[2014] JMCC COMM 8

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO 2007 HCV 01483/CLAIM NO 2013CD0107

BETWEEN	**MOSSEL (JAMAICA) LIMITED**	**CLAIMANT**
AND	**CABLE & WIRELESS JAMAICA LIMITED**	**DEFENDANT**

CONSOLIDATED WITH

CLAIM NO 2009 HCV 00472/CLAIM NO 2013CD00108

BETWEEN	**DIGICEL (JAMAICA) LIMITED**	**CLAIMANT**
	(T/A 'DIGICEL')	
AND	**CABLE & WIRELESS JAMAICA LIMITED**	**DEFENDANT**

IN OPEN COURT

Michael Hylton QC, Kevin Powell and Melissa McLeod instructed by Hylton Powell for the Claimant

Denise Kitson QC, Suzanne Risden Foster and Trudy-Ann Dixon Frith instructed by Grant Stewart Phillips & Co for the Defendant

STATUTORY INTERPRETATION – SECTIONS 29, 31, 32 AND 34 OF TELECOMMUNICATIONS ACT – INTERPRETATION OF CONTRACT

March 31, 2014, April 2, 3, 7, 8, 10 and July 21, 2014

SYKES J

[1] 'Whenever Digicel terminates a call from CWJ which originates on any part of their network, CWJ must pay Digicel its charges for such call termination. These charges may differ depending on whether the call originated on a CWJ mobile or CWJ fixed line. Where a call originates on a CWJ fixed line and terminates on Digicel's network the charges payable will be calculated pursuant to the fixed origination regime. The fixed origination regime … [has] an essential element … the Fixed Retention (also called FTMR) which is retained by CWJ and incorporated into the retail price charged to CWJ fixed line customers who originates (sic) the call. The FTMR is an interconnection charge which is calculated and paid by reference to the length of the call. Ultimately, CWJ will bill its customers who originated the calls to Digicel's network a retail fee which is comprised of all of the elements of the call which are chargeable including portions which are retained by CWJ and in turn CWJ is obliged to pay to Digicel the amounts which are due to it under the fixed originating regime' (para 4 of witness statement of Mr Richard Fraser, attorney at law and corporate executive for Digicel, dated October 4, 2011). With these words, the latest battle between Cable and Wireless Jamaica Ltd ('CWJ' or 'C&WJ') and Mossel (Jamaica) Limited began and what a battle it has been. The claimants in both claims are Mossel (Jamaica) Limited and Digicel (Jamaica) Limited. In this judgment, the claimants will be referred to collectively as Digicel. The court understands that

Mossel changed its name to Digicel. All the issues in this case revolve around how money collected from calls made from CWJ's fixed line to Digicel's mobile network should be divided.

[2] For the purposes of this case, there is no need to refer to any other fixed line or mobile service provider except where necessary for the narrative to make complete or better sense. In Jamaica, each telephone company has its customers who are also called subscribers. Before the advent of mobile or cellular phones telephone calls were made and received by means of a fixed line also called a landline.

[3] The fixed line telephone network is a standalone system. It is referred in the technical jargon as Public Switched Telephone Network ('PSTN'). The mobile telephone system is also a standalone system. This network is called a Public Land Mobile Network ('PLMN'). . With the advent of mobile phones it became necessary to establish a mechanism whereby calls could be made from fixed lines and terminated (that is answered by the receiving party) on mobile phones. Both systems needed to interconnect so that fixed callers could call mobile service customers and vice versa. The calls that go from fixed to mobile telephones are known as FTM calls. Those callers who made FTM calls which terminated on Digicel's network have to pay for this facility.

[4] Milton Friedman, the Nobel Prize winning economist, always said that there is no such thing as a free lunch and so it is with FTM calls. Somebody has to pay for it. There also has to be a method of collecting the money to pay for this service and then dividing the revenue so that each service provider gets the money required to pay for the service it provides. There is a jargon that has developed to speak about all of this. We have already met FTM. There are others to meet and to know. There is fixed to mobile termination rate ('MTR'). A close relative of MTR is the fixed to mobile retention ('FTMR'). Finally, for now, there is the calling party pays system ('CPP')

[5] The CPP tells how the revenue is collected. This is how it is done. CWJ's customers receive a monthly bill from CWJ. The customer pays. From this revenue stream, CWJ is permitted to deduct a fixed sum, FTMR, from the money collected to pay for CWJ's costs of providing their part of the service, that is the costs associated with originating the call and transporting the signal along its network to the interconnection point with Digicel where the call is handed over to Digicel's network which continues the transmission of the call to the final destination, namely, the Digicel subscriber. Digicel incurs costs in providing this service. Digicel gets the revenue for this service from CWJ's customers. It gets part of what CWJ collects from its customers. Thus CWJ's customers pay for the whole service with CWJ as the collecting company, it takes its cut and hands over the rest to Digicel. Digicel does not bill CWJ's customers directly. Digicel tells CWJ how much CWJ is to charge its customers for making FTM calls. CWJ does not set this price.

[6] Under the current system CWJ, if requested by Digicel, and it was so requested, must provide interconnection services. CWJ cannot refuse. For this interconnection system to work, CWJ and Digicel ultimately concluded what is called an interconnection agreement ('ICA'). The ICA covers all sorts of things from rates payable and unit measure to changes to the ICA.

[7] A word about the regulator. The telecommunication business in Jamaica is regulated by an entity known as the Office of Utilities Regulation ('OUR' or simply, 'the Office). It is a statutory body established by the Office of Utilities Regulation Act ('OURA'). The OUR was given further powers under the Telecommunications Act ('TA'). The OUR has the power to set terms and conditions for interconnection including charges. From what has been said it can be said that the telecommunications business, at least for telephone service, is regulated by a combination of public law (statute) and private law (the ICA).

[8] Both cases are about division of revenue that CWJ collects from its customers. Even though we are in 2014, the root of the problems goes back to the very

inception of competition in the telecommunications market in 2001. The court should point out that no one is to be blamed for what has happened. It is simply the natural outworking of the introduction of a new dispensation and with the best will in the world not every problem or issue can be thought of and solved at the outset. Experience has to be the teacher. The OUR sought to be guided by the experience in other countries but there is a limit to that. There is no substitute for experience of your own markets.

[9] Digicel says that it should get everything left after CWJ has deducted its FTMR and hand over the rest. Digicel calls this the balance regime. CWJ disputes the label and says there was no balance regime and all that Digicel should get should be that which it is entitled to contractually and in any event should not get more than the MTR set in 2002 and implemented in 2007. This is really a quibbling about words. The undisputed fact is that in the CPP system of calls originating on CWJ's fixed line and terminating on Digicel's network, CWJ was to deduct its lawful deductions and provide the rest of the revenue to Digicel. As will be shown in detail below, there is no third position. Money was collected and divided.

[10] Wrapped up with this issue is the unit measure to be used for calculating the retention CWJ should keep. Digicel claims that it had the authority under the regulatory regime to tell CWJ whether to charge the CWJ customers on a per minute or per second basis and CWJ was obliged to so charge both the dollar figure per unit measure as well as use the actual unit measure specified by Digicel. Digicel goes further to say that CWJ's retention should only be calculated on per second basis even if the duration of the call was measured on a per minute basis. CWJ on the other hand debunks this and says that it was entitled to calculate the retention on any unit measure whether per minute or per second. Thus if Digicel was charging on a per minute basis then the retention is calculated on a per minute. If Digicel was charging on a per second basis then the retention is calculated on a per second basis.

[11] Another issue between the parties is the vexed question of the impact of devaluation. Part of the problem is that when the CPP system was set up, no one addressed the issue of devaluation of the Jamaican currency. This issue came up and according to CWJ, the regulator made changes to the regulatory framework which enabled CWJ to deduct sums based on devaluation from the revenue generated. In other words the FMTR extended to include changes arising from devaluation of the Jamaican currency. Is this permissible? CWJ claims that once the regulator makes changes to the regulatory framework including changes to charges and how charges are calculated then those changes apply automatically to any agreement between CWJ and Digicel. CWJ went ahead based on its understanding of what the regulator had done in relation to devaluation and deducted those sums, which it claims were based on devaluations, from the revenue. Digicel says that CWJ had no lawful authority for this and that those sums deducted should be handed over to Digicel. These two issues of whether part of the FTMR should be based on per second or per minute measure as well as the devaluation issue formed the basis of the 2007 claim (Claim No 2007HCV01483; 2013CD00107). The 2007 claim was transferred to the Commercial Division of the Supreme Court and consolidated with 2009HCV00472; 2013CD00108). One of the important sub issues in the 2007 claim is whether rulings (called Determinations) issued by the OUR after the ICA was entered into between CWJ and Digicel automatically changes the relevant term or terms of the ICA.

