;

(3) Refusing to supply aviation fuel to Sol Aviation's customers pursuant to the terms of the JOA and the ALC; and

(4) Interfering with Sol Aviation's customers at the airport in a manner contrary and/or inimical to the JOA and which exceeds or is not limited to the role, duties, and functions of Rubis as the current operator under the JOA and specifically from doing any act or making any representation to ostensibly assert effective transfer of Sol Aviation's ownership share in the joint operation.

[15] Rubis opposed the application for injunctive relief by way of an affidavit of its managing director, Mauricio Nicholls, filed on 19th March 2019.

[16] The judge, having considered the application and the affidavit evidence filed in support of and in opposition to the grant of the injunction, as well as the arguments and submissions of counsel for the parties, dismissed the application. She considered that, based on the correspondence exchanged between the parties, the foundation of the dispute was their disagreement on the interpretation of "forthwith" in clause 13(a)(iii)(aa) and on the procedure to be adopted after Rubis' acceptance of Sol Aviation's offer. She found that there was no reason, on a review of the JOA, to revert to any rule of interpretation other than the plain meaning rule. She concluded that the meaning of "forthwith" in the JOA would therefore be its plain meaning of 'immediately, without delay, directly, promptly, within a reasonable time under the circumstances'.[1]

[17] Applying the principles stated in **American Cyanamid Co. v Ethicon Ltd.**,[2] the judge first determined that the differences of opinion between the parties as to the interpretation of the JOA suggested that there was a serious issue to be tried. She then considered the issue of whether damages would be an adequate remedy and concluded that it was clear that the transaction was solely about a fixed sum of money, that is, payment for Sol Aviation's ownership share and its severance obligation to its employees. She therefore held that, in view of Sol Aviation's offer for its ownership share being for a fixed sum which Rubis was willing to accept and the court's interpretation of "forthwith", there was nothing before her which suggested that damages were not an adequate remedy. She concluded, based on her determination of the meaning of "forthwith", that the balance of convenience favoured not granting the interim injunction sought by Sol Aviation. She also stated that there was nothing before her to suggest that Rubis would not be able to pay any damages ordered in the event the injunction ought to have been granted.

[18] Being dissatisfied with the judge's refusal of the injunction, Sol Aviation appealed on 8 grounds of appeal challenging several findings of law and claiming an improper

[1] Black's Law Dictionary 8th Edn.
[2] [1975] 1 ALL ER 504.

exercise of discretion by the judge. The notice of appeal filed on 1st June 2019 set out the following grounds of appeal:

(1) The learned judge improperly exercised her discretion when she failed to consider or have any regard whatsoever to article 25.2 of the ALC and its effect on clause 13 of the JOA regarding the timing of the transfer of the ownership share where there is a change of control.

(2) The learned judge erred in failing to consider the evidence before her of the developed industry practice between the parties for effecting a transfer of ownership share in similar joint operating agreement.

(3) The court's accepted interpretation of "forthwith" was erroneous in all the circumstances of this case and was inconsistent with the developed industry practice between the parties and with business common sense.

(4) The learned judge improperly exercised her discretion when she failed to consider or have any regard whatsoever to Sol Aviation's reputational damage resulting from Rubis' interference with its rights under the JOA and ALC to service its customers.

(5) The learned judge improperly exercised her discretion when she failed to consider or have any regard whatsoever to Sol Aviation's reputational damage resulting from Rubis' active solicitation of long-term agreements with Sol Aviation's existing customers.

(6) The learned judge improperly exercised her discretion when she failed to consider or have any regard whatsoever to the nature and scope of Sol Aviation's reputational damage in that it will suffer significant market loss throughout the Caribbean region since aviation fuel supply contracts are typically offered for tender as international or regional packages, rather than airport-specific contracts.

(7) The court's finding that damages were an adequate remedy is wholly erroneous in that the learned judge failed to consider or have any due or sufficient regard to the evidence of Sol Aviation's reputational damage and the established case law recognising that damages are not an adequate remedy for reputational harm.

(8) The learned judge denied Sol Aviation its right to be heard and its right to a fair trial in failing to consider its case that (i) the JOA which provided in clause 13 for the transfer of Sol Aviation's share forthwith had been amended by clause 25.2 of the ALC which provides for a period of notice of at least one year to effect such transfer; (ii) the JOA had not therefore been terminated and could not be terminated for at least twelve months, or since such notice had not been given, the JOA had not been terminated at all; and (iii) the damage which Sol Aviation suffered as a result of the breach of the JOA by Rubis was not limited to financial loss which Sol Aviation suffered as a result of the breach but the reputational damage suffered as a consequence of being prevented from servicing its customers and the business damage likely suffered by the loss of market share likely to result as Sol Aviation's customers gravitated to other suppliers.

