[2020] JMCA Civ 35

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS 47/2016 & 53/2017

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**TRAILLE CARIBBEAN LIMITED**	**APPELLANT**
AND	**CABLE & WIRELESS JAMAICA LIMITED T/A LIME**	**RESPONDENT**

Dr Lloyd Barnett and Sylvester Hemmings instructed by Sylvester Hemmings & Associates for the appellant

Mrs Denise Kitson QC, Kevin Williams and David Ellis instructed by Grant, Stewart, Phillips & Co for the respondent

8, 9, 10, 11 October 2019 and 31 July 2020

BROOKS JA

[1] These consolidated appeals arise from a dispute over the interpretation of an interconnection agreement (ICA), made between the appellant, Traille Caribbean Limited (Traille) and the respondent, Cable & Wireless Jamaica Limited t/a LIME (CWJ). The application of the Provisional Collection of Tax (Telephone Calls Tax) Order, 2012 (TCT Order) to the operation of the ICA proved to be a major sticking point between the parties. Traille insisted that CWJ's invoices for servicing calls for Traille, through the ICA, should not include telephone call tax (TCT) on those calls. Traille contended that it

should bear the responsibility for paying the TCT over to the tax administration. CWJ, on the other hand, contended that since it provided the service, Traille should pay the TCT over to it for onward payment to the tax administration.

[2] The litigation commenced with a claim filed by Traille, which sought specific performance of the ICA, a mandatory injunction to compel CWJ to service calls for Traille, under the ICA, and damages for breach of contract.

[3] CWJ resisted the claim. It contended that a proper reading of the ICA and the TCT Order mandated that it should both bill for, and collect, the TCT. CWJ also filed a counterclaim, seeking compensation for losses incurred as a result of Traille's alleged breach of the ICA, in failing to settle in full, CWJ's invoices, rendered under the ICA.

[4] Traille secured an interim injunction, which mandated CWJ to provide the service. It gave an undertaking that it would pay any damages that CWJ would incur in obeying the court's order.

[5] The claim came before Batts J, who, on 15 April 2016, entered judgment in favour of CWJ on the claim, with damages, arising from Traille's undertaking, to be assessed. He, however, gave judgment for Traille on the counterclaim. On 22 May 2017, Laing J assessed the damages pursuant to the order made by Batts J.

[6] These two appeals arise from the respective decisions of Batts J and Laing J.

Background to the appeals

[7] Traille obtained telecommunications licences with the intention of entering the telecommunications industry in Jamaica. Traille's business model involved charging international telephone carriers for sending the carriers' customer's calls from outside of Jamaica through Traille's system to mobile telephone customers in Jamaica. Since Traille did not have a public telecommunications network in Jamaica, it needed to contract the services of a company that had such a network. Accordingly, it agreed with CWJ, a major telecommunications provider in Jamaica, for the termination of the international calls that Traille secured, onto CWJ's local network, that is, to CWJ's mobile telephone customers. The agreement included having CWJ route some of those international calls through CWJ's network to another telecommunications network in Jamaica, Digicel, for receipt by Digicel's customers.

[8] The parties agreed that CWJ would provide the infrastructure, including the provision of fibre optic cables, linking Traille's equipment to CWJ's equipment, to facilitate the processes mentioned above. On or about 23 June 2014, CWJ notified Traille that the infrastructure was in place. All that was then needed was for Traille to pay CWJ a security deposit in order for CWJ to turn on 'a switch' to transmit Traille's calls to CWJ's network. The operation is technically called, "an interconnection".

[9] The security deposit was to be the equivalent of an anticipated three months' usage charge for the provision of the service. The parties disagreed over the calculation of the deposit. CWJ's calculation included the amount payable for TCT on the calls

going through its system. Traille was adamant that the TCT should not form part of the calculation. It refused to pay CWJ's invoice, as charged, for the deposit.

[10] With neither side budging, CWJ refused to turn on the switch. Traille said that the delay was costing it dearly. It accused CWJ of stifling competition and complained to the Office of the Utilities Regulation (OUR) and to Tax Administration Jamaica ("tax administration" or "Commissioner General"), pursuant to the ICA, for a determination as to whether the TCT was to be applied to the deposit.

[11] Traille was not satisfied with the OUR's ruling, so it filed a claim against CWJ in the Supreme Court. Traille's claim sought, among other relief, specific performance of the ICA, damages for breach of contract and an interlocutory mandatory injunction compelling CWJ to activate the interconnection. It gave the usual undertaking as to damages in respect of the application for the injunction.

[12] On 15 August 2014, G Brown J granted an interlocutory mandatory injunction. He also made orders:

a. stipulating that Traille pay the security deposit to CWJ;

b. excluding the TCT from that payment; and

c. compelling CWJ, upon the payment being made, to "turn on the switch to allow [Traille] to terminate international calls on its network until the trial of the

claim herein" (see consolidated core bundle - pages 34-35).

On 12 September 2014, Traille paid the deposit, excluding the TCT, and CWJ later turned on the switch.

[13] As time progressed, another dispute, with the TCT at its root, arose between the parties. CWJ's monthly invoices to Traille for the interconnection service, included the TCT:

a. on calls terminating on CWJ's mobile network; and

b. on calls that CWJ transferred for Traille to Digicel, for termination on Digicel's network.

The Digicel portion was significant, as 90% of Traille's calls were terminated on Digicel's network.

[14] Traille paid the invoices, excluding the TCT. Instead of paying the TCT to CWJ, Traille paid it directly to the tax administration. Meanwhile CWJ paid to the tax administration and to Digicel the relevant portions of the TCT that it had sought to charge Traille. CWJ was therefore, "out of pocket", in respect of each invoice.

[15] Being bound by the mandatory injunction, CWJ did not seek to terminate the interconnection. Instead, on 4 November 2015, it filed an amended defence and counterclaim, seeking damages from Traille for its failure to satisfy invoices including the TCT for the period September 2014 to August 2015 and continuing, plus interest.

CWJ also sought a declaration that it was entitled to terminate the agreement due to Traille's failure to pay the TCT portion of the invoices.

[16] There is also a difference between CWJ and Traille as to the calculation of the TCT. The difference resulted from Traille's claim of a 30% exemption on the TCT charged for the calls going through CWJ's service. CWJ asserted that the exemption was only available to telephone service providers, which Traille was not, and further was only applicable to international calls that originated in Jamaica, not elsewhere. Accordingly, CWJ contended, Traille did not qualify for the TCT exemption.

[17] That, in essence, was the dispute that went before Batts J. In an elegant, well-structured written judgment, Batts J considered the dispute in the context of three broad issues:

i. Whether the TCT is to be included in the computation of the security deposit;

ii. Whether it is CWJ's duty to collect and pay over the TCT; and

iii. Whether Traille is entitled to a 30% exemption and if so, to determine the computation.

[18] He resolved the issues as follows:

(a) the security deposit should include the TCT (paragraph [44]);

(b) the TCT is to be paid over by CWJ (paragraph [49]);

(c) CWJ was not obliged to turn on the switch unless and until Traille paid the deposit, including the TCT (paragraphs [50] and [57]);

(d) the TCT on monthly invoices should be reduced by 30% having regard to the exemption provided in the TCT Order (paragraph [56]); and

(e) Traille, in making the monthly payments without the TCT, was acting in accordance with the order made by Brown J and, therefore, CWJ had no right to terminate the ICA for that short payment (paragraph [59]).

[19] On 15 April 2016, Batts J made the following orders:

"1) Judgment for [CWJ] against [Traille], the claim is therefore dismissed[.]

2) [CWJ's] counterclaim is also dismissed and there is judgment for [Traille] on [CWJ's] counterclaim.

3) [CWJ] is at liberty to pursue recovery pursuant to [Traille's] undertaking as to damages. The court will give directions accordingly after hearing further submissions.

4) [CWJ] is awarded 2/3rd of the costs of this action because the greater time and effort was taken on the issues raised in the claim and because [CWJ] succeeded in two of the three issues for determination. Such costs to be taxed or agreed." (See page 119 of the consolidated core bundle)

[20] Pursuant to Batts J's order, concerning Traille's undertaking as to damages, Laing J assessed the damages and held on 22 May 2017 that Traille was to pay CWJ the following:

> "(i). $1,415,075.19 being the shortfall of [Traille's] payments to the Government of Jamaica which is irrecoverable by [CWJ] as a set-off[;]
>
> (ii). Interest on $65,986,564.57 in the sum of $20,556,493.00;
>
> (iii). Per diem interest at $28,596.00 from 1st May 2017 to 22nd May 2017 in the sum of $629,112.00[.]"

[21] He then made the following order:

> "[Traille] is to pay damages assessed in the sum of $22,600,680.19, plus statutory interest at the rate of 6 percent per annum from today's date, the 22nd May 2017."