[12] Now to the second claim (2009HCV00472; 2013CD00108). The regulator at some point permitted the telephone companies to keep back some of the revenue for what is called bad debt. The bad debt retention was put in to take account of the fact that some of CWJ's FTM callers would not pay the bill at all or pay in full and even if they did not CWJ was still obliged to pay over the FMTR associated with FTM call made from its network to Digicel's. Digicel argues that any sum retained for bad debt is to be based on actual bad debt and cannot be used to justify a retention for bad debt if there is in fact no bad debt. CWJ

contends the contrary and submits that whether or not CWJ in fact incurred a loss, it was in fact permitted to keep back that sum for bad debt and not hand it over to Digicel.

[13] The issue of bad debt became a very sore point between the parties when CWJ introduced what it called the Homefone service. This was a prepaid system of making FTM calls. CWJ says that this service was new and therefore fell outside of the regulatory regime which existed at the time the ICA was executed. Digicel submits that it is not a new service and therefore is subject to the CPP system outlined above and in any event, because it is prepaid service, it is impossible to say that there is a loss and so any revenue generated from this service should not be subject to any deduction for bad debt for the simple reason that prepaid services cannot have any bad debt. Therefore, Digicel says, any sums deducted for bad debt under the Homefone service was wrongly deducted and should now be handed over to Digicel. The basis of Digicel's argument is as stated above, when CWJ bills its landline customers, it takes it retention for its costs and hands over the rest to Digicel.

[14] This case requires an examination of the relationship between the regulatory powers, the relevant statute and the ICA. CWJ contends that when the regulator changes the regulatory framework, the ICA, at the appropriate places must and do also change automatically to reflect the changes brought about by the regulator. Digicel contends that there cannot be any automatic amendment of the ICA because the ICA sets out how changes are to be effected even if the changes are precipitated by the regulator's conduct.

[15] Let it be clear that Digicel is not arguing that the regulator cannot make changes to the regulatory framework but even if it does that does not mean that the contractually agreed method of dealing with those changes can be ignored and either party acts unilaterally without complying with the contractual provisions.

[16] Both claims require the interpretation of (a) terms of an agreement between Digicel and CWJ, called an interconnection agreement and (b) the provisions of the Telecommunications Act ('TA').

[17] There will be a brief outline of how the present regulatory regime came to be. In so doing reference will be made to the TA and other relevant statutes as well as the provisions of the ICA relevant to this case.

How did we get here?

[18] CWJ and its predecessors had a monopoly over telephone land line services in Jamaica under an exclusive licence which was to last for at least fifty years. When that was agreed not many persons in Jamaica foresaw the speed with which telecommunications would develop. One of the legacies of the collapsed dotcom companies was surplus fibre optic cables were now lying idle. The cables had crisscrossed the world thus making it possible for long distance calls to be made at a fraction of the cost charged by traditional land line operators. When this capability was twinned with wireless transmission the costs could and did plunge even lower. As these systems of communication became more reliable and cheaper, the issue of what should be done to make these benefits available to the general public arose. In seeking to be ahead of the game, CWJ introduced what is now called wireless or cellular service to Jamaica but this was still under a monopoly. As far back as 1776, that outstanding Scotsman, Adam Smith, in his mammoth work which laid the foundation for modern economics, **An Inquiry Into the Nature and Causes of the Wealth of Nations**, warned against monopolies. One of his themes was that monopolies were (and are) a constant threat to competition and free exchange which meant that men were not free to pursue their own self interest and thus increase the wealth of themselves and the society. It appeared that the Government of Jamaica accepted this view in respect of telecommunications services in Jamaica.

[19] By the late 1990s the Government of Jamaica came round to the view that CWJ's monopoly on telephone services had to be broken. To put it in the language of economists, customers should be able reap the benefit of lower prices and better service from competition rather than suffer under the yoke of a monopolist who had little or no incentive to lower prices and improve service at a pace fast enough to benefit the public. The problem to be solved was how to introduce competition when the incumbent had a monopoly granted to it by the Government. By September 1999, the Government and CWJ had reached agreement on breaking the monopoly. This is where the TA enters the picture.

[20] Under this Act, the telecommunications sector would be freed from the burden of a monopoly with the hope that consumers would benefit. The liberalisation would take place in three phases. Phase 1 which would run for eighteen months beginning March 2000. During this phase additional mobile service providers would be licenced while CWJ retained its monopoly over land line services. Under Phase 2, which began at the end of Phase 1, other fixed line providers could enter the market. During these two phases, CWJ would still keep its monopoly over international calls. Phase 3, which began at the end of Phase 2, would see the end of this last aspect of the monopoly.

[21] Who was to oversee this process of increased competition? This is where the OUR comes in. The TA was passed and became law on March 1, 2000 and under that law the OUR was given responsibility to regulate telecommunication services. Section 4 (1) of the TA states quite explicitly that the 'Office shall regulate telecommunications in accordance with this Act.' The Office referred to here is the OUR (section 2 (1) of the TA). It is proper to point that the under the OURA, the OUR had responsibility for regulating telecommunication services. The advantage of the TA over the OURA is that the former is a specific and highly specialised legislation dealing with all aspects of telecommunications regulation.

The regulatory framework

[22] For mobile service providers to make headway in the new environment one of the things needed would be for CWJ's fixed line customers to be able to make calls from CWJ's network to the mobile telephone providers system. This aspect of the telecommunications system is regulated by the TA.

[23] The relevant provisions of the TA are as follows:

> *29. -*
>
> *(1) Each carrier shall, upon request in accordance with this Part, permit interconnection of its public voice network with the public voice network of any other carrier for the provision of voice services.*
>
> *(2) A public voice carrier shall provide interconnection in accordance with the following principles -*
>
> *(a) any-to-any connectivity shall be granted in such manner as to enable customers of each public voice network to complete calls to customers of another public voice network or to obtain services from such other network;*
>
> *(b) end-to-end operability shall be maintained in order to facilitate the provision of services by an interconnecting carrier to the customer notwithstanding that the customer is directly connected to a different network;*
>
> *(c) interconnecting carriers shall be equally responsible for establishing interconnection and so as quickly as is reasonably practicable.*

(3) Copies of all interconnection agreements shall be lodged with the Office which may object to any such agreement in the prescribed manner.

(4) The Office may, either on its own initiative in assessing an interconnection agreement, or in resolving a dispute between operators, make a determination of the terms and conditions of call termination, including charges.

(5) When making a determination of an operator's call termination charges, the Office shall have regard to the principle of cost orientation, so, however, that if the operator is non-dominant then the Office may also consider reciprocity and other approaches.

(6) For the purposes of subsection (5), 'reciprocity' means basing the non-dominant carrier's call termination charges on the call termination charges of another carrier.

…

31. Each term and condition in relation to the provision of interconnection services provided to each carrier shall be determined -

(a) in accordance with the relevant reference interconnection offer or any part there of which is in effect in relation to the provision of those services;

(b) where paragraph (a) does not apply, by agreement between the interconnection seeker and the interconnection provider; and

(c) where neither paragraph (a) nor (b) applies, by the Office acting as arbitrator pursuant to the arbitration rules referred to in section 34(2).

- (1) Every dominant carrier shall, and any other carrier may, lodge with the Office a proposed reference interconnection offer setting out the terms and conditions upon which other carriers may interconnect with the public voice network of that dominant or other carrier, for the provision of voice services.

(2) …the existing telecommunications carrier shall submit its initial reference interconnection offer within thirty days after the appointed day.

(3) A reference interconnection offer shall contain such particulars as may be prescribed.

(4) A reference interconnection offer or any part thereof shall take effect upon approval by the Office in the prescribed manner.

…

34. -

(1) Where, during negotiations for the provision of interconnection there is any dispute between the interconnection provider and the interconnection seeker (hereinafter in this section referred to as a pre-contract dispute) as to the terms and conditions of such provision,

either of them may refer the dispute to the Office for resolution.

(2) The Office shall make rules applicable to the arbitration of precontract disputes.

(3) A decision of the Office in relation to any pre-contract dispute shall be consistent with –

(a) any agreement reached between the parties as to matters that are not in dispute;

(b) the terms and conditions set out in a reference interconnection offer or any part thereof that is in effect with respect to the interconnection provider;

(c) the principles specified in sections 29(2) and 30(1).