[19] Notwithstanding the 8 grounds of appeal contained in the notice of appeal, the overarching issue on this appeal is whether the judge wrongly exercised her discretion in dismissing the application for injunctive relief.

**Discussion**
**Appellate Court Interference with Exercise of Discretion**

[20] An application for an interlocutory injunction is one for discretionary relief and an appellate court will not disturb the decision of the court below on such an application, unless it is shown that the judge's exercise of discretion exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. The basis upon which an appellate court will interfere with a

trial judge's exercise of discretion is well-known and often restated. In the seminal case of **Michel Dufour and others v Helenair Corporation Ltd**[3] Sir Vincent Floissac CJ explained the principle in the following way:

> "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 learned 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 considerations and (2) that as a result of the error or the 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."

[21] More specifically, in relation to an appellate court reviewing the exercise of discretion by a trial judge in respect of an interlocutory injunction, Lord Diplock in **Hadmor Productions Ltd. and Others v Hamilton and Another**[4] explained thus:

> "An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached

[3] (1996) 52 WIR 188.
[4] [1983] 1 AC 191, at p. 220.

it. 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."

[22] In the Privy Council decision in **National Commercial Bank Jamaica Ltd. v Olint Corporation Ltd.**,[5] Lord Hoffman referring to what may be considered as the locus classicus on interim injunctions, **American Cyanamid Co. v Ethicon Ltd.**, explained the approach courts should adopt in determining whether to grant injunctive relief pending trial. His Lordship explained as follows:

> "16.…It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.
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> 17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408: 'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'

[5] [2009] UKPC 16.

> 18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.
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> 19. There is however no reason to suppose that, in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. 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: see Lord Jauncey in R v Secretary of State for Transport, Ex p Factortame Ltd (No 2) (Case C-213/89) [1991] 1 AC 603, 682-683…"

[23] The well-known considerations to which the Court must have regard in determining whether to grant an interim injunction were most notably enunciated by Lord Diplock in **American Cyanamid**. Suffice it to say that, the court should consider:

(1) Whether there is a serious issue to be tried.

(2) Whether an award of damages would not be an adequate remedy.

(3) Whether the balance of convenience lies in favour of granting the injunction.

(4) Whether the applicant is and will be able to compensate the respondent for any loss which the injunction may cause in the event that it is later determined that the injunction should not have been granted.

**Serious Issue to be Tried**

[24] The judge found that there is a serious issue to be tried. As there is no dispute between the parties as to whether there is a serious issue to be tried, there is no need for any extensive discussion on this point. I will only briefly address the point for completeness. On this point, Sol Aviation submitted that there is a serious issue to be tried as to whether Rubis is in breach of the JOA by refusing to permit Sol

Aviation to service its customers and to have access to the facilities covered by the JOA to do so. It contended that there was no concluded agreement for the sale of Sol Aviation's ownership share in the joint operation as Rubis had not unconditionally accepted the offer in full, as evidenced by Rubis' letter dated 31st January 2019. Sol Aviation also contended that it was not obliged to transfer its ownership share to Rubis and it remained a party to the JOA with full rights thereunder to take over from Rubis as operator and to service its own customers with aviation fuel as and when the need arose. It also stated alternatively that, if Rubis did in fact accept its offer in full, it would only cease to be a party to the JOA when it transferred its ownership share to Rubis. Sol Aviation also claimed that clause 12(b)(i) of the JOA is not to be interpreted as meaning that the mere acceptance of the offer by Rubis is tantamount to an effective transfer of Sol Aviation's ownership share without more. It contended that the clause merely imposed an obligation on the parties to effect the transfer forthwith, which the parties never did. In any event, Sol Aviation maintained that clause 12(b)(i) was modified by clause 25.2 of the ALC, which requires that the parties give at least twelve months' notice of any withdrawal from the JOA to the ABBA. Thus, even if Rubis had accepted Sol Aviation's offer in full, Sol Aviation was to continue being a party to the JOA for at least twelve months. Rubis submitted that, in light of the contrasting positions on the interpretation of clause 12(b)(i), there is a serious issue to be tried.