The appeal against Batts J's judgment

[22] In its appeal against Batts J's judgment, Traille seeks the following orders:

> "(1) That the Judgment for [CWJ] on the claim be set aside;
>
> (2) That there be judgment for [Traille] on the claim in the sum of US$256,500.00[;]
>
> (3) That the finding that [CWJ] is at liberty to pursue recovery pursuant to [Traille's] undertaking as to damages be set aside; and
>
> (4) That the order for costs made by the learned trial Judge be set aside and the costs of the action and the costs in the Court of Appeal be awarded to [Traille] against [CWJ]." (Underlining removed)

[23] The further amended grounds of appeal are:

"(1) The learned trial Judge erred in fact and/or in law in holding that the computation of usage charges includes any tax payable as clause 9.7 of the Interconnection Agreement only requires tax to be added to the charges where appropriate and this was not the case where the tax liability fell on the Appellant;

(2) The learned Judge erred on the facts in holding that the Appellant does not provide a telephone service in Jamaica since [Traille] provided a telecommunication service for the transmission of overseas calls to the ultimate recipients in Jamaica;

(3) The learned Judge erred in fact and in law in holding that [Traille] does not provide a telephone service in Jamaica although:

    (i) it was common ground that [Traille] brings telephone service to Jamaica;

    (ii) It was not disputed that [Traille] brings overseas calls to Jamaica and uses the services of [CWJ] as an interconnection facility for the purposes of transmitting the calls to the telephones of the individual recipients or mobile telephone instruments in Jamaica;

(4) The learned Judge erred in law in holding that [CWJ] was not obliged to turn on the switch until and unless [Traille] paid the contractually agreed deposit, since the Agreement provided for compliance with its provisions while any genuine dispute was being resolved;

(5) The learned trial Judge erred in law and fact in finding that [Traille] failed to tender the properly computed deposit and this meant that [CWJ] was not obliged to turn on the switch since the said payment, contrary to the learned Judge's finding, was not a precondition to interconnection;

(6) The learned Judge erred in law in holding that the protection provided by [Traille's] undertaking would avail [CWJ] in the circumstances of the case;

(7) The learned Judge erred in law in holding that [CWJ] was entitled to include the tax in question in computing the required deposit and that the relevant tax is properly part of the agreed deposit;

(8) Since the evidence was that [Traille] offered to pay the deposit including the tax in question less the 30% waiver which it properly claimed, and [Traille] proceeded on the basis of an unchallenged order of a Judge, the learned trial Judge erred in dismissing [Traille's] claim as well as in stating that [CWJ] is at liberty to pursue recovery pursuant to [Traille's] undertaking as to damages;

(9) The learned Judge erred in law in ordering that [CWJ] is at liberty to pursue recovery pursuant to [Traille's] undertaking as to damages since the injunction was not the cause of any losses suffered by [CWJ].

(10) The learned Judge erred in awarding 2/3 of the costs although on the major issues of the right to determine the Agreement and the obligation of [CWJ] to provide interconnection thereby implementing the agreement until the trial or the dispute was resolved and whether [CWJ] had demanded the incorrect deposit, [Traille] was correct." (Underlining removed)

The analysis of the appeal against Batts J's judgment

[24] It should be evident from the outline of the case that the TCT is at the centre of the dispute between the parties. The approach to the analysis of the appeal, therefore, will start with that element. The analysis will consider the following issues:

(a) whether the TCT is valid;

(b) whether it is CWJ's or Traille's obligation to pay the TCT to the tax administration (grounds (2) and (3) of the grounds of appeal);

(c) whether [CWJ] is entitled to include the TCT when computing the deposit (grounds (1) and (7) of the grounds of appeal);

(d) whether, in light of the finding in respect of the exemption in the TCT for the deposit, CWJ was obliged to turn on the switch and whether it is liable to Traille for having failed to turn it on before Brown J mandated it so to do (grounds (4), (5), (7) and (8) of the grounds of appeal);

(e) whether Traille's undertaking as to damages could avail CWJ in the circumstances of the case (grounds (6), (8) and (9) of the grounds of appeal); and

(f) whether the award of costs is appropriate (ground (10) of the grounds of appeal).

(a) Whether the TCT is valid

[25] Dr Lloyd Barnett, on behalf of Traille, argued that the TCT was not a valid tax. Its ineffectiveness, he submitted, was recognised by Parliament, when the legislature sought to cure the invalidity of the TCT Order, by passing the Telephone Calls Tax (Validation and Indemnification) Act, 2017 (the Validation Act).

[26] Learned counsel invited this court to consider that if the TCT Order mandating the payment of TCT was invalid at the time, the TCT could not be an "appropriate tax"

for the purposes of the relevant clause in the ICA. He submitted that CWJ relies on the Validation Act to sanction the TCT Order, but the Validation Act, he submitted, is not clear, "and in any event cannot modify the law" (paragraph 2.18 of the written submissions on behalf of Traille). The result, on those submissions, is that CWJ's claim for the TCT was illegal and invalid at the time that it was made.

[27] Mrs Kitson QC, on behalf of CWJ, in extensive submissions on this issue, accepted that Batts J had relied on the TCT Order, in his judgment. That reliance was on the basis that there was no controversy, before him, that the TCT was a valid tax. She submitted however, that when the defect in the TCT Order was discovered, it was cured. Learned Queen's Counsel argued that the Validation Act, which sought to retrospectively validate all actions taken in good faith, pursuant to the TCT Order, was clear in its terms and effective in achieving its intent.

[28] Learned Queen's Counsel submitted that there is judicial precedent approving retrospective legislation such as the Validation Act. She relied for support on the cases of **Barrington Cigars (Jamaica) Limited v The Ministry of Finance & Planning & The Commissioner of Customs** [2016] JMFC Full 1 and **Lowell Lawrence v Financial Services Commission** [2009] UKPC 49.

[29] Dr Barnett's submissions cannot be supported on this issue. In a nutshell, the TCT Order became invalid because it was not affirmed by the Parliament within the time specified in the Provisional Collection of Tax Act. It would seem that the defect

was not brought to light until 2017, as it was then that Parliament sought to correct the situation by passing the Validation Act.

[30] The long title of the Validation Act states its purpose. That purpose is more fully set out in the last recital, which states:

> "AND WHEREAS **it is desirable to validate and confirm as lawful the imposition, assessment, collection and variation of the tax on telephone calls in good faith**, and inadvertent that the imposition, assessment, collection and variation thereof was invalid, improper and without lawful authority during the period commencing on the 15th day of July, 2012 and ending on the day of the coming into operation of this Act and to indemnify the Government and persons acting on behalf of the Government from liability in relation thereto:" (Emphasis supplied)

[31] Section 3(1) of the Validation Act declares to have been "validly, properly and lawfully done", all those acts of imposition, assessment, collection and variation of the TCT, which were made in good faith. Section 3(2) declared every person, who, in good faith, carried out the acts referred to in section 3(1), "freed, acquitted, discharged and indemnified…against all persons, whatsoever, from…liability" for those acts.

[32] It is beyond question that the Validation Act achieved its purpose. The terminology of their Lordships, at paragraph 29 of **Lowell Lawrence v Financial Services Commission,** is appropriate for these purposes:

> "…there is no room for doubt as to what the intention of the legislature was in passing the Validation Act. The recitals make it clear that it was intended to validate all acts done in good faith by the FSC in the purported exercise of its functions... That purpose was plainly put into effect by section 2... The critical part of that section is the provision that all acts done in good faith between 21 December 2001

> and the commencement of the Validation Act by the FSC, its officers and staff in the purported exercise of its powers under the FSCA and the Insurance Act 2001 were thereby declared to have been validly properly and lawfully done and were thereby confirmed. There can be no doubt that one such act was the giving of the penalty notice..."

[33] In applying that learning to this case, it must be said that CWJ's inclusion of the TCT in its calculation of the deposit and its invoices for services was done with a view to comply with the TCT Order, and was done in good faith. The issues between the parties did not turn on the validity of the TCT, but rather on the mechanics of its framework. The steps taken by CWJ and the tax administration up to the time of the passing of the Validation Act, were therefore validated.

[34] The Validation Act was accompanied by another statute, The Telephone Calls Tax Act, 2017. Both statutes were promulgated on the same date, 10 May 2017. There is no issue that Telephone Calls Tax Act, 2017 legitimised the TCT from that date forward.

[35] Having decided that the TCT has been validated, and was claimed in good faith, the next issue is to identify which of these parties was required by the legislative framework to pay it to the tax administration.

(b) Whether it is CWJ's or Traille's obligation to pay the TCT to the tax administration (grounds (2) and (3) of the grounds of appeal)

[36] Dr Barnett asserted that there is no dispute between the parties that the TCT is to be paid by Traille. Instead, he contended that there is a dispute as to where the

obligation lay for the payment over of the TCT to the tax administration. That dispute affected whether the deposit and CWJ's monthly invoices, payable by Traille, should include the TCT.

[37] Learned counsel submitted that, according to the ICA, Traille is the party responsible to pay the TCT to the tax administration. He argued that it was Traille that brought international calls to Jamaica and engaged CWJ to terminate the calls in Jamaica, as agreed by both parties. On that basis, he submitted, Traille provided a telephone service in Jamaica and CWJ was Traille's agent for the purposes of the termination of the calls. He relied, in part, on clause 9.7 of the ICA which provides that value added or applicable taxes are to be added to the usage charges and should be paid by the party responsible for making the payment.

[38] He asserted that Batts J was wrong for holding that Traille did not provide telephone service in Jamaica as the Telecommunications Act, and the recitals of the ICA, suggest that Traille's and CWJ's equipment facilitate the interconnection. In these circumstances, he contended that the statute is clear and there was no reason to ignore the plain meaning of the agreement. He relied on **Janet Thompson v Goblin Hill Hotels Ltd** [2011] UKPC 8 and **Meadows and Others v Attorney-General** [2017] UKPC 29 for support of those submissions.

[39] He argued that Batts J erred in failing to appreciate the distinction between GCT and the TCT. Dr Barnett stated that the GCT is attracted by a service charge, usage or price invoice, which Traille had to pay to CWJ. On the other hand, he submitted, the

TCT is imposed on the minutes of each telephone call, and was payable by the entity providing the telephone service.

[40] Alternatively, Dr Barnett submitted that the TCT Order stipulated that the TCT is to be paid by an "applicable taxpayer" which is a service provider. He argued that Traille is an applicable taxpayer as it possesses a service provider licence.

[41] Mrs Kitson disagreed with Dr Barnett's analysis. Learned Queen's Counsel submitted that the issue was to be decided by the evidence in respect of four factual points. These, she submitted, were :

a. Traille is not a terminating carrier;

b. Traille has no telephone network in Jamaica;

c. Traille provides no service in Jamaica; and

d. Traille only terminates the international traffic on CWJ's network or transits that network to Digicel.