(4) Where neither party to the dispute is a dominant public voice carrier, the Office may decline to act as an arbitrator in relation to the dispute.

…

46. -

(1) In this Part -

'prescribed price caps' means such restrictions on the price of prescribed services as are prescribed in rules made under this section;

'prescribed services' means services to which prescribed price caps apply;

'price cap' means a restriction whereby the weighted aggregate price, calculated in the prescribed manner, for prescribed services shall not be greater than a specified price.

(2) The Office shall make rules providing for the imposition, monitoring and enforcements of price caps.

[24] These provisions are found in Part V which deals with interconnection. They set out how interconnection services were to come about. The base document is the reference interconnection offer ('RIO'). A RIO is an offer document, from the existing carrier or dominant carrier, setting out matters relating to the price and terms and conditions under which it will permit interconnection to its network. 'Existing telecommunications carrier' was defined in section 2 (1) of the TA to mean 'Cable & Wireless Jamaica Limited and included any wholly owned subsidiary or any successor or assignee of that company. After March 30, 2000, only a dominant carrier **must** submit a RIO to the OUR. CWJ had to submit the RIO to the OUR within 30 days of the TA becoming law because it fell within the definition of existing carrier and not because it was a dominant carrier. Section 28 outlined formalities that had to be followed before any provider could be declared a dominant carrier.

[25] After a RIO is submitted, the OUR invites comments from other participants in the sector. This is how it conducts consultations in the industry. While the responses are coming in, the OUR conducts, simultaneously, its assessment of the RIO. After the consultations are completed the OUR then issues what is called a Determination. A Determination is a formal document from the OUR setting out its official position regarding the RIO. It may approve the RIO, in whole or part or not at all. The Determination has some legal consequence in that parties are expected to heed the Determinations. Those parts that are approved then become the basis on which the existing carrier or dominant carrier

makes an interconnection offer to another. If the offer is accepted, then the parties may conclude an ICA that regulates how the interconnection service is to be provided. The ICA can over technical matters such as the type of equipment that can be used at the interconnection point.

[26] It is important to emphasise that the RIO is not the actual agreement concluded between the carriers – in this case, CWJ and Digicel. It is the offer coming from the carrier offering interconnection services, CWJ in this case, to the interconnection seeker, Digicel. The parties are then free to agree the terms of the interconnection. In other words, Digicel does not have to accept the RIO meaning it can decline to contract with CWJ. However, freedom contract is curtailed by section 29 (4). Under that section, the Office may, on its own initiative, when assessing any ICA or resolving a dispute between the parties, 'make a determination of the terms and conditions of call termination, including charges' (section 29 (4)). In addition section 29 (3) mandates that all ICAs must be lodged with the Office. Also section 31 states that each term of the ICA is to be determined in accordance with relevant RIO. Section 32 requires that a dominant carrier must lodge a RIO with the OUR while any other carrier may lodge a RIO. Significantly, section 32 (4) states that a RIO does not take effect unless approved by the Office.

[27] Just to clarify the positon of other carriers in relation to the RIO. Other than dominant carriers the only carrier that had to submit a RIO was CWJ. This was initially on the basis that it was the existing carrier as defined in the statute. In 2000, no carrier was designated a dominant carrier and so in practical terms only CWJ had to submit a RIO which was then approved and that approved RIO became the basis of the ICA now in force between the parties. The first decision regarding dominance was not made until August 2003. The ICA was signed on April 18, 2001 following the OUR's approval of RIO 3.

[28] As a practical matter, it appears that even though after March 2000 only designated dominant carriers were required to submit a RIO, because of the nature of what interconnection is and the technical information required to be exchanged for that facility to provide optimum benefit for the parties to such an arrangement prudence suggests that a RIO should always be produced so that any party wishing interconnection services would know what were the terms on which the services were being offered.

[29] The process of interconnection is therefore tightly controlled from the RIO (which must be approved by the OUR before it takes effect) to the ICA.

[30] It is clear that section 29 (4) confers on the OUR power to decide what terms should be in an ICA and that power includes determining charges. The OUR has the power to approve RIOs (section 32 (4)).

[31] The question of whether the OUR can issue Determinations even after an ICA has been concluded and has become operative is no longer in doubt. This position taken by this court derives support from the Court of Appeal's in **Office of Utilities Regulation v the Minister of Industry Commerce and Technology** SCCA Nos 4&5/ 04 (unreported) (delivered May 30, 2007). When the case got to the Privy Council it was known as **Mossel (Jamaica) Limited v OUR** [2010] UKPC 1 ('Mossel').

[32] The background to that case was that an investor wished to enter the telecommunications sector. That investor wanted rates to remain at a particular level in order to make his intended investment profitable. The OUR had indicated that it was going to review rates and charges in the industry. The Minister sought to persuade the OUR to stay its hand. The OUR sought, gently, to deflect these efforts by the Minister. The Minister would not stand for this. He struck preemptively by issuing a Ministerial Direction on April 9, 2002, which said, among many things:

> *THE OUR IS HEREBY DIRECTED that as a matter of policy(i)The OUR is not to intervene in the mobile (cellular) market by setting rates, tariffs or price caps on the interconnection or retail charges made by any mobile competitor.(ii)The OUR is to facilitate competition and investment for the new mobile carriers in Jamaica.*

[33] In a very strong show of strength, Mr Hay, the then Director General of the OUR, took the view that the Minister had exceeded his statutory remit. Mr Hay's response to the Minister's contretemps was to issue a Determination from the OUR on May 22, 2002, just a month after the Minister had issued his directions. In that Determination, the OUR decided that the price of FTM calls shall continue to be fixed by mobile carriers subject to a cap. It also stated what were the maximum termination charges applicable as of July 1, 2002. This Determination was in respect of RIO 4 put forward by CWJ.

[34] The issue before the board was whether the OUR could issue the Determination containing, as it were, explicit prices for certain services and whether the Minister could issue his Direction. The Board upheld the Court of Appeal's decision that the Minister's Direction was outside the statute and therefore unlawful. It also held that the OUR acted within the statute and could issue Determinations.

[35] This is what Lord Phillips held at **[38]** – **[39]**:

> *38 What are the relevant duties imposed on the OUR by the Act in relation to telecommunications? They are those in Part V, which deals with interconnection, which is what this case is all about. Section 29 imposes a duty on every carrier that is both C&WJ and any competitor licensed to provide telecommunications services, to permit other carriers to*

interconnect. Such a requirement could be rendered nugatory if it were left to each carrier to decide upon the charges that it would make for interconnection. Equally, in the absence of the regulation of charges, the market could be abused by a dominant licensee, or by anti- competitive agreements between licensees. No doubt for this reason (i) section 29(3) requires every interconnection agreement to be submitted for assessment by the OUR, which has the power to determine the terms and conditions, including charges – section 29(4); (ii) C&WJ, which was in a special position as the existing carrier, had to submit its initial RIO for approval; (iii) any other carrier is entitled (and any dominant carrier bound) to submit an RIO for approval. ***Approval of a RIO involves the approval of charges.*** (emphasis added)

39 Performing these functions was of the essence of the OUR's role as regulator. The Minister had stated that he intended to "rethink the role of the OUR in telecommunications". He had done precisely that and sought, by the Direction, to emasculate OUR's statutory function in relation to interconnection.

[36] Mr Hylton QC has argued in this case that the OUR does not have the power to change the terms of any existing ICA. This submission echoes one of the points that arose before the Board. The relevant passages from Lord Phillips' advice are these at **[51]** – **[57]**:

51 This issue is independent of the issue of the vires of the Minister's Direction. Digicel had advanced two independent grounds for contending that the Determination was unlawful.

The first was that it was vitiated by irrationality. Mr Pleming QC told the Board that Digicel had reluctantly decided not to pursue this ground. The other ground turned on the construction of the Act. ***Digicel argued that the Act gave the OUR no power to impose on the parties to an existing agreement a variation of the terms of that agreement.*** *Section 29(4) did not confer on the OUR a free standing power to impose on parties to a concluded contract, in relation to which the OUR had made no objection under section 29(3), terms and conditions in place of those that they had agreed. The power conferred by section 29(4) could be exercised only (i) where the parties were in a pre-contract dispute under section 34(1) or (ii) where the OUR had objected to an ICA under section 29(3) . Neither was applicable in the present case.*

52 The Board's conclusions are as follows. One way in which the Act enables the OUR to regulate charges is by imposing constraints on the terms under which those competing in the market can contract with one another. Section 46 appears to contemplate an alternative means of price capping, but no rules were made pursuant to this section.