[25] In determining whether there is a serious issue to be tried the court must be satisfied that the claim is not frivolous or vexatious. Lord Diplock in **American Cyanamid** explained the first stage of the court's determination of whether to grant an injunction as follows:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with at the trial…So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at

the trial, the court should go to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."[6]

[26] In **Suzanne P. Gryspeerdt et al v Clico Investment Bank Limited (In Compulsory Liquidation)**,[7] the learned Chief Justice Pereira explained the meaning of "serious issue to be tried" in the following terms:

> "This clearly suggests that the claimant must be able to demonstrate that his case discloses a serious issue to be tried or put another way, that he has a real prospect of succeeding in his claim for a permanent injunction at the trial as a threshold issue as it is only where that threshold is met that the court is then required to consider where the balance of convenience lies."

[27] Sol Aviation in its statement of claim alleged, amongst other matters, breaches of the JOA by Rubis. In his oral submissions before this Court, Senior Counsel for Sol Aviation, Mr. Douglas Mendes, highlighted that the critical issue arising on Sol Aviation's claim is whether the transfer of Sol Aviation's ownership share was to occur forthwith or as Sol Aviation contended, within at least 12 months of giving notice to the ABBA of its intention to withdraw from the JOA. Rubis' position is that the JOA calls for the transfer of the ownership share to be made forthwith. There is also the issue of whether Rubis unconditionally accepted Sol Aviation's offer. At this stage of the inquiry, there is no need to resolve conflicts of evidence as to facts on which the claims of either party may depend nor any need to decide difficult questions of law, it is sufficient to state that the judge correctly concluded that the differences in the interpretation of the JOA demonstrate that there is a serious issue to be tried on Sol Aviation's claim.

**Adequacy of Damages**

[28] An applicant seeking injunctive relief must establish that damages would not be an adequate remedy in the circumstances of the case. If an award of damages would be an adequate remedy in the circumstances and the defendant would be in a financial position to pay them, an injunction should not be granted. Lord Diplock in **American Cyanamid** explained thus:

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[6] [1975] 1 ALL ER 504 at p. 511.
[7] SLUHCVAP2017/0016 (delivered 8th September 2017, unreported).

> "…the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction."[8]

[29] On the question of the adequacy of damages, Sol Aviation submitted that damages are not an adequate remedy in the circumstances. It argued that the judge failed to consider that loss of actual or potential customers, goodwill and reputational damage amount to irreparable harm which are not compensable in damages. It contended that the judge's focus was on the financial liquidity of the parties, rather than the adequacy of damages as a remedy for the harm suffered by Sol Aviation. Sol Aviation claimed that Rubis' actions in preventing it from supplying fuel to its customers have deprived it of income it would have derived from the sale of fuel to its customers under the JOA. It further claimed that such a loss could not be quantified as it is unknown whether Rubis will be in a position to satisfy any judgment debt obtained because Rubis has not presented any evidence of its financial wherewithal. Sol Aviation also contended that it has incurred and continues to incur the expense of compensating its customers for the additional fuel prices

[8] [1975] 1 ALL ER 504 at p. 511.

charged by Rubis. It stated that, although such a sum is quantifiable, there is no evidence of Rubis' capacity to pay any damages awarded against it.

[30] Sol Aviation argued that Rubis has been soliciting its customers and that its reputation has been prejudiced because of its inability to provide an uninterrupted service to its customers. Sol Aviation claimed that unless Rubis is restrained, Rubis' actions may result in significant losses to its business in Antigua and across the region which increases the likelihood of irreparable harm to its business and its reputation. Referring to **National Commercial Bank of Anguilla Ltd. v National Bank of Anguilla (Private Banking and Trust) Limited (in administration)**[9] in support of its position, Sol Aviation argued that damages are not an adequate remedy for reputational harm and there was no requirement for an applicant for injunctive relief to minutely particularise such harm. Sol Aviation stated that if injunctive relief is granted, Rubis will only lose the income it would have derived from the sales to Sol Aviation's customers. There is no suggestion that Rubis is likely to suffer any reputational damage or market loss if an injunction is granted. Sol Aviation also stated that it would be willing to undertake to compensate for any losses which Rubis might suffer if it is later adjudged that the injunction sought should not have been granted.

[31] Rubis submitted that the judge correctly concluded, based on the evidence before her, that damages were an adequate remedy. It stated that Sol Aviation failed to advance any evidence of financial loss, any instance of reputational damage suffered as a consequence of being prevented from servicing its customers, or any damage to its business incurred by the loss of market share in Antigua and the region resulting from its unilateral decision to offer its ownership share to Rubis. Rubis argued that Sol Aviation had not presented any evidence which could reasonably have informed the judge to exercise her discretion differently.