[42] She pointed to the evidence of Traille's principal, Mr Rory Robinson, who conceded, in cross-examination before Batts J, that Traille did not provide any domestic telephone service to the public. He said that Traille had a licence to provide a telephone service in Jamaica, but chose not to do so.

[43] In assessing this issue, it is accepted, as Dr Barnett has recognised, that the parties agree that Traille is liable to pay the TCT. The dispute is which party is responsible for paying the TCT over to the tax administration. The TCT Order provides

some guidance. Despite its problems, it is what guided the parties at the time. Section 2 of the TCT Order defines who is an applicable taxpayer. It states:

> "'applicable taxpayer' means a carrier or service provider who is registered pursuant to section 27 of the General Consumption Tax Act and is liable to pay tax under this Order".

Section 27 of the General Consumption Tax speaks to a person carrying on a taxable activity. It does not assist the present analysis.

[44] The TCT Order provides that "carrier" and "service provider" are given the same meaning as outlined in section 2 of the Telecommunications Act. Section 2 of the Telecommunications Act defines "carrier" as:

> "a person granted a carrier licence pursuant to section 13."

A "service provider" is defined as:

> "a person who is the holder of a service provider license [sic] issued under section 13."

Section 13 of the Telecommunications Act provides that the carrier and service provider licence allows the licensee "to own and operate the facilities specified in the application". Neither the above definitions in section 2 nor the expansion in section 13, distinguishes CWJ from Traille, for these purposes, as both possess these licences.

[45] Returning to the TCT Order, it is noted that section 3 states:

> "Subject to the provisions of this Order, every applicable taxpayer **who provides telephone service in Jamaica shall pay to the Commissioner General**, a tax on telephone calls (hereinafter referred to as "the tax") on [sic] provided-

...

(c) from a point originating outside of Jamaica and terminating on **a public mobile network in Jamaica**". (Emphasis supplied)

[46] The section requires reference to other definitions in section 2 of TCT Order. The first is that "telephone service" means:

> "the provision of telecommunications comprising wholly or partly of real time or near real time audio communications utilizing a telephone".

The second is that although a "public mobile network" is not specifically defined, a "public network" and a "mobile network" are both defined, by reference to the Telecommunications Act. The definitions are:

> "'public network' means a telecommunications network used by any person **to provide specified services to the public** and includes a network whereby the public can send or receive telecommunications services to or from-
>
> (a) anywhere in Jamaica; or
>
> (b) anywhere outside of Jamaica
>
> and includes a network commonly known as a public switched telephone network".
>
> "'mobile network' means a telecommunications network used to provide specific services that–
>
> (a) permits a user to move continuously between places (including places accessing that network through different mobile base facilities) during the provision of a single call; and
>
> (b) does not require physical contact between the network and the customer equipment;"

It is important to note that section 3 of the TCT Order does not require the "public mobile network", referred to in paragraph (c) thereof, to be operated by the "applicable taxpayer" referred to in the chapeaux of the section. There is, therefore, so far, still nothing to distinguish between Traille and CWJ as to which is eliminated as the party responsible for paying over the TCT to the tax administration.

[47] The Technical Note to the Special Telephone Call Tax (Technical Note) dated 13 July 2012, issued by the Ministry of Finance & Planning to guide the implementation of the TCT, does, however, help in the statutory analysis. Batts J quite properly recognised that statutory interpretation is the business of the court and is not to be surrendered. That principle does not, however, prevent the court, in executing its task, from seeking assistance from other sources.

[48] The Technical Note indicates at page 3, under the heading "Person Liable to Tax" that "[t]he tax is to be paid by a terminating carrier in the case of international incoming calls...". A "terminating carrier" is defined on page 3 of the Technical Note as a carrier who provides termination services on **its** public network" (emphasis supplied). The Technical Note further states at page 6, under the heading "Payment of Taxes" that "[t]he terminating carrier should pay over the tax in respect of international calls terminated **on its public mobile network** to the Commissioner General of Tax Administration Jamaica ('Commissioner General')." (Emphasis supplied)

[49] The Technical Note goes further at page 6 to state that in relation to international calls, the terminating carrier is responsible to pay over the TCT to the Commissioner General and states at D(iii) as follows:

> "D. The tax shall be paid over to the Commissioner General as follows:
>
> …
>
> (iii) In the case of incoming international calls that terminate on a domestic public mobile network **by the terminating carrier** at a tax rate of US$0.075 per minute." (Emphasis supplied)

Traille possesses carrier and service licences, but as Dr Barnett conceded during oral arguments, it does not have a public network.

[50] There is no inconsistency between the Technical Note and the TCT Order. Accordingly, the terms of the former may be relied upon in this context. Batts J is, therefore, correct in his finding at paragraph [49] that it is CWJ that bears the obligation to pay the TCT to the tax administration. He said:

> "The evidence is clear that [CWJ] is the terminating carrier. [Traille] deals only with incoming traffic. It takes calls from overseas carriers and places them with the [CWJ] either for purposes of termination or to transit to another terminating carrier such as Digicel. [Traille] is not a terminating carrier and has no public network. It is manifest that [Traille] does not provide a telephone service in Jamaica and does not terminate calls in Jamaica. The tax is therefore not payable to the Commissioner by [Traille]. The Commissioner of Taxes for reasons of convenience and accountability has decided to impose the special tax on incoming international calls on the telephone service provider who terminates the call."

[51] Despite his concession that Traille does not operate a public network, Dr Barnett, argued that that want does not mean that Traille cannot provide the terminating service on CWJ's network and pay for it. He maintained that CWJ was Traille's agent for the purposes of providing a service to the public. This assertion was denied by CWJ. It is important, therefore, to determine whether CWJ is Traille's agent.

[52] The learned authors of Halsbury's Laws of England, 2008, Volume 1, 5th edition, at paragraphs 29 and 30 explain the nature of the relation of agency as follows:

> "The terms 'agency' and 'agent', in popular use, have a number of different meanings, but in law the word 'agency' is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. **The relation of agency arises whenever one person, called the 'agent', has authority to act on behalf of another, called the 'principal', and consents so to act**.
>
> The authority of the agent may be derived expressly from an instrument, either a deed or simply in writing, or may be conferred orally. Authority may also be implied from the conduct of the parties or from the nature of the employment. It may in certain cases be due to the necessity of circumstances, and in others be conferred by a valid ratification subsequent to the actual performance. In addition, a person may appear to have given authority to another, and acts within such apparent authority may effectively bind him to the third party." (Emphasis supplied)

[53] In order for Traille to prove that CWJ was its agent, it must prove that there was a relationship between it and CWJ that gave CWJ the authority to create legal relations between Traille and third parties (see also **Lena Hamilton v Ryan Miller and Others**

[2016] JMCA Civ 59). Nothing arises on the evidence to suggest that CWJ was Traille's agent for any such purpose.

[54] Accordingly, from a reading of the statutes and the Technical Note, it must be found that CWJ is the terminating carrier, with responsibility to pay the TCT to the tax administration. This finding has repercussions on the issue of the calculation of the deposit as well as the treatment of the issue of damages arising from CWJ's payment over of the TCT in respect of the monthly invoices.

(c) Whether [CWJ] is entitled to include the [TCT] when computing the required deposit (Grounds (1) and (7) of the grounds of appeal)

[55] Dr Barnett argued that the deposit should not include the TCT as the ICA makes no reference to the payment of TCT. He relied on clause 28.2 of the ICA, which indicates that Traille should provide an initial security deposit. He asserted that clause 28.2 speaks of the deposit comprising three months' usage charges for services performed by CWJ. That clause, he submitted, is a separate and distinct provision from clause 9, which, among other things, addresses the matter of tax, which belongs to the government.

[56] Dr Barnett submitted that the deposit is held in trust for Traille. CWJ is only entitled to the deposit where there has been non-payment in the event of termination. He contended that clause 28.2 stipulates that on termination of the ICA the deposit is to be returned to Traille together with the interest earned thereon, less any outstanding charges. He submitted that there is nothing to indicate that the TCT is to be paid in advance.

[57] Mrs Kitson also referred to various clauses in the ICA in support of her contention that CWJ properly included the relevant TCT in calculating the deposit that it required from Traille. Learned Queen's Counsel lay particular emphasis on clause 9.7 of the ICA, which referred to the addition of "any value added or other applicable tax" to all or any part of the charges under the ICA.

[58] In addressing these competing submissions, it must be noted that it is the interpretation of Clause 28 of the ICA that will resolve this issue. Clause 28 is one of the clauses in the section of the ICA that is termed "The Legal Framework". Apart from that section, there are also other sections, namely:

a. Definitions;

b. Service Descriptions;

c. Tariff Schedule;

d. Joint Working Manual;

e. Service Schedule; and

f. Parameter Schedule.

They are to be used in descending order of priority in resolving any issues which may arise in construing the Legal Framework (see clause 1.5 of the Legal Framework). Hereafter, all references to clauses, unless otherwise stated, will be to clauses in the Legal Framework.

[59] Clause 28.1 speaks to CWJ's entitlement to request a bank guarantee in an amount to satisfy the maximum "Early Termination Charges" that Traille would be liable to pay CWJ for setting up the interconnection infrastructure. CWJ did not insist on that

entitlement in this case, but the reference to "Early Termination Charges" may assist the analysis of this issue. That will be done below.