53 The Determination related to the approval of RIO 4 for C&WJ. This was part of an ongoing process pursuant to section 32(2) to (4) of the Act. Earlier RIOs had been approved, but on the basis that these were only to have temporary effect, to be replaced in due course by a revised RIO. Digicel were involved in the ongoing negotiations and had made no objection to the process. More significantly, at

the instigation of the OUR, they had included in the ICA that they negotiated with C&WJ, provision for amendment of the ICA to give effect to changes that might be made to C&WJ's RIO.

54 ***The Board can see nothing inconsistent with the provisions of the Act in the process of replacing C&WJ's interim RIO with RIO 4. The Determination was lawfully made in accordance with the provisions of the Act.*** *The effect of that determination on the ICA between C&WJ and Digicel is essentially a matter of private rather than public law. It depends upon the interpretation of clause 23 of that agreement. Clause 23.5 appears to constitute an agreement that the ICA would be amended to reflect the revised RIO.*

…

57 As the Board understands the position, Digicel acted as if the OUR's Determination would, and subsequently did, amend the terms of its ICA with C&WJ. If any issue remains as to precisely how the Determination impacted on that contract, this is not a matter for resolution by the Board on this appeal. (emphasis added)

[37] From the facts and analysis of those facts by the Board, there can be no doubt that the OUR can issue Determinations. Since RIO 4 was the basis of the Determination that was before the Board that Determination was held to be lawful in a context where the previous RIO 3 was then extant (and found that it and other prior RIOs were intended to be replaced by a later RIO) and on which the ICA was based, there can be no doubt that an extant RIO on which a Determination was based does not foreclose the issuing of a Determination based on a later RIO. Lord Phillips' reasoning made it clear that the impact of the

RIO on the ICA was a matter of private law and in particular clause 23 which spoke to alterations in the ICA. The Board explicitly decided that approval of RIO may necessarily involve approval of charges. Thus it inevitably follows that since approval of charges is included within the power to approve RIOs and RIOs may have an impact on the ICA then the inescapable deduction has to be that an approval of charges can have an impact on any existing ICA.

[38] Crucially, the Board reasoned that the actual impact was a matter of private law which means that the idea of wholesale automatic changes to the ICA as submitted by CWJ does not derive strong support from the Board. Lord Phillips was very clear that the '*effect of that determination on the ICA between C&WJ and Digicel is essentially a matter of private rather than public law*' which in turn meant the ultimate outcome rested on '*depends upon the interpretation of clause 23 of that agreement.*' His Lordship observed that '*[c]lause 23.5 appears to constitute an agreement that the ICA would be amended to reflect the revised RIO.*'

[39] Since the Board held that the Determination issued in relation to RIO 4 was lawful and further that previous RIOs were temporary and could be replaced by a 'revised RIO' a necessary corollary from this reasoning is that the Determinations issued in respect of the later RIOs may have the effect of altering previous Determinations which were based on earlier RIOs. In other words, a RIO is not cast in stone and still less is a Determination based on a pre-existing RIO immutable.

[40] It is perhaps useful at this point to distinguish between a Determination and Clarification. A Determination, as understood by this court, is the name given to final decisions of the OUR on any regulatory issue after it has gone through the consultation and analytical process. A Clarifications seems to be that name given to statements made by the OUR in which it is seeking to explain what some previous Determination meant or was intended to mean. The implication of this

distinction is that in this case what falls for interpretation is the Determination since that is the officially stated position. The Clarification while of some value does not carry the same weight since it is not regarded as a Determination.

[41] Once the Board decided that the Determination issued in relation to RIO 4 was within the power of the OUR then it meant that its terms took effect. The Board rightly pointed out that the effect of approving a RIO (and issuing a Determination based on that approval) on the ICA between CWJ and Digicel is a matter of private law. The Board could not speak to that since that issue was not before it. Mr Hylton is absolutely correct when he said that the Board did not say and indeed could not pronounce upon the effect of issuing a Determination or approving a RIO on the ICA. This means Mrs Kitson's insistence that the Court of Appeal and the Board had decided that there was automatic amendment of the ICA on the Determination was issued is not consistent with Lord Phillips' reasoning and conclusion. The Court of Appeal and the Privy Council could not possibly have decided the point insisted on by Mrs Kitson for the reason that what was before both courts was whether the directions issued by the Minister and the Determination issued by the OUR was within the powers granted to both functionaries by the relevant statute. Also it is not possible to induct that conclusion from what the Board said. The conclusion derived from the reasoning of the Board is actually inconsistent with the proposition advanced by Mrs Kitson.

[42] If the position advanced by Mrs Kitson was so obvious the question is why would the legislature make the following amendments in 2012 after the Board handed down its advice? In 2012 section 32 (4) was amended by deleting the words

> *'in the prescribed manner'*

and substituting

> *'and all existing interconnection agreements executed by the filing carrier shall be amended in accordance with the approved reference*

interconnection offer and until actually amended are deemed to be so amended.'

[43] Mrs Kitson said that this amendment was designed to remove doubts over the power of the OUR to amend existing ICAs. Mr Hylton said that this establishes that the OUR did not have this power before. All the RIOs relevant to this case were issued before the 2012 amendment.

[44] This court says that Mrs Kitson's submission of wholesale automatic amendment cannot be accepted. First, this 2012 amendment provides very good reasons against such a conclusion. Second, the reasoning of the Board would have been otherwise since the argument was placed squarely before it. It is significant that the Board directed the parties to the terms of ICA to decide the impact of a lawfully issued Determination of the OUR. Third, unless the power is clearly given or arises by necessary implication, courts do not readily accept that the executive branch of government, through a regulator, has the power to determine the terms of a private law contract because there is the well established principle of freedom of contract. In a liberal democratic state, the starting point is that parties are free to act in their own self interest without interference from the state and that state power should not be extended needlessly into the private lives of citizens. Fourth, in this case, the parties have established elaborate provisions in the ICA regarding the process by which the ICA is changed. Fifth, there is dictum from Harrison P in the **Mossel** case before it went on to the Board capable of suggesting that the OUR does not have the power to retroactively modify a previous agreement between the parties. His Lordship said at page 46:

This provision [referring to clause 23 of the ICA] for amendment of the interconnection agreement was purely a matter between the contracting parties, at their option. There was no statutory provision that a subsequent RIO could

retroactively modify their prior agreement. On the contrary, an interconnection agreement being entered into is required to conform with the existing RIO.

[45] Lord Phillips, it will be recalled, indicated that the Determination based RIO 4 was understood to be the version that would replace the previous temporary RIOs. Lord Phillips referred explicitly to that part of the RIO 4 Determination which said:

All interconnection agreements should now be modified to reflect the Office's determination. These changes are effective as of November 22, 2001.

[46] In spite of this reference his Lordship still said that the impact of the Determination was a matter of private law meaning what the ICA said on the issue. The concept of automatic alteration of the ICA by an OUR Determination is not compatible with Lord Phillips' reasoning.

[47] The fact that the OUR has the power to issue Determinations that affect the content of an existing RIO does not mean automatic incorporation without reference to the contractual provisions of the ICA. The TA did not say so before 2012. The OUR has the power to impose terms and if it does, the regulated entities need to give effect to them. How they comply and the details of that as between themselves is a matter regulated by private contract. Lord Phillips therefore recognised and necessarily approved the notion that it is in fact a combination of statute law and private law that regulates the telecommunications sector under the TA. By taking this approach his Lordship was actually saying that the private law made by the parties should be observed. There is nothing in is Lordship's analysis suggesting that his Lordship thought that there was a necessary an inevitable inconsistency between a situation in which the regulator makes rules and the regulated decide, by private law means, how to manage the rules made by the regulator. In the **Mossel** case, the parties in fact made

provision for giving effect to RIOs approved by the OUR – a provision which undoubtedly influenced the thinking of Lord Phillips in coming to the conclusion that he did.

[48] This court needs to address one of CWJ's submissions on this concept called judicial deference. It is a concept that flourishes in the United States of America and Canada. Reduced to its essence, the idea is that courts should defer to the regulator's interpretation of the statute and rules governing the regulator unless there is some good reason not to do so. This argument was deployed to support the view advanced by the OUR. Mr Hewitt, the OUR's witness who testified for CWJ, shared CWJ's view of automatic alteration of the ICA when a Determination was issued.