[9] AXAHCVAP2016/0009 (delivered 28th February 2017, unreported).

[32] The crux of Sol Aviation's submissions on this point is that as a result of Rubis' actions, it has suffered reputational damage which is unquantifiable and therefore damages are not an adequate remedy. In my view, if any reputational damage has been suffered by Sol Aviation, it is as a consequence of its offer to sell its ownership share to Rubis, which it was obliged to do under the JOA because of the change in its effective ownership. There is no doubt that a departure from the facilities at the airport must have been within Sol Aviation's contemplation. Indeed, while there is no requirement for an applicant for injunctive relief to particularise reputational damage, the evidence of reputational damage contained in the affidavit and supplementary affidavit of Andrew Niles does not establish that any such damage arose as a result of anything but the change of ownership in Sol Aviation. Sol Aviation was alive to the fact that there was going to be a change in its ownership and that it would no longer be a party to the JOA. It would therefore have been obvious to Sol Aviation that a departure from the JOA would have ramifications for its business in Antigua and Barbuda and across the region. Further, Sol Aviation has not presented this Court with any evidence of incurred liability to any of its customers arising from its inability to supply fuel nor evidence of any third party concern, locally or regionally, as a result of its loss of participation in the JOA.

[33] In addition, the dispute between the parties concerns principally the timing of the transfer of Sol Aviation's ownership share. In any event, Sol Aviation accepted that it would be required to depart the facilities at a determinable stage, at the latest, after the expiry of a stipulated notice period and its presence at the facilities was only in the form of fuel stored there for inter plane refueling purposes. In my view, any losses arising from Sol Aviation being denied access to the facilities and from supplying fuel to its customers are capable of being compensated by damages.

[34] Furthermore, although no financial disclosure was made by Rubis, it is known that Rubis operates similar businesses across the region and is undoubtedly a company of substantial worth. The judge was also entitled to draw such an inference of Rubis' financial capacity from its immediate acceptance of Sol Aviation's offer and its

prompt payment for Sol Aviation's ownership share. I am persuaded by Rubis' arguments on this point and I can find no fault with the judge's reasoning and conclusion that damages are an adequate remedy in the circumstances and that if Sol Aviation is successful at trial, it is likely that Rubis would be in a financial position to pay damages to Sol Aviation. Accordingly, there is no basis for interfering with the judge's finding.

**Balance of Convenience**

[35] This Court's finding that the judge correctly concluded that damages were an adequate remedy and that Rubis would be in a financial position to pay the damages means that - in the words of Lord Diplock - "no interlocutory judgment should normally be granted, however strong the plaintiff's claim appeared to be at that stage".[10] At the hearing of the appeal, though, Mr. Mendes, SC made extensive submissions on the issue of the judge's assessment of the balance of convenience, which I believe merits this Court's consideration of the issue. I will, therefore, treat with the issue of where the balance of convenience lies on the facts of this case.

[36] In assessing the balance of convenience, the question to be answered is which course of action, whether granting or refusing injunctive relief, is likely to cause the least irremediable harm. In **American Cyanamid**, Lord Diplock stated that:

> "The extent to which the disadvantage to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies, and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance, the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application."[11]

[37] In his oral submissions, Mr. Mendes, SC submitted that the judge having found that there was a serious issue to be tried, ought to have considered the balance of convenience on the basis that clause 13 of the JOA was modified by article 25.2 of the ALC, the practical effect of which is that the JOA could not have been terminated

[10] [1975] 1 ALL ER 504 at p. 511.
[11] [1975] 1 ALL ER 504 at p. 512.

for at least 12 months. Mr. Mendes, SC argued that only Sol Aviation is at risk of an injury to its reputation as it is in a position where it cannot service its customers in Antigua and the 12-month period would have afforded Sol Aviation a period of transition to make alternative arrangements for its business in Antigua and across the region. He argued that the judge, in failing to consider the issue of whether clause 13 of the JOA was modified by article 25.2 of the ALC, denied Sol Aviation its right to be heard and its right to a fair trial.

[38] Sol Aviation contended that if an injunction is granted, Rubis will not suffer any irremediable harm and would be required to continue under the JOA supplying its own customers with fuel and earning income. However, if the injunction is not granted, Rubis is likely to continue "poaching" Sol Aviation's customers, seeking to bind them to long-term contracts. Sol Aviation claimed that the effect of injunctive relief will be to stop Rubis temporarily from doing what it had not been doing previously, which is, supplying Sol Aviation's customers under arrangements made directly between Rubis and those customers. It further claimed that an injunction would not interrupt Rubis' business, but rather will cause the parties to revert to the situation which existed prior to the breaches of the JOA alleged. Sol Aviation asserted that the balance of convenience favours granting the injunction sought and that Rubis would be adequately compensated in damages if the injunction ought not to have been granted.