[60] Clause 28.2 addresses the issue of the calculation of the deposit, and specifies that the deposit is not to exceed the sum of three months' usage charges. It states:

> "In addition to the guarantee required pursuant to clause 28.1 [CWJ] may require a Telco [such as Traille] without sufficient immoveable fixed assets to provide an initial security deposit by the Ready for Service date of the first Joining Service provided pursuant to this agreement (the Initial Deposit). **The amount of such Initial Deposit shall not exceed the sum of three months['] Usage Charges for all Services forecast to be used by [Traille]** in the Forecast agreed pursuant to the Joint Working Manual. On the expiration of a period of twelve months after the Ready for Service date of the first Joining Service, **the deposit should be revised to a fair amount that covers the average amount payable by [Traille] for billing and credit for the collection cycle applicable to [Traille]**. Any Deposit provided under this Clause shall be returned to [Traille] with interest, less outstanding Charges in the event that the Agreement is terminated. For the purposes of this Clause, 'sufficient immovable fixed assets' means fixed assets of [Traille] located in Jamaica of a value which would reasonably cover the amount of any security deposit calculated in accordance with this Clause." (Emphasis supplied)

[61] Before going to clause 9, to which Mrs Kitson referred, it must be noted that the Definitions section of the ICA defines "usage charges" as:

> "The usage related charges that are specified in the Tariffs Schedule and are payable by Service Taker to Service Supplier."

The Definitions section defines the terms "Service Taker" and "Service Supplier" but those definitions do not assist the present discussion, except to say that for these

purposes CWJ is the Service Supplier and Traille is the Service Taker. The section also defines the term "Charges" as distinct from "Usage Charges". It defines "Charges" as:

> "The amounts specified in the Tariffs Schedule and described in the Service Descriptions which are payable pursuant to clause 9 of the Legal Framework."

"Early Termination Charges" is defined as:

> "The amounts set out in the Tariffs [sic] Schedule and chargeable pursuant to Paragraph 2.4.2.6 of the Joint Working Manual."

[62] All the above references to charges provide a further reference to the Tariff Schedule section. The charges outlined in the Tariff Schedule are the charges for the provision of the services and do not include taxes. The Tariff Schedule starts off with the important caution that all tariffs are subject to GCT:

> "All tariffs in this schedule are presented excluding GCT but are subject to GCT [General Consumption Tax] at the prevailing rate."

It then goes on to set out the various charges, including joining services, terminating access service and PLMN (Public Land Mobile Network) Usage Charges, which are particularly relevant to the ICA between CWJ and Traille.

[63] Clause 28 also refers to a Forecast. That Forecast is explained in the Joint Working Manual. It speaks to the process of establishing an estimate of the type and quantity of services one party will require of the other. It does not speak to the charges for such services.

[64] Clause 9 deals with charges and the payment of charges. It generally requires each party to the ICA to pay to the other the relevant charges applicable to each service. In dealing with a range of issues regarding payment, clause 9 uses the term "Charges". In those contexts, the term must be ascribed the technical definition contained in the Definitions section. Clause 9.6 provides a nuance to the issue of "Charges", in that it speaks of the total amount of an invoice. Clauses 9.6 and 9.7 both speak to the element of tax. They respectively state:

> "9.6 Notwithstanding the reference of any dispute for investigation and determination under this Agreement, if the amount in dispute represents less than five *per cent* (5%) **of the total amount of the invoice** (**excluding any value added or other applicable tax**), the **invoiced amount** shall, for the purposes of Clause 9.4 [dealing with interest on unpaid Charges] be deemed payable in full. If the amount in dispute represents 5% or more **of the total amount of the invoice (excluding any value added or other applicable tax)**, the amount in dispute shall, for the purpose of Clause 9.4, be deemed not payable pending resolution of the dispute…"
>
> "9.7 **Where appropriate, any value added or other applicable tax shall be added to all or any part of the Charges under this Agreement**, and shall be paid by the Party responsible for making such payment." (Emphasis supplied)

[65] The learned judge found clause 9.7 compelling. He held that it required the TCT to be included in the computation of the three months' usage charge required by clause 28.2. He said, at paragraph [44]:

> "The initial deposit therefore is not to exceed the sum of three months['] usage charges forecast to be paid. It is

> intended to be a hedge against defaulting players. There are persons with no substantial infrastructure or network and the purpose is to allow recovery in the event they do not pay. **To the extent therefore that the charges levied include any tax payable it certainly was within the parties' contemplation, and reflects to my mind a correct construction, that the computation of three months['] usage charge includes any tax payable, in accordance with clause 9.7 quoted above**." (Emphasis supplied)

[66] Since it must be accepted that clause 9.7 states that Charges do not automatically include taxes, it is necessary to examine clause 28, to determine if it is appropriate that TCT should be added to the Charges for the purposes of calculating the deposit.

[67] The learned judge held that given the purpose of the deposit, it must be held that the parties contemplated that the taxes were included in the computation of the Charges. Dr Barnett criticised this approach. He contended that Batts J confused the deposit with the usage charge.

[68] Dr Barnett's criticism cannot be upheld. It suffers from two flaws. Firstly, contrary to his assertions, there are indications that taxes are to be added to the usage charges. The Tariff Schedule that sets out the quantum of the usage charges indicates that GCT is to be added to them. Although the distinction between GCT and TCT is recognised, CWJ, based on the reasoning above, is responsible to pay over both to the tax administration. Secondly, if the deposit is intended to protect CWJ from a defaulting Service Taker, the protection should not only protect it for the charges covering its costs and profit margin, but should also protect it from its exposure to the tax

administration for both GCT and TCT. Indeed, it is common ground between the parties that the TCT on each invoice rendered by CWJ, is multiples of the amounts charged for its service. It is plain that without the TCT being factored into the deposit, CWJ would have very little in the way of the protection envisaged by the deposit.

[69] Dr Barnett advanced a further argument. He invited this court to consider that charges could never include TCT for three months. He argued that the TCT would be payable in the month succeeding the month the calls are made, and therefore, at the end of three months, only two months of TCT would be payable. In the result, he submitted, if this court finds that the deposit includes the TCT, only two months of TCT would be payable during the three month period.

[70] The flaw in the argument is that the clause was not contemplating an actual monthly payment situation. It is purely a mathematical method of arriving at a figure.

[71] Traille's grounds in respect of this issue cannot succeed.

> *(d) Whether, in light of the finding in respect of the exemption in the TCT for the deposit, CWJ was obliged to turn on the switch and whether it is liable to Traille for having failed to turn it on before Brown J mandated it so to do (grounds (4), (5), (7) and (8) of the grounds of appeal)*

[72] Batts J, at paragraph [56] of his judgment, found that Traille was entitled to a 30% reduction in the TCT. He said:

> "In the matter at bar however the words are clear and their effect creates no absurdity, injustice or manifest inconvenience. I therefore hold that in computing the deposit [CWJ] was obliged to add the applicable tax with a 30% reduction in respect of the exemption."

[73] Dr Barnett submitted that the ICA required CWJ to turn on the switch as soon as the infrastructure was in place. He said that the ICA also required a particular process in the event of a dispute between the parties as to payment. That process, he submitted, allowed Traille not to pay the disputed amount. Learned counsel argued that the ICA also provided for the method by which the ICA could be terminated.

[74] Dr Barnett submitted that if this court accepts that the TCT is to be included in the deposit, it should not be calculated on 100% of the call charges. Instead, he argued, the 30% exemption provided for in the TCT Order should apply. He noted that Batts J held that the 30% exemption was applicable to Traille and that finding has not been appealed by CWJ. He contended that CWJ was therefore demanding an incorrect sum for the security deposit. In fact, Dr Barnett submitted, even before the grant of the injunction, Traille offered to pay the amount, eventually sanctioned by Batts J, and CWJ refused that offer.

[75] Dr Barnett argued that the parties had a genuine dispute and the ICA prescribed a process for resolving disputes. He submitted that Traille accepted that it was to collect the TCT from its customers, but the parties had differing views as to which of them should pay over the TCT to the tax administration. Although the OUR and the tax administration were contacted to resolve the dispute, it was not resolved. Learned counsel submitted that the ICA outlines that whenever there is a genuine dispute between the parties, the agreement is to remain in force. He further submitted that, pursuant to clause 9.6 of the ICA, where the disputed amount is 5% of the total invoice

amount, or greater, the disputed amount should not be paid until the dispute has been resolved. He argued that the disputed amount in this instance exceeded 5%.

[76] When the relevant provisions of the ICA are considered together, learned counsel submitted, not only was CWJ obliged to turn on the switch, but it was not entitled to discontinue the service or terminate the ICA without following a particular process. He pointed out that CWJ did not turn on the switch until ordered by Brown J, and it took none of the steps required to terminate either the service or the ICA.

[77] Mrs Kitson contended that Traille had misconstrued the ICA in respect of these matters. Learned Queen's Counsel premised her submissions on Traille's refusal to accept that it was CWJ that was responsible for paying over the TCT, and that the TCT was properly included in the computation of the deposit. She pointed out that Traille even refused to accept the OUR's determination on the dispute. Traille, Mrs Kitson pointed out, maintained its position to the end of the trial before Batts J.

[78] Having determined that the TCT was to have been included in the computation of the deposit, Batts J was correct, learned Queen's Counsel argued, to have held that CWJ was not obliged to turn on the switch until the correct sum had been paid. She submitted that that finding was consistent with clause 28.2 of the ICA.

[79] Learned Queen's Counsel addressed clause 9.5 in this context. She argued that it had to be read, not in isolation, but in conjunction with clauses 24.4 and 28.2. She argued that clause 28.2 required the payment of a deposit, as a condition precedent for the provision of the service, and clause 24.4 required the maintenance of that deposit.

In the absence of a deposit, she submitted, CWJ was permitted to terminate the ICA. There is no provision in the ICA, she submitted, for CWJ to turn on the switch while the deposit remained outstanding.