[49] This court has no hesitation in rejecting the judicial deference argument. The court accords respect to the regulator's view since it is the body entrusted with the daily administration of the statute but the view projected by Mrs Kitson has deep philosophical problems such as the breakdown of the separation of powers doctrine. The regulator is part of the executive branch of government. It is entitled to have its own views and act on those views until changed by judicial decision. The reason for this is not judicial deference but because as a practical matter, the regulator has to give some interpretation to the statute it administers in order to carry out its functions and is entitled to act on its interpretation unless it is told otherwise by a court. Unless it did so it could not begin operating. In our legal system the need for judicial interpretation does no arise unless some issue has arisen which requires adjudication. Our courts do not render academic opinions but deliver decisions based on real disputes. But to say that the courts should give the regulator large room to maneuvre would involve the court handing over to the executive its role in interpreting laws. The final interpretation of statutes and contract is always a judicial function and cannot be handed over to the executive. It is an intrinsic part of the separation of powers doctrine.

[50] As was indicated to Mrs Kitson during oral submissions, her proposition involves creating a no-fly zone for the executive branch to operate knowing full well that the courts would not intervene. Take the **Mossel** case that went to the Privy Council. The evidence was that the Minister sought to influence the decision of the OUR and tried to prevent it from carrying out its statutory duty. What if Mr Hay had succumbed to the request? What if it were a matter of interpretation and the Minister had suggested one particular interpretation in order to favour the potential investor and the OUR accepted that view? This shows the danger of Mrs Kitson's position. What the court accepts, as was pointed out by Mr Hylton, is that where it comes to highly technical matters that are likely to be beyond the ordinary experience of the court then surely there may be a case for the court to defer to the regulator. However, even in this regard, if it becomes a court issue then the court must decide whether the approach to the technical issues is consistent with the statute.

[51] Why was there this need to appeal to this doctrine and cite cases from the Canadian jurisdiction in this effort to create a no-fly zone over which judicial eyes should not pass? The OUR, it appears, has a reformed view of what the words used in its Determination of February 21, 2001 may have meant. From the material presented, it appears that the OUR did not appreciate the full implications of the interpretation that Digicel is insisting on regarding the OUR Determination of February 21, 2001 and the ICA it approved. As will be shown below the wording of the documents permitted Digicel to set the mobile retail rate within the range set by the OUR and hold CWJ to the increment by which the retention should be calculated. The result was that Digicel took full advantage of the regime and sought to maximize its revenue. When this was appreciated, the OUR, by subsequent Clarification, sought to say what it meant and to suggest that Digicel's exploitation of the regulatory gap was somehow unjustified and that the alleged excess revenue Digicel earned should not have happened. In effect, the OUR has now adopted CWJ's interpretation on the per second/per minute issue, issued later documentation in which it has sought to explain what it meant

when it issued the February 21, 2001 Determination. The OUR appears to be saying now through the mouth, Mr Ansord Hewitt, an officer of the OUR and who testified on behalf of CWJ, that Digicel was not entitled to the rest of the money after CWJ took its retention. Mr Nelson took this same position on behalf of CWJ (para 30 of third witness statement dated March 21, 2014). The court is not saying that the OUR has adjusted its position merely because it is now convenient to do so. But what if that were the case?

[52] This demonstrates why this doctrine of judicial deference will not be adopted by this court. The interpretation of what documents mean, in the event of a dispute, must always be a judicial function and this court will not countenance the proposition that it should yield that position to a regulator who, as in this case, might have meant one thing but the words actually used did not convey what was intended. This explains why interpretation of statutes and contracts is an objective exercise focusing on the actual words used and not a search for the subjective intention of the contracting parties. In the same way that there is the risk of a regulator succumbing to the influence of the relevant Minister as was attempted in the **Mossel** case so too must the court be aware that the regulator may, with the benefit of hindsight have too clear an appreciation of one of the parties' views especially if that view coincides with what the regulator may have subjectively intended but failed to capture in the words used. The court now refers to the ICA and indicates the approach to interpreting the document.

The ICA

[53] The ICA is a private document entered into between Digicel and CWJ. However, as concluded earlier, the OUR can indicate to the parties what terms and conditions should be in the document. The principles of interpretation of private contracts like the ICA are not in doubt. These were stated in **Investors Compensation Scheme Limited v West Bromwhich** [1998] 1 All ER 98; **Goblin Hotel Hotels Limited v John Thompson** [2011] UKPC 8; **Goblin Hill Hotels Limited v John Thompson** SCCA 57/2007 (unreported) (delivered

December 19, 2008). The current law is that the interpretation to be given to the contract is the objective one. It is that given by a reasonable person placed in the same position as the parties were at the time of the contract having regard to background knowledge and information that was reasonably available to the parties at the time they contracted. Background includes not only the circumstances leading up to the agreement but the existing law. Pre-contractual negotiations are excluded.

[54] At one time, it was fashionable to speak of plain and ordinary meaning but perhaps it is more accurate to speak of the conventional and usually understood meaning of the word in the context in which they are used. As one eminent judge said, the words, 'Eats, shoots and leaves' vary in meaning depending on whether one is speaking about a Panda or an outlaw. To this, a humorist added that one may well be speaking about a Panda which happens to be an outlaw and in that case only more information would indicate whether the outlaw Panda was eating a meal or discharging his gun. In interpreting any document one starts with the conventional and usual meaning of the words, having regard to the context, as understood at the time of the contract and only departs from that when that meaning cannot be the one intended. One comes to the position that the conventional meaning was not what was intended when the conventional meaning produces a really stupid result and not merely a difficult or hard result. That a result is stupid is not a conclusion readily reached because the strong policy of Anglo-Jamaican law is to hold parties to their agreement and not to conjure an interpretation that would make like easier. If the interpretation yields a bed of nails he must lie on it because that is what he contracted for.

[55] There is one more principle not commonly appreciated. It is that at times the document is not directed at the ordinary man in the street or even intended to be read, understood and applied by him. In **Investors Compensation** Lord Hoffman took the view that the document in question was designed to be read by lawyers even though it was to be signed by ordinary citizens. Thus Lord Hoffman's

interpretation of the relevant clause of the contract was heavily influenced by his view that it would be read by lawyers. As can be appreciated a lawyer is no ordinary citizen. He is schooled in law. Thus, where a document was carefully prepared by lawyers or specialists in a particular field one does not readily find that the meaning of the words used produces a stupid outcome. The search is not for the meaning of words standing in isolation (the work of dictionaries) but the meaning of the document read as a whole.

[56] If this is correct, then in this case the ICA is a highly specialised agreement designed to be read by a reasonable man with specialist knowledge of the subject matter and is acquainted with the intricacies of telecommunication. It is a highly technical document with language found mainly in the world of telecommunications. It is not a document intended to be used by the ordinary citizen. It was created by specialists for specialists and to be read by the specialists in the field of telecommunication. This means that there is very little scope for saying that parties have missed the mark by using the wrong words or the right words but bad syntax. Where parties in very technical and specialized area of life have gone out of their way to create a very specialized and peculiar document not intended to be used by the ordinary man there is a strong case for saying that the meaning the technical words have to the reasonable person specialized in the field of telecommunication is what was meant. In the ICA the parties have even created their own dictionary, definitions and explanations.

[57] With these principles in mind the court turns to the ICA. Clauses 10 and 23 are the two most important ones. Clause 10 deals with variation of charges and clause 23 speaks to review and amendment. The relevant parts of clause 10 read:

> 10 Variation of Charges
>
> 10.1
> *The Telco [Digicel] will notify C&WJ of the Usage Charge for the PLMN Terminating Access Services and may notify*

C&WJ of changes to the Usage Charges for the PLMN Terminating Access Service from time to time prior to September 1, 2001. Any such notice shall specify the proposed new Usage Charges (being an amount between the Usage Charges made by C&WJ for its PLMN Terminating Access Service and the amount set out in Table 5.4 of the OUR's determination notice of 21 February 2001 less the amount set out in Table 5.2 of the OUR's determination notice of 21 February 2001) and the date on which it is proposed that the variation to the Charges is to become effective, such date being at least 5 weeks from the date of the notice is deemed to be received. C&WJ shall, within 4 Business Days of receipt of such notice, acknowledge receipt and within a reasonable time notify the Telco in writing of acceptance of the proposed variation to the Charges or rejection (together with any reasons for rejection). Any dispute as to the changes which may be made to the Usage Charges pursuant to this Clause 10.1 will be referred to the OUR for resolution in accordance with Section 34 of the Act.