[39] Rubis submitted that the judge correctly determined, based on the meaning of "forthwith", that the balance of convenience favoured refusing the injunction. In his oral submissions, Mr. Leslie Haynes, QC on behalf of Rubis referred this Court to the following statement in **English v Emery Reimbold & Strick Ltd.**:[12]

> "It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues, the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them

[12] [2002] EWCA Civ 605.

> explained…it does require the judge to identify and record those matters which were critical to his decision."

Mr. Haynes, QC submitted that the judge considered the vital issues in her determination of Sol Aviation's application and there was no need for the judge to identify every factor in her evaluation of the evidence. He contended that the judgment clearly reveals the basis on which she determined the application and her discussion suggested that she had the ALC in contemplation.

[40] Rubis also contended that the JOA required that notice of change or an impending change in the effective control of a party should be given to the other party. It argued that Sol Aviation knew of the impending change in its effective control several months in advance as it was public knowledge as at 10th October 2018 that Parkland Fuel Corporation was to acquire 75 percent of Sol Aviation, and it waited 3 months to offer its ownership share to Rubis, which Rubis accepted in January 2019. Rubis contended that Sol Aviation took no steps during that 3 month-period to make alternative arrangements. Rubis also stated that it had always been the operator under the JOA, which provided for an exchange of the role of operator between the parties every 5 years. However, when it became Sol Aviation's turn to assume the role of operator, the parties agreed to maintain the status quo. Rubis submitted that the balance of convenience favoured maintaining that status quo and refusing the injunction. Rubis therefore contended that the judge correctly exercised her discretion in so finding and that there is no basis on which this Court should interfere with the exercise of her discretion.

[41] In my view, Rubis' submissions on the balance of convenience are to be preferred. The status quo is that Rubis carries on the role of operator and has been doing so throughout the period of the JOA. Rubis has been providing all airlines, possibly with one exception, which were serviced by Sol Aviation with an uninterrupted fuel supply. Any question of compensation for interference with commercial rights will be a question of damages. Further, over 9 months have elapsed since Sol Aviation gave notice of its effective change of control and Rubis, by its own account, would in any event be required to leave the facilities by January 2020. As stated previously,

the reputational damage which Sol Aviation alleges is as a consequence of its change of control, which would inevitably lead to Sol Aviation ceasing to be a party to the JOA. In the circumstances, as the judge stated, it is clear that Sol Aviation knew what was in its 'pipeline' and that once there was going to be a 75 percent change of its ownership, it could no longer be a party to the JOA. In the premises, Sol Aviation has not demonstrated that the grant of an injunction is likely to cause the least irremediable harm. In my view, therefore, the judge correctly concluded that the balance of convenience lies in favour of refusing injunctive relief, and there is accordingly no basis for interfering with her exercise of discretion.

[42] In addition, having determined the meaning of "forthwith" on her construction of the JOA, there was no need for the judge to have expressly addressed the balance of convenience on the basis that the ALC modified the JOA. Indeed, a review of the judge's reasoning reveals that she did have regard to the ALC in arriving at her conclusions. Accordingly, having regard to the dicta in **English v Emery Reimbold**, there is no merit in Sol Aviation's contention that the judge failed to consider whether the ALC amended, modified or superseded the JOA.

[43] A review of the judge's findings on the issues of adequacy of damages and the balance of convenience demonstrates that she gave sufficient consideration to the relevant principles in the context of the factual circumstances of the case. There is therefore no basis to conclude that she exceeded the generous ambit within which reasonable disagreement is possible or that her decision to refuse the injunction sought by Sol Aviation is so plainly wrong that it warrants this Court interfering with the exercise of her discretion. In my view, Sol Aviation's appeal therefore fails.

**Conclusion**

[44] For the reasons outlined, I would dismiss the appeal and order that Sol Aviation pays Rubis' costs on the appeal amounting to $2,000.00, being two-thirds of the amount awarded in the court below.

I concur.
**Dame Janice M. Pereira, DBE**
Chief Justice

I concur.
**Paul Webster**
Justice of Appeal [Ag.]

**By the Court**

**Chief Registrar**