[80] Mrs Kitson is correct in her analysis in respect of these grounds. The premise of ground (8), that Traille offered to pay the TCT (less the 30% exemption), as part of the deposit, is curious. The ground states that there was evidence to that effect. The evidence is that Traille asked CWJ to recalculate the deposit using 70% of the TCT. In an e-mail dated 30 June 2014, Traille's principal, Mr Robinson, pointed out to CWJ, the exemption provision. He said:

> "We are trying to calculate the call tax as the figure you indicated and [are] unable to do so.
>
> We realize that on the 300,000 minutes, the Tax is only charges [sic] the tax [sic] on 70%. The law exempt [sic] thirty percent (30%) of the taxable call minutes in each transaction month for each call category.
>
> This means that 210,000 minutes is [sic] taxable at US$0.075.
>
> have [sic] again sent the gazetted law. This can be seen on page 433,,,(Exemptions 5.b)
>
> The actual form for submission [to] the Commissioner General (TCT01), has a special section to subtract the exempted 30%
>
> Looking forward to the recalculated figure[.]" (See Vol 5 page 1324 of the record of appeal)

Strictly speaking, there was no offer, but it is correct to say that CWJ rejected Traille's interpretation of the TCT Order, and insisted that the 30% exemption did not apply

(see e-mail dated 2 July 2014 from CWJ to Traille at Vol 5 page 1326 of the record of appeal).

[81] In another e-mail date 2 July 2014, Mr Robinson indicated to the OUR that Traille accepted the OUR's guidance that it was CWJ which bore the responsibility of paying over the TCT (see Vol 5 page 1328 of the record of appeal).

[82] Despite that concession, Traille's adamant position, as advanced to CWJ, to the court below, and to this court, has been that the TCT is not to be included in the computation, and it is Traille which bears the responsibility of paying over the TCT. Up to the time that Brown J granted the injunction, Traille had not tendered anything, which purported to be a deposit.

[83] In addition to the difficulty with the premise of ground (8), it must also be said that the rest of the ground, as it relates to the deposit, is flawed. Batts J rejected Traille's stance that the computation of the deposit should not include the TCT. He was not required to rule on the correctness of Brown J's order, and did not do so. The analysis that has been conducted above demonstrates that Traille's stance concerning the exclusion of the TCT from the computation of the deposit was quite misguided.

[84] The analysis of grounds (4) and (5) in respect of this issue requires an examination of clauses 3, 9, 24 and 28 of the Legal Framework of the ICA, as well as clause 3.3 of the Joint Working Manual.

[85] Batts J's finding that CWJ was not obliged to turn on the switch, in the circumstance that existed prior to Brown J's order, is correct. Clause 3.1 of the ICA speaks to the commencement of the interconnection. It states that the payment of the deposit was a pre-requisite for CWJ's turning on of the switch:

> "**Subject to Clause 28**, [CWJ] shall connect and keep connected the [CWJ] System to the [Traille] System and [Traille] shall connect and keep connected the [Traille] System to the [CWJ] System in the manner described in this Agreement in order to convey Calls to, from or in transit over their respective System [sic]." (Emphasis supplied)

[86] It is beyond dispute that the deposit was not paid up to the time of the grant of the injunction. That would itself be conclusive support for the dismissal of Traille's claim.

[87] Traille's reliance on the provisions of clause 9 does not assist it. It is true that clause 9.6 speaks to Traille's stance of not paying the figure for TCT. There was a dispute in respect of an amount in excess of 5% of the total of the invoice for the deposit (as was explained above, the TCT was multiples of the charge for CWJ's service). The clause refers, however, to the resolution of the dispute.

[88] Clause 9.5 stipulates that where a party disputes, in good faith, the specific amount of any invoice, the parties "shall resolve the dispute in accordance with the investigation and determination procedure set out in the Joint Working Manual". Importantly, the clause requires the parties, during the dispute resolution procedure, "to continue to observe and perform the provisions of [the ICA]". That of course would mean, in the context of the calculation of the deposit, a reversion to clauses 3.1 and

28.2. Nonetheless, following Traille's line of reasoning, the next stop would be the Joint Working Manual.

[89] Clause 3.3 of the Joint Working Manual deals with invoice disputes. The clause is more appropriate to service invoices rather than an invoice for the deposit. It speaks, among other things, to "daily summaries" for the periods under dispute and "lowest rating element level". That is another reason for finding that the reference to clause 9, in the context of a dispute over the deposit, is inappropriate.

[90] However, clause 3.3.1.3 of the Joint Working Manual also assists in demonstrating that Traille cannot succeed on this issue. The clause states that if the dispute is not resolved within 10 working days, either party may refer it for determination to, among other entities, the OUR, to appoint an expert, whose decision shall be "final and binding".

[91] In respect of the dispute over the deposit, Traille referred the dispute to the OUR, for resolution. It did not ask the OUR to appoint an expert but asked "for their assistance" (see Vol 3 page 703 of the record of appeal). Both parties placed their respective positions before the OUR. The OUR ruled in favour of CWJ. The OUR stated, in part, at page 2 of its letter dated 1 May 2014:

> "Based on the nature of the contracted services, that is joining services, [CWJ] would be the Terminating Carrier. Since [CWJ] is the Terminating Carrier, it can clearly be seen from the provisions of the Technical Note that **[CWJ] is the entity liable to pay the [TCT] over to the tax authority**." (Emphasis supplied) (See Vol 3, page 709, of the record of appeal)

The OUR also definitively stated, at page 3 of its letter, that "based on Clauses 28.2 and 9.7 of the Legal Framework [of the ICA], the Office has determined that it is appropriate to include the [TCT] in the calculation of the Initial Deposit" (see Vol 3 page 710 of the record of appeal).

[92] Despite its initial indication to the contrary, Traille did not accept the OUR's ruling. It should have accepted it as "final and binding". As a result, the process prescribed by rule 9.5 does not assist Traille.

[93] The analysis of these grounds may be concluded by stating that Traille's claim was based on its contention that the TCT should not be included in the computation of the deposit. Batts J, having identified the flaw in Traille's position, could not have given judgment for Traille on the claim. He was correct in finding that the claim failed. These grounds have no merit.

(e) Whether Traille's undertaking as to damages could avail CWJ in the circumstances of the case (grounds (6), (8) and (9) of the grounds of appeal)

[94] The issue of the availability of Traille's undertaking as to damages, in securing the interlocutory mandatory injunction imposed by Brown J, arises from Batts J's decision in respect of CWJ's counterclaim for the loss that it says it suffered, arising from its obedience of the injunction. CWJ asserted before Batts J, that as a result of Traille's refusal to pay over to CWJ the TCT portion of the monthly invoices, CWJ was forced to pay those sums to the tax administration, and thereby incurred loss. As mentioned above, it claimed those sums as well as interest, from Traille. It also claimed

the right to terminate the contract due to Traille's refusal to make the monthly payments mentioned above.

[95] Batts J dismissed the counter-claim. He found that Traille was acting pursuant to Brown J's order and was therefore protected from a claim for breach of contract. He found, however, that CWJ was entitled to have Traille honour its undertaking as to damages, which was given as a pre-requisite for the grant of the interlocutory mandatory injunction. Batts J said, in part, at paragraph [59] of his judgment:

> "…I therefore hold that the payments pursuant to the interlocutory order do not give a right of termination. [CWJ] is protected by [Traille's] undertaking as to damages….It is that to which [CWJ] may have recourse given the final determination of these issues."

It is on that basis that he ordered, in CWJ's favour, an enquiry as to damages.

[96] By the time the matter went before Laing J, CWJ had ameliorated its position. It arranged with the tax administration to be credited, by way of set-off against its future liabilities, with the sums that it had paid over in respect of TCT for Traille's calls. CWJ, therefore, only claimed from Traille, interest on the sums that it paid, as well as the amount by which Traille short-paid TCT, on at least one occasion.

[97] Laing J's award, after conducting the enquiry that Batts J ordered, is for the interest and for the short-payment, to which he found CWJ was entitled.

[98] The arguments on behalf of Traille in respect of these grounds overlapped to a great degree with the grounds in Traille's appeal from the decision of Laing J. In this issue, the principles in respect of the ordering of the assessment will be assessed,

leaving the matter of quantification, to the assessment of the appeal from Laing J's judgment.

[99] Dr Barnett submitted that, save for the exemption of 30%, the issue between the parties was procedural and did not go to the root of the ICA. There, therefore, was no basis, he submitted, for CWJ to institute a breach of contract claim and the dispute should have been resolved by arbitration. He advanced the following arguments in support of existence of the ICA and CWJ's obligation to fulfil its terms:

a. Traille was within its right to obtain an injunction as CWJ had incorrectly withheld its interconnection;

b. in light of the difference of opinion between the parties, Traille's decision not to pay the TCT portion of the monthly invoices over to CWJ was not a repudiatory breach or a failure to perform an essential term of the agreement to merit termination of the agreement;

c. argument b. also applied where negotiations are made in good faith but the incorrect contract price is demanded or offered; and

d. even if Traille had misinterpreted Brown J's order but genuinely believed that it was to make payments to the tax administration, that is not sufficient basis for CWJ to terminate the ICA.

[100] He relied on the following cases as support for those submissions:

a. **Decro-Wall International S.A. v Practitioners in Marketing Ltd** [1921] 1 WLR 361 (which cites the important case of **Heyman v Darwins Ltd** [1942] A.C. 356);

b. **Woodar Investment Development Ltd v Wimpey Construction UK Ltd** [1980] 1 WLR 277; and

c. **Vaswani v Italian Motors (Sales and Services) Ltd** [1996] 1 WLR 270.

[101] In respect of the injunction, Dr Barnett further submitted that CWJ had failed to show either that:

a. Traille was not entitled to the injunction; or

b. CWJ had suffered loss as a result of the injunction.

Accordingly, he argued, Batts J erred in ordering an enquiry into damages and Laing J erred in awarding damages.

[102] Learned counsel submitted that CWJ could not show that the injunction was wrongly granted, because it had not claimed the correct amount for the deposit, nor was there any evidence or decision that the initiation of the service was in breach of the ICA, or in any way unlawful. As a result, he argued, compensation did not arise.