10.2

C&WJ may from time to time notify the Telco [Digicel] of changes to the Usage Charges made by C&WJ Mobile for its PLMN Terminating Access for Calls originating from PSTN Subscriber Connections, corresponding changes to Telco's Charges shall automatically be made to relevant Usage Charges of the Telco's with effect from the date of the changes to the Usage Charges made by C&WJ Mobile for its PLMN Terminating Access Services.

10.3

In the event that the Telco's Charges are set by reference to the Usage Charges made by C&WJ Mobile for its PLMN Terminating Access Service for Call originating from PSTN Subscriber Connections, corresponding changes to the Telco's Charges shall automatically be made to relevant Usage Charges of the Telco with effect from the date of the changes to the Usage Charges made by C&WJ Mobile for its PLMN Terminating Access Service.

10.4

In addition to the changes to Charges notifiable under Clause 10.2, C&WJ may from time to time notify the Telco of changes to Charges being

(i) Charges approved by the OUR; or

(ii) Charges changed as result of changes made by Third Party Telecoms Providers to their Charges

Such notice shall specify the date on which the variation is to become effective. In the case of changes falling within (i) above, the changes will take effect from the effective date approved by the OUR. In the case of changes falling within (ii) above, the changes will take effect from the date set out in the notice as being the effective date, such date being at least 5 weeks from the date such notice is deemed to be received unless C&WJ does not receive sufficient notice from the Third Party Telecoms Provider. In the case of changes falling within (ii) above, to the extent that C&WJ does not receive sufficient notice from the Third Party Telecoms Provider to give at least 5 weeks' notice of any

changes C&WJ will give as much notice as is reasonably practicable

10.5

Not used [as in original]

10.6

For the avoidance of doubt, the Charges for new services will be agreed pursuant to Clause 18.

23

Review and Amendment

23.1

Without prejudice to the provisions of Clause 10, either party may seek to amend this Agreement by serving on the other a review notice if:

(a) a material change occurs in the law or regulations governing telecommunications in Jamaica (including, without limitation, licence changes and court decisions that necessitates the amendment of this Agreement);

(b) a material change occurs (including without limitation, enforcement action by any regulatory authority and changes to the company constitution of the Parties) which affects or reasonably could be expected to affect the commercial or technical basis of this Agreement;

(c) a revised RIO submitted by C&WJ is approved in whole or in part (and for the avoidance of doubt, revised RIOs will be

submitted for approval at the commencement of Phase II and at the commencement of Phase III);

(d) the OUR exercises its powers under section 29 and section 34; or

(e) both Parties agree in writing that there should be a review.

23.2

A review notice shall set out in reasonable detail the events giving rise to the review required by the notice and the nature of the amendments sought by the Party serving the notice.

23.3

With the exception of reviews arising under Clause 23.1 (e), a Party must serve a review notice within 3 months of the event giving rise to the review

23.4

On service of a review notice, the Parties shall forthwith negotiate the matters to be resolved with a view to agreeing the relevant amendments to this Agreement provided that if the event giving rise to the review is as specified in either Clause 23.1 (c) or Clause 23.1 (d), this Agreement shall be modified accordingly by the Parties without the need for renegotiation. If nevertheless the Parties shall disagree on the nature or extend of the modification(s) required in any such case, they shall resolve the dispute in the manner provided in Clause 23.6

23.5

If the event giving rise to the review is approval in whole or in part of a revised RIO submitted by C&WJ, the Parties agree that the relevant amendments will include amendments to reflect the principles in the approved RIO.

23.6

If, after a period 30 days from commencement of such review, the Parties fail to reach Agreement, the Parties shall resolve the dispute in accordance with the dispute resolution procedure adopted pursuant to Section 34 of the Act.

23.7

For the avoidance of doubt, the Parties agree that the terms and conditions for this Agreement shall remain in full force and effect during such review until the Parties complete an agreement replacing or amending this Agreement or until such time as this Agreement is terminated in accordance with its terms.

[58] The ICA defines charges as

The amounts specified in the Tariff Schedule and described in the Service Descriptions which are payable pursuant to Clause 9.

[59] Clause 10 is focusing on changes to charges as between CWJ and Digicel. It speaks to notice periods which should be given to either party. In particular clause 10.4 speaks to changes to charges brought about by changes introduced by the OUR. Clause 23 permits the parties to review and make changes to the ICA if the specified trigger events take place (clause 23.1). It is important to note that clause 23.1 (c) makes express provision for a revised RIO submitted by CWJ which is approved in whole or part as a trigger event. Clause 23.1 (d) takes account of the OUR exercising its power of review of the ICA under section 29 or its power to resolve disputes under section 34 of the TA.

[60] In clause 23.2, the contracting parties have stated what the review notice should contain and in clause 23.4 they have placed a limitation period of three months from trigger to serve the notice. If the review notice is acted upon the parties are to commence negotiations and if they fail to come to a conclusion within 30 days of commencement of the review then the matter is referred to the OUR (clause 23.6). Clause 23.5 appreciates that if the trigger event is a CWJ RIO approved in whole or part by the OUR then the amendments are to give effect to the principles in the RIO. In order there not be a vacuum the parties agreed that during the period of negotiations leading to conclusion the current ICA remains in force.

[61] From these clauses it is plain that CWJ and Digicel have created extensive provisions for managing changes to the ICA. So far as they do not conflict with the statute, the expectation is that the parties are to comply with the provisions of their contract. With this the court now turns to the matter of whether Digicel could direct CWJ to bill CWJ's customers on a per second or per minute basis.

The per minute or per second controversy

[62] Central to the resolution of many issues between the parties is whether the retention kept by CWJ, before there was a discrete and distinct provision for bad

debt, should be calculated on a per minute or per second basis. An important part of this aspect of the case is the content of Determinations issued by the OUR concerning various MTRs. The RIOs in view here are RIOs 3, 4, 5/5A and the Determinations issued in respect of each of them.

[63] On this issue, Digicel says that from this revenue, once CWJ took its lawful retention, based on a per second measure of the call duration, then it had no legal right to any other part of the revenue which must then be handed over to Digicel. CWJ submits that this is not the case. It says that Digicel was only entitled to receive the maximum termination rates set by OUR.

[64] The resolution of this issue turns on whether CWJ was permitted to calculate the retention on a per minute or per second basis. It is common ground that just before Digicel began actual telephonic operations, it had set its retail rate on a per second basis and CWJ had calculated its retention on the same basis. At some point, Digicel changed to a per minute basis while CWJ continued calculating its retention of per second basis.

[65] CWJ is now saying that when Digicel shifted to per minute billing then it should have also changed to per minute calculation and therefore during the period when Digicel charged per minute and CWJ was calculating its retention on a per second, CWJ had failed to keep back its true retention and consequently, Digicel received too much money. CWJ wants back this money and this is the basis of its counterclaim. Digicel is seeking a declaration that its interpretation is correct.

[66] Digicel is saying, through Mr Fraser, that under the fixed to mobile charging regime the amount charged to CWJ's customers comprised at least two variables. The first was the dollar figure per minute and the increment measure by which the dollar figure would be measured. Both figures would affect the amount that Digicel would receive once CWJ took its retention which was a fixed number per second and not per minute (paras 27 – 31 of witness statement dated March 21, 2014).

[67] To settle this dispute, recourse must be had to the Determination issued by the OUR in response to CWJ's RIO 3. This Determination had a number of decisions. It is dated February 21, 2001. The February 21, 2001 Determination issued in respect of CWJ's RIO 3 so far as relevant to this aspect of the dispute set interconnection charges and other matters relating to price. This is found in chapter 5 of the Determination. There are several tables set out in the chapter which will not be reproduced because the overall arithmetic is agreed between the parties and the final figure which either side receives depends on the outcome of the interpretation of the document.

[68] The OUR opted for two sets of figures in relation to FTM calls. In table 5.2 there is what is called the fixed retention (FTMR), that is, the amount CWJ is entitled to keep for itself from the revenue collected from its subscribers. That table has different rates depending on whether the call is made at peak, off peak or weekends and whether the call is regional or national. The retention is stated in Jamaican dollars per minute. Whether a call is regional or national depends on where the call originates. At the material time all of Digicel's switches were located in Kingston. A call originating in Kingston would be a regional call and a call from Montego Bay would be a national call. The national calls had a higher retention figure regardless of the whether it was made at peak, off peak or weekends.