[103] Dr Barnett also submitted that not only did the injunction not require CWJ to pay the TCT, but any loss that CWJ suffered after turning on the switch, was not as a result of that action but rather was a consequence of its paying the TCT to the tax administration and to Digicel. CWJ's action, he submitted, was the result of a difference in interpretation of the ICA and the TCT Order. He also argued that if CWJ was the applicable taxpayer for the TCT, it would have been entitled to enquire of the tax administration, whether, and how much TCT, Traille had paid and so avoid duplicating payments. It would thereby have avoided or minimised losses.

[104] Mrs Kitson argued that Traille, in applying for the injunction, gave its irrevocable undertaking to abide by any order as to damages. Learned Queen's Counsel submitted that the natural and probable consequence of Brown J's grant of the injunction, was that billing would flow from CWJ's turning on the switch allowing interconnection. TCT being an integral part of the billing, and Traille refusing to pay the TCT portion of the invoices, it fairly and reasonably arose for CWJ to pay the TCT to the tax administration.

[105] CWJ asserts that it has suffered loss as a result of that payment. In those circumstances, learned counsel submitted, it cannot be properly said that Batts J wrongly exercised his discretion in enforcing Traille's undertaking as to damages. She stressed the principle that an appellate court does not lightly interfere with such an exercise. Learned counsel relied on **Smith v Day** (1882) Ch 427 in support of that principle.

[106] Dr Barnett's submissions in respect of CWJ's failure to prove a breach of contract do not require any assessment. Batts J found that there was no breach of contract and there is no appeal from that decision.

[107] Similarly, there was no point taken below concerning a reference to arbitration. That issue, therefore, does not arise for discussion here.

[108] Although the giving of "the usual undertaking as to damages", is a commonplace feature of civil litigation, the principles of law governing that undertaking are not always appreciated. When a party applies for an interlocutory injunction, the usual practice is that the applicant must give an undertaking as to damages. The practice has been codified in the Civil Procedure Rules (CPR). In dealing with orders for interim injunctions, rule 17.4(2) states:

> "Unless the court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting or extension of the order."

[109] In giving such an undertaking as to damages, the applicant ought to compensate the respondent for damages that the court considers it should pay. This is explained by the learned authors of Halsbury's Laws of England Volume 12 (2015) paragraph 609 as follows:

> "An undertaking as to damages is the price which the person asking for an interim injunction has to pay for it and any order for an interim injunction, unless the court orders otherwise, must contain such an undertaking. By the undertaking **the party obtaining the order undertakes to pay any damages which the respondent sustains**

> **which the court considers the applicant should pay**...." (Emphasis supplied)

[110] The nature of the undertaking as to damages was explained in **Cheltenham & Gloucester Building Society v Ricketts and others** [1993] 4 All ER 276. Neill LJ explained at pages 280-282:

> "...When granting an injunction of an interlocutory nature it is the usual practice of the court to require the plaintiff to give an undertaking as to damages. The use of the word 'damages' is perhaps inappropriate because it might suggest that the grant of the injunction involved a breach of some legal or equitable rights of the defendant. The undertaking is given to the court and is intended to provide a method of compensating the party enjoined if it subsequently appears that the injunction was wrongly granted.
>
> ...
>
> From the authorities the following guidance can be extracted as to the enforcement of a cross-undertaking in damages.
>
> (1) Save in special cases an undertaking as to damages is **the price which the person asking for an interlocutory injunction has to pay for its grant.** The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does.
>
> (2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted.
>
> (3) The undertaking is not given to the party enjoined but to the court.
>
> (4) **In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so.**

> (5) The time at which the court should determine whether or not the interlocutory injunction should have been granted will vary from case to case. It is important to underline the fact that the question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged or continued.
>
> (6) In many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before the conclusion of the trial. Even then, as Lloyd LJ pointed out in *Financiera Avenida v Shiblaq* [1990] CA Transcript 973 the court may occasionally wish to postpone the question of enforcement to a later date.
>
> ...
>
> (8) It seems that damages are awarded on a similar basis to that on which damages are awarded for breach of contract. This matter has not been fully explored in the English cases though it is to be noted that in *Air Express Ltd v Ansett Transport Industries (Operations) Ltd* (1979) 146 CLR 249 Aicken J in the High Court of Australia expressed the view that **it would be seldom that it would be just and equitable that the unsuccessful plaintiff 'should bear the burden of damages which were not foreseeable from circumstances known to him at the time'.** This passage suggests that the court in exercising its equitable jurisdiction would adopt similar principles to those relevant in a claim for breach of contract." (Emphasis supplied)

[111] Turner LJ, in **Newby v Harrison** (1861) 45 ER 889; (1861) 3 De GF & J 287 noted, at page 890, that the applicant in giving an undertaking as to damages, is liable for the loss, sustained by the respondent, as a result of the grant of the injunction. He said, at page 290:

> "The true principle appears to me to be this, that a party who gives an undertaking of this nature puts himself under the power of the Court, not merely in the suit but absolutely; that the undertaking is an absolute undertaking that he will

> be liable for any damages which the opposite party may have sustained, in case the Court shall ultimately be of opinion that the order ought not to have been made…."

[112] Where an application is made for an enquiry as to damages flowing from the grant of an injunction, the general principle is that the result of that exercise will not be lightly disturbed by an appellate court (see **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042). **Smith v Day** (1882) 21 CH D 421 makes that point more specifically with respect to orders as to enquiry as to damages. Brett LJ, at pages 427-428, said in this regard:

> "Again, I am strongly of opinion that the question whether an inquiry as to damages should be granted is within the discretion of the Judge who originally tries the case, and that his discretion ought not lightly to be interfered with. In exercising this discretion the Court should act as nearly as may be on fixed rules, or by analogy to fixed rules."

[113] Dr Barnett's criticisms of Batts J's exercise of his discretion cannot be supported. He has not shown that the learned judge was plainly wrong.

[114] Firstly, it has been proved that Traille was not entitled to the injunction. Batts J found that CWJ was not obliged to turn on the switch until Traille had paid the deposit. The fact that CWJ claimed an incorrect amount as the deposit did not affect that position. That issue has been assessed above and it has been pointed out that Traille did not tender the amount that Batts J ultimately determined to be the correct figure.

[115] Secondly, Batts J found that Traille's claim had failed on the merits. The consideration of its undertaking as to damages arose as a consequence of CWJ's assertion that it incurred loss as a result of the injunction.

[116] Among the orders made by Brown J were that:

(a) Traille was to pay the deposit to CWJ, less the TCT; and

(b) Upon receipt of the stipulated deposit, CWJ should turn on the switch to facilitate the interconnection until the trial.

[117] Although it is true that Brown J's order did not mention the issue of TCT on monthly invoices, the natural and probable consequence of Brown J's grant of the injunction, was that billing would flow from CWJ's turning on the switch. The fact that Brown J ordered that the calculation of the deposit should not include TCT did not implicitly mean that monthly invoices should not include TCT. Batts J, however, found to the contrary. He said at paragraph [59] that implicit in Brown J's order was that tax was not to be included in the monthly invoices. He cannot be said to be correct on that finding. The inclusion of TCT in the monthly billing constituted a different dispute. The OUR had already ruled that CWJ was responsible for paying over the TCT. It was, therefore, fair and reasonable for CWJ to have done so. That expenditure by CWJ would weigh in its favour in any consideration as to the ordering of an enquiry as to damages.

[118] There is also the factor, in CWJ's favour, that it made fruitless enquiries as to Traille's payment to the tax administration of the TCT on the monthly invoices. CWJ received no positive response to those enquiries, from either Traille or the tax administration.

[119] Such was the evidence before Batts J for him to exercise his discretion whether to enforce Traille's undertaking as to damages. At paragraph [59] of his judgment he exercised that discretion and ruled that "[CWJ] is protected by [Traille's] undertaking as to damages…to which [CWJ] may have recourse given the final determination of these issues".

[120] In those circumstances, Batts J cannot be said to have been plainly wrong in exercising his discretion. Traille must fail on the grounds in respect of this issue.

(f) Whether the award of costs is appropriate (ground (10) of the grounds of appeal)

[121] The complaint in this issue is that Batts J erred in awarding two-thirds of the costs to CWJ although Traille had succeeded on the major issues of the exemption and CWJ's obligation to continue performing the ICA.

[122] Mrs Kitson differed on the identification of the major issues. She identified them as the claim, the counterclaim and the issue concerning the undertaking as to damages. Learned Queen's Counsel argued that the learned judge ruled in favour of CWJ on the majority of the issues on the claim, including:

a. the principal issue of whether the deposit and/or monthly invoices should include the TCT; and

b. the issue of the party responsible for paying the TCT over to the tax administration.

[123] She also pointed out that Batts J ruled in CWJ's favour in respect of most of the reliefs that Traille sought. Although CWJ failed on the issue of the counterclaim, she said, it succeeded on the issue of the entitlement of the enquiry as to damages.

[124] She advanced that CWJ was therefore the more successful party. Learned Queen's Counsel argued that Batts J so found and his ruling on costs made an allowance of one-third to Traille for the counterclaim. She submitted that this court should be slow to reverse the exercise of Batts J's discretion.

[125] Traille cannot succeed on this issue. The Judicature (Supreme Court) Act stipulates that costs in civil proceedings are in the discretion of the court (see sections 28E and 47). The approach to the exercise of discretion has already been addressed above.

[126] The CPR also gives guidance as to the award of costs. Where the court orders costs, the general rule is that costs follows the event (see rule 64.6(1)). Rule 64.6(4)(b) stipulates that a court in deciding the issue of awarding costs must have regard to "whether a party has succeeded on particular issues, even if that party has not succeeded in the whole of the proceedings".

[127] In the matter before Batts J, he had three issues to determine as well as the counterclaim. The issues in the main claim are outlined at paragraph [40] of his judgment as follows:

> "(a) Firstly, whether [CWJ] is entitled to include the special telephone tax when computing the required deposit.
>
> (b) Secondly, whether it is [CWJ's] duty to collect and pay that tax; and
>
> (c) Thirdly, whether [Traille] is entitled to claim a 30% exemption and if so how is it computed."

[128] Batts J determined the first two issues in favour of CWJ (see paragraph [50] of the judgment), and the third issue in favour of Traille (see paragraphs [56] and [60] d) of the judgment), but ultimately concluded that Traille's claim failed (see paragraphs [57] and [61] 1) of the judgment). The learned judge then ruled in favour of Traille in respect of CWJ's counterclaim but stipulated the method by which it was entitled to terminate the ICA, if Traille's non-payment of the TCT continued (see paragraphs [59] and [61] 2) of the judgment).

[129] The learned judge, in explaining his reason for awarding ⅔costs to CWJ indicated that more time was expended on the issues in the claim and CWJ was successful in two of the three issues. The learned judge is in a better position than this court in assessing the time spent on the issues. This court will not disturb the exercise of his discretion.

The appeal against Laing J's judgment

[130] Pursuant to Batts J's order, Laing J assessed damages and held on 22 May 2017 that Traille should pay CWJ the following:

> "(i). $1,415,075.19 being the shortfall of [Traille's] payments to the Government of Jamaica which is irrecoverable by [CWJ] as a set-off[;]
>
> (ii). Interest on $65,986,564.57 in the sum of $20,556,493.00;
>
> (iii). Per diem interest at $28,596.00 from 1st May 2017 to 22nd May 2017 in the sum of $629,112.00[.]"

[131] He then made the following order:

> "[Traille] is to pay damages assessed in the sum of $22,600,680.19, plus statutory interest at the rate of 6 percent per annum from today's date, the 22nd May 2017."

[132] In its appeal from that judgment, Traille seeks the following orders:

> "• That the Order that [Traille] is to pay damages assessed in the sum of $22,600,680.19 plus statutory interest at the rate of 6 percent from today[`s] date the 22nd May 2017... be set aside.
>
> • That [the] Order for cost[s] made by the learned trial Judge be set aside and th[e] cost[s] of the action and the cost[s] in the Court of Appeal be awarded to [Traille] against [CWJ]."

[133] The grounds of appeal are as follows:

> "(1) The learned trial Judge erred in holding that as a matter of law the payment of the Telephone Call Tax is primarily the responsibility of [CWJ] which recoups that Telephone Call Tax from its client such as [Traille] where applicable. Page 9[21]

(2) The learned trial Judge erred in holding that the Order did not expressly or by implication direct [Traille] to make payments directly to the Commissioner General or any other organ or agent of the Government. Page 9[22]

(3) The learned trial Judge erred in holding that the effect of Justice Brown's Order was that [CWJ] as a matter of operation of law, incurred Call Tax liability arising from its provision of interconnection to [Traille] and its payment of that Call[s] Tax. Page 10[24]

(4) The learned Judge erred in finding that there was no merit in [Traille's] Submission that [CWJ] would have attempted to take advantage of section 8(1)(a) and 8(1)(b) of the Calls Tax Act since both the Tax Administration and the OUR regarded the issue as to which of the Parties had to pay the TCT as challenging.

(5) The learned Judge erred in holding that the resolution of the issue as to when [CWJ] was first notified that [Traille] was paying the TCT was not necessary for the assessment of damages, since [CWJ] had an obligation to mitigate any damages it could suffer by avoiding duplication of the payments.

(6) The learned Judge erred in finding that it was unreasonable for [Traille] to conclude that it had the responsibility to pay the TCT since a reasonable interpretation of the law could and/or did lead to that opinion and it was common ground that this was a genuine issue.

(7) The learned Judge erred in finding that the Calls Tax Order did not place the obligation on [Traille] to pay the TCT and/or that it was unreasonable for [Traille] to conclude that it was authorised to pay the TCT directly to the Government.

(8) That [CWJ] did not show the type of loss and links of causation that can reasonable [sic] be regarded [as] having been in the contemplation of the parties when the injunction was granted.

(9) That the learned Judge erred in finding that the undertaking was the exclusive cause of the loss suffered by [CWJ] yet awarded damages to [CWJ].

(10) That the learned Judge erred in not finding that [CWJ] did not take action to mitigate its losses if any.

(11) The learned Judge erred in failing to take into account that by reason of the injunction CWJ obtained income from the service charges paid to it by [Traille] and this should be taken into account in assessing the impact of the injunction.

(12) That the Learned Judge erred in allowing [CWJ] to bring in further evidence after the close of the case and which [Traille] was not allowed to test." (Underlining removed)

Issues

[134] The grounds will not be individually assessed; they will be grouped according to the issues they raise. They are:

a. the responsibility for paying the TCT (grounds (1), (6) and (7) of the grounds of appeal);

b. the interpretation of Brown J's order (grounds (2) and (3) of the grounds of appeal);

c. the cause of the loss claimed (grounds (8) and (9) of the grounds of appeal);

d. CWJ's duty to mitigate damages (grounds (4), (5) and (10) of the grounds of appeal);

e. the treatment of the income generated by CWJ as a result of the interconnection (ground (11) of the grounds of appeal); and

f. the allowing of evidence after the close of the case (ground (12) of the grounds of appeal).

(a) The responsibility for paying the TCT (grounds (1), (6) and (7) of the grounds of appeal)

[135] Traille's criticism of Laing J's award of damages, on the basis that CWJ did not bear the responsibility of paying over the TCT, cannot be accepted. Batts J decided that issue, and it has already been discussed above. Laing J was obliged to follow Batts J's decision that the TCT is to be paid over by CWJ. Laing J therefore did not err when he stated at paragraph [21] of his judgment:

> "As a matter of law the payment of the [TCT] is primarily the responsibility of [CWJ]... It remained the responsibility of [CWJ] at all material times and [Traille] could not have unilaterally displaced [CWJ] as the party responsible to make the payments."

(b) The interpretation of Brown J's order (grounds (2) and (3) of the grounds of appeal)

[136] Brown J's orders, in greater detail, are as follows:

> "1.Interlocutory Mandatory Injunction granted to [Traille] on the following terms:
>
> (a) [Traille] is to pay to [CWJ] the deposit, excluding the Telephone Call Tax, as required under the terms of the Interconnection Agreement dated March 4, 2014 executed between the parties.

(b) Upon payment of the said deposit in Order 1(a) herein, [CWJ] is to turn on the switch to allow [Traille] to terminate international calls on its network until the trial of the claim herein.

..."

[137] Order 1(a) merely provides that the deposit should be paid by Traille, to CWJ, and should exclude the TCT. There is no further reference to the TCT in the entire order. It does not address who should make the payments to the Commissioner General. Accordingly, Laing J cannot be said to have been in error when he found, at paragraph [22] of his judgment that "the Order did not expressly or by implication direct [Traille] to make payments directly to the Commissioner General or any other organ or agent of the Government".

[138] What has resulted from order 1(b), however, is that CWJ was to facilitate the interconnection, upon payment of the deposit. In so doing, monthly tax liability was incurred. Pursuant to the TCT Order, CWJ was responsible for paying the TCT to the tax administration. Accordingly, as indicated by Laing J, at paragraph [24] of his judgment, implicit in Brown J's order, CWJ, "as a matter of operation of law, incurred [c]alls [t]ax liability" and was the party responsible for making payments of same to the Commissioner General.

(c) The cause of the loss claimed (grounds (8) and (9) of the grounds of appeal)

[139] Dr Barnett's submissions as to the cause of CWJ's loss have been outlined during the assessment of the appeal from Batts J's decision. Dr Barnett relied on, among

others, **Hadley and another v Baxendale and others** (1854) 9 Exch 341 and **Galoo Ltd (in liquidation) and others v Bright Grahame Murray (a firm) and another** [1994] 1 WLR 1360, for support of his submissions on this issue.

[140] While Dr Barnett accepted that the injunction caused the interconnection, he argued that it cannot be said that the injunction caused all the losses sustained by CWJ. Instead, he submitted, it is the varying interpretation of the TCT Order as to who should pay the TCT that resulted in the losses relating to the monthly sums paid by both parties. He argued that CWJ therefore cannot rely on the undertaking as to damages to compensate them for all their losses.

[141] Mr Williams, also appearing for CWJ, argued that Brown J's order mandating CWJ to make the connection required CWJ, not only to provide the interconnection service, but to fulfil any obligation that flowed from that connection. Since CWJ was the party responsible for paying the TCT, any loss that CWJ incurred, as a result of so doing, was a direct result of Brown J's order. He pointed out that CWJ made the required payments and was out of pocket as a result. He argued that damages were therefore appropriate.

[142] The principle outlined by Dr Barnett, that CWJ may only claim damages that naturally arise from the grant of the injunction and not merely that the injunction created an opportunity for the loss, is accepted (see **Galoo Ltd**). It is also accepted that the losses must also have been reasonably foreseeable. It necessarily follows that

Laing J was only entitled to award damages that are the natural and probable result of the injunction.

[143] Dr Barnett's submissions as to the absence of a connection between the injunction and CWJ's expenditure, cannot, however, be accepted. It has already been assessed above that the losses from the monthly billing were a natural consequence of the interconnection. Had there been no interconnection, Traille could not have caused CWJ to pay the TCT.

[144] In relation to the losses sustained by CWJ, Laing J was of the view that Traille's undertaking of damages covered all of CWJ's losses as a result of the interconnection. This he stated, in part, at paragraph [29] as follows:

> "In my view the undertaking as to damages given by [Traille] was to cover the loss occasioned by [CWJ] having to provide interconnection services pursuant to the order of Justice Brown. The damages suffered by [CWJ] arise from al[l] the payments paid to the Government and the cost to [CWJ] or the loss occasioned by it as a result of it being kept out of this money.... "

[145] Although Brown J's order only spoke to the deposit, no issue arises from the payment of the deposit, without a computation for TCT. CWJ has suffered no loss as a result of the amount that was paid for the deposit. As Dr Barnett submitted, that sum was to be held in trust for Traille. CWJ would only be able to benefit from it in the event that Traille defaulted in its obligations to pay invoices, at the time of termination of the agreement.