[69] On the other hand, the FTM call rates were set by means of a price cap, that is, the OUR set a maximum figure that could be charged. This is found in table 5.4. Digicel had the option of choosing the dollar figure per minute as long as it did not exceed the price cap.

[70] Paragraph 5.7 of February 21, 2001 Determination also said (agreed bundle vol 1 p 86):

> *The retail rates for calls from C&WJ's fixed to network to C&WJ's mobile network will not change at this time**. At the same time the retail rates for calls from C&WJ's fixed network to the mobile network of either Digicel or Centennial [the other mobile carrier that had received a licence in 2000] will be set by C&WJ at the direction of the mobile carrier.** The minimum retail rates that can be charged are the retail rates for calls from C&WJ's fixed network to C&WJ's mobile network. The maximum retail rates that can be charged are set out in Table 5.4 below* (emphasis added)

[71] The italicised bold words are clear. They bear the conventional meaning that an ordinary reader of English with knowledge of the grammar and syntax of the language would understand, namely, the retail rates for FTM calls would be set by CWJ when it was told what that figure was by the mobile carrier. It does not say that CWJ had a discretion to abide the direction of the mobile carrier.

[72] There is para 5.8 which reads:

> *The maximum rates in Table 5.4 were established using international benchmarks for mobile termination … adjusted to reflect scale of operations, cost of capital, and other conditions in Jamaica plus retention rates (Table 5.2)**. C&WJ will remit to the terminating mobile carrier the revenue less the retention** (Table 5.2).* (added emphasis)

[73] Even though table 5.2 is captioned 'C&WJ Retention for Mobile Termination of International' and is under that part of chapter 5 which reads 'Mobile Termination – International' the retention rates were to be applied to domestic calls.

[74] Again the grammar and syntax of the last sentence which is bold presents no interpretational challenges. The subject of the sentence is CWJ. It is the subject of the transitive verb 'will remit.' The object word of the verb is 'revenue.' There would be an indirect object (carrier) had the preposition 'to' been absent. Since 'to' is present, then the phrase 'to the terminating carrier' becomes a prepositional phrase and thus there is no direct object. The phrase, 'less the retention gives information about 'revenue' and thus functions as an adjective. It is telling what type of revenue is remitted or gives fuller meaning to the direct object 'revenue.' Thus far the sentence is telling of CWJ's expected or future conduct. It is to send to, in this case, Digicel, the revenue (money collected from CWJ's customers under the CPP system) after taking out the retention. The sentence therefore carries the conventional meaning and there is nothing in the context immediate or otherwise to say that the conventional meaning should not be the one taken. Thus Digicel's assertion that it should get revenue left after the retention is taken is on very solid ground. This solid ground was reinforced by the fact that this Determination was issued before the ICA was concluded and the ICA was in fact based on this Determination as well as further Determinations issued on April 6 and 18, 2001 respectively. Nothing in these documents affected the MTR or FTMR (agreed bundle vol 1 pp 100 – 105; 108 – 115). The ICA was executed on April 18, 2001 (agreed bundle vol 1 pp 116 – 146).

[75] There is Determination 5.1 which reads: *The determination of the Office with regard to rates are contained in Tables 5.1, 5.2, 5.3 and 5.3.*

[76] From the wording of para 5.8 the maximum retail rates included the retention rates of table 5.2. On the ordinary reading of this paragraph, the OUR was saying that CWJ would remit the revenues to Digicel after it took out the retention at table 5.2. The earlier paragraph at 5.7 tells how the actual retail rate was arrived at. After OUR sets the maximum that may be charged then for CWJ to know what figure in the band from J$0 to the maximum to bill its customers the mobile service provider would inform CWJ and CWJ would be obliged to use that retail

price once it was within the maximum retail rate set. There was no other mechanism established in the Determination by which the actual retail price would be known.

[77] It is to be noted as well that the FTM rates permitted the units to be billed in per minute increments but it did not prevent the minute being broken down into fractions of the minute.

[78] In light of this, Digicel wrote to CWJ by letter dated March 8, 2001 (agreed bundle vol 1 page 99). In this letter Digicel told CWJ what it should charge for the various time periods (peak (JA$12/min, off peak JA$11/min and weekends JA$10/min). These figures were within the maximum fixed to mobile retail rates. Digicel also told CWJ that the 'rates are denominated on a per minute basis [and] they should be charged and billed to fixed line customers on a per second basis.' Digicel closed by asking that these rates be implemented by March 31, 2001.

[79] This continued until July 16, 2003 when Digicel requested CWJ to decrease the retail rate to CWJ's customers from the previous figures to a flat rate of JA$7 across all time periods. It also asked that rate be charged on a per minute basis (agreed bundle vol 1 p 399).

[80] In November 2003, CWJ tried to get from under this arrangement but a gentle reminder from the OUR of the terms of the February 21, 2001 Determination was sufficient to deter any deviation (agreed bundle vol 1 pp 410 – 411).

[81] The arrangement continued from 2003 to 2006 when CWJ, by letter dated September 12, 2006, alleged that it had discovered an error (agreed bundle vol 1 p 445). CWJ stated that Digicel's letter of July 16, 2003 'changing the billing for both retail and wholesale Fixed to Mobile Calls from per second to per minute' meant that 'since Fixed Retention is a function of the retail rate, fixed retention should also have been on a per minute basis.' CWJ also stated that since it now 'discovered' this error, it was asking for 'a review of the invoices for the period

September 1, 2003 to September 2006 in accordance with section 4.4.1.1 of the Joint Working Manual.' The letter stated, as well, that on October 17, 2006, CWJ 'shall commence computing the Fixed Retention on a per minute basis.' This letter was signed by Mr Derrick Nelson who testified for CWJ in this case. What CWJ did was to change the unit of measure for the retention. Digicel objected by letter dated October 4, 2006 (agreed bundle vol 1 pp 449 – 450).

[82] Before going on, it must be noticed that CWJ has not challenged the right of Digicel to set a price per minute within the cap set by the OUR for FTM calls. It has been said that this was issue was raised by the pleadings. However, the shape of the contest the court did not form the view that CWJ was seriously contending that Digicel could not change from per second to per minute at its elections. The point, as understood by the court, was that if Digicel switched to per minute then CWJ could do the same. The The opening submissions of CWJ has the concession that the ICA provided for a per second billing regime for the retention (para 18 of opening submissions). Not only was this present in the opening submission but counsel for CWJ stated in oral closing submissions that 'Lime agrees that the interconnection provides for a per second billing regime but Lime says it was compelled to charge on a per minute basis in response to Digicel's direction in September 2003 for Lime.' This compulsion was found not in the terms of the ICA but in some equation which is said to be what governs this aspect of CWJ's and Digicel's relationship.

[83] However, it contends that once Digicel shifted to a per minute measure then CWJ had to do the same.

[84] The weakness of this argument is that CWJ does not cite any provision in the ICA or the Determination or the relevant RIO. It conjures up the concept of over compensation and embarks upon a self fulfilling argument that since Digicel is accused of being over compensated then it is so. The other weakness of the argument is to say that the fixed retention is based on the retail rate and how that retail rate is computed. That is very inaccurate. The agreement between the

parties is that the retention is based primarily on call duration, that is, the actual length of the call measured in tenths of a second. The ICA restricted the calculation of the retention to per second as in tenths of a second. The part deducted as retention was based on the retail price set by Digicel but CWJ did not have the legal authority to calculate its retention on a per minute basis.

[85] It is fair to say that it is common ground that Digicel could switch between a per minute or per second unit measure. It was solely Digicel's choice. Thus the issue of whether Digicel could direct CWJ to charge on per minute or per second basis was not raised in the case by CWJ. CWJ's case theory has proceeded on the footing that Digicel could direct CWJ to charge per minute or per second to CWJ's customers for making fixed to mobile calls. CWJ's case is that it had the right to calculate its retention on the same increment basis as Digicel directed CWJ to charge CWJ's customers.

[86] No ICA provision or indeed any RIO provision was cited for this proposition. The argument seemed to be an appeal to general ideas of fairness and equity. Mr Nelson testified that 'the ICA provides that calls and retention are chargeable per 60 seconds which denotes a per second charging regime' (para 28 of witness statement dated August 31, 2011). Mr Fraser who testified for Digicel said that the retention was a fixed amount decided by the OUR. Mr Hewitt also said that the retention was a fixed amount.