[146] CWJ's loss has resulted from Traille's failure to pay the TCT portion of the monthly invoices. CWJ was advised by the OUR that it bore the burden to pay over the TCT to the tax administration. It acted in compliance with that advice. It was not able to get any information that countermanded that advice; the tax administration did not respond to it and Traille refused to provide any proof that it was paying the TCT. CWJ was out of pocket because of Traille's actions. Traille was only able to act in the way it did because it had the benefit of interconnection. That interconnection was caused by the injunction. Similarly, Traille's short-payment of TCT by $1,415,075.19 also flowed from the injunction. Non-payment of the associated costs of the interconnection is a loss which was reasonably foreseeable. Laing J cannot be faulted for awarding the interest on the sums that CWJ expended and the amount of Traille's short-payment of TCT.

d. Mitigation of damages (grounds (4), (5) and (10) of the grounds of appeal)

[147] Dr Barnett submitted that CWJ had a duty to minimise loss and failed to do so. He argued that CWJ could have mitigated its losses by:

(a) accepting that Traille was entitled to the 30% exemption;

(b) refusing to pay the TCT to the tax administration, even after being told that Traille was paying the TCT;

(c) awaiting the assessment of the TCT by the Commissioner General in accordance with sections 8(1)(a) and (b) of The Telephone Calls Tax Act, 2017;

(d) contacting the tax administration to resolve the duplication of payments; and

(e) implementing a system of recording and claiming excess.

[148] In respect of (c) above, Dr Barnett argued that Laing J erred in rejecting that CWJ could have utilised section 8(1)(a) and (b) of The Telephone Calls Tax Act, 2017. That section provides that where the applicable taxpayer does not furnish the returns or furnishes an incomplete return, the Commissioner General would assess the outstanding TCT payable by the applicable taxpayer.

[149] Dr Barnett relied, in part, on **Harries v Edmonds** (1845) 1 Car. & K. 686 for support for these submissions.

[150] Mr Williams pointed out that CWJ paid, on behalf of Traille, the sum of $73,202,881.33. That sum represents 70% of the invoiced sum. CWJ, however, only seeks to recover the interest on these sums for being kept out of pocket of these sums.

[151] It is settled that an injured party is to take the necessary steps to mitigate its loss. The principle is set out in **Harries v Edmonds**, to which Dr Barnett referred. This principle was also explained by this court in **Richard Sinclair v Vivolyn Taylor** [2012] JMCA Civ 30. Although it is a personal injury case, the principle enunciated on

mitigation is equally applicable in this case. In **Sinclair**, Phillips JA enunciated that an injured party may not recover losses which could have reasonably been avoided. She said at paragraphs [34]-[35]:

> "[34] With regard to the award for general damages being excessive on the basis of the failure of the respondent to follow instructions, **the law is clear, and the basic rule of mitigation is that a plaintiff may not recover losses which he should reasonably have avoided**. In fact, the principles relating to mitigation of damages have been set out clearly and applied in our courts. Langrin J (as he then was) in **Pearl Smith v Conrad Graham and Lois Graham** (1996) 33 JLR 189 said:
>
> > 'It is a general principle that a person who has been injured by the acts of another party **must take reasonable steps to mitigate his loss and cannot recover for losses which he could have avoided but has failed through unreasonable inaction or action to avoid.** The person who has suffered the loss therefore does not have to take any step which a reasonable and prudent man would not take in the course of his business.'
>
> [35] However, the duty to mitigate involves taking reasonable steps to avoid one's losses, and in **Erlington Nielssen and Lovetta Nielssen v Ridgeway Development Ltd** (1998) 35 JLR 675, Rattray P stated:
>
> > '...In any event in the face of a dispute existing up to the time of litigation and indeed up to the appeal, between the plaintiff and the respondent as to the existence of structural defects which the respondent refused to remedy and which the learned trial judge found did in fact exist, it could not be reasonably expected that the plaintiff would proceed on the basis of a duty to mitigate to employ other persons to remedy these defects. A failure to mitigate could not harness the plaintiffs with any liability to the defendant/respondent.'"(Emphasis supplied)

[152] CWJ did make efforts to mitigate its losses. It contacted Traille, within a reasonable time, to enquire about the TCT payments in relation to the monthly invoices. The first invoice was for the period 1-30 September 2014. That invoice was due at the end of October 2014. By 7 November 2014 CWJ contacted Mr Robinson, by email, requesting payment of the TCT. He responded to say that he had paid the TCT, however no proof was forthcoming. He steadfastly refused to provide any proof of payment until Traille was ordered on 30 October 2015 by Batts J to make specific disclosure (see paragraph 47 of the witness statement of Simone Wynter, filed 18 November 2015 – Volume 2A page 431 of the record of appeal).

[153] CWJ also gave evidence that it contacted the tax administration on two occasions, firstly by letter dated 2 December 2014 and again on 30 January 2015 to determine whether Traille was making TCT payments. It asserts that it received no response (see paragraph 6 of the supplemental witness statement of Simone Wynter filed 19 November 2015– Volume 2A page 435 of the record of appeal).

[154] Another key feature of mitigation is that the duty is on the negligent party to show that the injured party failed to take a reasonable step to mitigate the losses. Phillips JA, in **Sinclair**, distilled this principle at paragraph [38] as follows:

> "It is important to note too that **it is settled law that the onus lies on the negligent defendant to show that the claimant ought, on the facts, reasonably to have pursued some course of action, which he did not, in order to mitigate his loss. Although the claimant does not have to take the most 'efficacious' course, the defendant must put forward a 'concrete case' to demonstrate what the claimant might reasonably**

> **have done but failed to do**. The failure to mitigate does not of course bar any claim at all for damages under the particular head in question (per Laws LJ in **Lee James Leonard Samuels, TG Motors Ltd v Michael Benning** [2002] EWCA Civ 858). The question of mitigation of damages is, however, a question of fact not law (see **Payzu v Saunders** [1919] 2 KB 581)." (Emphasis supplied)

[155] Dr Barnett's submissions on this issue cannot be accepted. CWJ stated that Traille is its only client that fails to pay over the TCT (see witness statement of Simone Wynter - Vol 2A page 431, paragraph 46 of the record of appeal). In these circumstances, it was not prudent for CWJ to fail to make the TCT payments as that would mean a short-payment of its total TCT liability. Non-payment would incur a penalty of 15% of the unpaid TCT pursuant to section 6(4) of the TCT Order.

[156] Additionally, CWJ did attempt to obtain clarification from the tax administration but received no response. It also sought clarification from Traille but Traille refused to provide any proof of payment of TCT. In these circumstances, CWJ took all reasonable steps to mitigate their losses. In view of the fact that there was an instance where Traille did not pay the full amount of TCT to the tax administration, CWJ cannot be faulted for making the TCT payments to the tax administration.

[157] It should be noted that CWJ's claim for interest has taken into account the 30% exemption to which Traille is entitled, as found by Batts J (see paragraph 7 of the affidavit of Simone Wynter filed on 17 May 2017 – Volume 5 page 1351 of the record of appeal). Laing J also recognised the application of the exemption (see paragraph 14 of the judgment of Laing J).

[158] It should also be noted that Traille cannot rely on the Telephone Calls Tax Act, 2017, as it was not in force at the relevant period.

e. Income generated by CWJ as a result of the interconnection (ground (11) of the grounds of appeal)

[159] Dr Barnett argued that, in the assessment of damages, CWJ was obliged to account for any earnings it reaped from providing the service to Traille as a result of the interconnection. He argued that CWJ benefited from the payments received as a result of providing the interconnection service. Laing J erred, Dr Barnett submitted, in not accepting that principle.

[160] Mr Williams contended that pursuant to the ICA, Traille was required to pay the charges relating to the interconnection. He also contended that CWJ did not obtain any benefit/additional income from the interconnection so the principles outlined in **British Westinghouse Electric and Manufacturing Company of London** [1912] AC 673 and similar cases, on which Dr Barnett relied, did not apply.

[161] Dr Barnett's submissions cannot be accepted. The ICA provided for the payment of interest in the event of non-payment. That provision is independent of the charge for providing the service. Taken to its logical conclusion, Dr Barnett's submission would mean that CWJ would not receive any compensation for the service that it provided.

[162] It is true that in some instances, benefits derived from an agreement should be considered when assessing damages (see **British Westinghouse Ltd v Underground Electric Railway Company of London** and **Parry v Cleaver** [1970]

AC 1). In the instant case, however, CWJ did not derive any windfall from the performance of the ICT. It provided a service to Traille, for which it was paid. Once a service is provided to Traille, there should be payment of the service charges.

f. Allowance of evidence after the close of the case (ground (12) of the grounds of appeal)

[163] This issue was not argued and need not be analysed, except to say that in **British Caribbean Insurance Company v Delbert Perrier** (1996) 33 JLR 119, this court accepted that it was permissible for the court to consider material from official sources, particularly the Bank of Jamaica, in determining appropriate rates of interest.

Conclusion

[164] Based on the above reasoning, it should be held that both appeals should be dismissed, with costs to CWJ to be agreed or taxed.

SINCLAIR-HAYNES JA

[165] I have read the draft judgment of my brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

P WILLIAMS JA

[166] I too have read the draft judgment of my brother Brooks JA, and agree with his reasoning and conclusion. I have nothing to add.

BROOKS JA

ORDER

1. The appeal from the decision of Batts J is dismissed and the judgment is affirmed.

2. The appeal from the decision of Laing J is dismissed and the judgment is affirmed.

3. Costs of the consolidated appeals to the respondent to be agreed or taxed.