[87] Mr Nelson in cross examination accepted that the ICA calls for retention chargeable on a per second basis (evidence transcript vol 2 pp 699 – 700). Mr Nelson said that if Digicel directed CWJ to charge CWJ's customers in per minute increments then CWJ should calculate the retention on a per minute because 'it is reasonable and correct' (evidence transcript vol 2 p 701). Mr Nelson went as far as saying that CWJ's official position was that Digicel had no legal right to indicate that CWJ should bill on either per minute or per second (evidence transcript vol 2 pp 702 – 703). Remarkably, this official position is not

being litigated in this case but rather the case has proceeded on the basis that Digicel had that right and properly exercised its option either way.

[88] In his examination in chief Mr Nelson said (para 24 and 25 second witness state Dated December 20, 2011):

> *The duration of an answered call will be measured from call start to call end. The duration of an answered call will be logged by the service supplier and the number of time units that shall apply will be calculated by the service supplier. For each answered call the duration will be measured to an accuracy of a time unit.*

[89] He added at paragraph 25 of the same statement:

> *A time unit is defined in the Definition section of the ICA as 'The accuracy to which the call duration is measured, which is one tenth of a second.' This means that a call is rounded up to one tenth of a second (called the per second basis, though even more minute than second) rather than to the next minute. For example if a call is of 15.25 seconds the agreement provides it should be rounded up to 15.3 seconds. The material difference is seen with the alternative as on a per minute basis, 15.25 seconds would be rounded to one minute.*

[90] It is vital to state some conclusions before looking at what CWJ says justifies its position. In making these conclusions it is crucial to hear what Mr Hewitt had to say. He said that the revenue generated under the CPP system from CWJ's customers had two components: fixed retention and transmission charges. The FTMR was that part kept by CWJ and that retention was intended to cover the costs incurred by CWJ in providing the service to its customer. The service in view here from CWJ's perspective is making or originating a call on CWJ's system, transmitting it along that network before it was handed over to Digicel's

network. All the costs before the handing over to Digicel were recoverable via the FTMR. From this it is too plain that the final retail price to CWJ's customer comprised the transmission charges payable to Digicel and the cost component incurred by CWJ. The upshot would be that once CWJ took its costs then clearly whatever was left had to have been the transmission costs payable to Digicel. The rub for CWJ was that the size of this transmission cost was influenced significantly by whether Digicel directed CWJ to charge per minute or per second. Regardless of whether Digicel directed CWJ to charge per minute or per second, CWJ was firmly anchored to the per second retention calculation. There is simply no third position advocated by CWJ which was that Digicel was only entitled to the MTR.

[91] The following example explains what aroused the ire of CWJ. If the rate per minute was J$7 and the call made was 63.46 seconds, Digicel could charge either per second or per minute for this call which would be regarded as having lasted 63.5 seconds (since according to Mr Nelson, the figure was rounded up to the nearest tenth) and the retention was based on 63.5 seconds. However, if Digicel charged per minute and treated the additional 3.4 seconds as a whole minute then the revenue that CWJ had to charge would be J$14. However, CWJ's retention would still be calculated at 63.5 seconds. The retention would have come out of the first JA$7 leaving the second J$7 untouched by the retention. It is this possibility that led to this complaint of over compensation.

[92] From the regime, as understood by this court, there is no such thing as over compensation. In the example given CWJ has received the costs via the retention based on the per second unit measure of the call. The fact that the call may be regarded as two minutes by Digicel is really beside the point. CWJ has received what it contracted for in the ICA.

[93] The plain fact of the matter is that the OUR fixed a band within which Digicel could set its price and it took full advantage of the position. This is all lawful. The court will now look at the material CWJ has presented to rebuff this conclusion.

[94] CWJ has prayed in aid an OUR document entitled 'Clarification on Interconnection Pricing Between Cable & Wireless Jamaica Limited's Fixed Network and Mobile Networks' dated June 5, 2009. In that document, the OUR purports to explain what it meant when it made Determination 2.5 in response to RIO 4. A bit of explanation of the background to this 'Clarification' is necessary. CWJ is relying on this bit of rethinking by the OUR to say that what was said in the February 21, 2001 Determination meant what was said some eight years later in this 'Clarification.'

[95] It will be recalled that the February 21, 2001 Determination was in response to RIO 3 and that document stated what the maximum retail rates were as well as the retention. RIO 4 was submitted by CWJ to the OUR on August 28, 2001. A Determination in respect of RIO 4 was issued on February 7, 2002. This was in respect of what OUR called non-pricing issues (agreed bundle vol 1 p 385). The OUR issued another Determination in respect of RIO 4 dated May 22, 2002. In this May 22, 2002 Determination, there is Determination 2.5 which reads:

> ***The price of FTM calls shall continue to be set by participating mobile carriers, subject to a cap.*** *The cap for domestic FTM calls shall be the sum of C&WJ's mobile termination costs plus imputed cost of spectrum plus the retention for the fixed network costs, which includes an allowance for bad debt.* (emphasis added)

[96] Determination 2.6 of the May 22, 2002 Determination provided that the following rates are applicable as of July 1, 2002. These were JA$6.838 per minute peak; JA$5.593 per minute off-peak; and JA$4.349 per minute weekend.

[97] It is to be noted that the part in bold restates what the RIO 3 Determination of February 21, 2001, had already stated, namely, that the mobile carrier (which in this case means Digicel) shall set the price within the cap set. Neither this document nor RIO 3 Determination prevents Digicel either as plain statement or

by necessary implication from deciding whether the price it chose would be billed per minute or per second.

[98] The May 22, 2002 Determination also addressed fixed retention. Determination 2.7 reads:

> *FTM calls, and fixed determination charges (and bad debt mark up) shall remain at RIO – 3 levels pending the completion of the MEA asset valuation.*

[99] These MTRs in Determination 2.6 were lower than those in February 21, 2001 Determination. This May 22 Determination was the one issued by the OUR in defiance of the Minister's now-declared ultra vires Directions which led to the **Mossel** case referred to above. After this May 22 Determination was issued, Digicel and Claro, another mobile service provider, secured a stay of it coming into force pending the court challenge. The May 22 Determination was quashed at first instance but the decision was reversed by the Court of Appeal and confirmed by the Privy Council. As noted earlier, there is nothing to indicate that the Privy Council was referring solely to manner and form and not content. The result has to be that the May 22, 2002 Determinations were lawful and thus stand.

[100] The point is, even if RIO 4 came into force and changed the ICA it did not change how the price to the CWJ's customers was set. The mobile carrier laid down the marker within the price cap. CWJ took its retention (whether it had a single component or multiple components) and passed on the rest.

[101] An important question is what was the date this May 22 Determination based on RIO 4 came into force? The evidence on this is not conclusive. Mrs Kitson uses the date of the Court of Appeal's decision which was May 30, 2007. But Mr Nelson in his second witness statement said that the stay was granted by the OUR in respect of Determination 2.6. His clear evidence is that 'the OUR granted

a stay of Determination 2.6) (para 34 of second witness statement dated December 20, 2011). The same paragraph states that in July 2003, Digicel and another mobile carrier applied to the court for certiorari to quash the May 22 Determination and applied for a stay of Determination 2.8 of the May 22 Determination. It appears that part of the Determination was suspended by the OUR and part by the court. Digicel took its stand on the principle that the Determination did not alter the ICA and could not unless the procedural steps outlined by the ICA were followed. Since both parties appear to have agreed that the entire Determination came into force, the court will proceed on the basis that it did and use CWJ's date of May 30, 2007.

[102] During the time the May 22, 2002 Determination was on hold, the maximum termination rates set in the February 21, 2001 Determination was the operative one. Mr Nelson concluded as much in his witness statement (para 35 of witness statement dated December 20, 2011). In this period of suspension of the May 22, 2002 Determination, Digicel, on July 16, 2003, issued the letter to CWJ directing a flat rate across all time periods of JA$7 per minute. In other words, between June 2002 and whenever the stay of the May 22, 2002 Determination was lifted business between Digicel and CWJ was conducted on the basis of the February 21, 2001 Determination which was based on RIO 3.

[103] With decision of the Privy Council confirming the lawfulness of the May 22, 2002 Determination it followed that the maximum termination rates stated there were validly issued. As stated earlier the court will use the date of May 30, 2007 as the date they came into force. How that affected the parties was now a matter of the ICA, as indicated by Lord Phillips.

[104] Regardless of the date the RIO 4 came into effect it could not operate retrospectively. There was no provision in the RIO and the Determinations issued based on the RIO which provided for this. The OUR had no statutory power to issue a Determination that could change rates retrospectively.

[105] It was noticed earlier that the new maximum rates in the May 22, 2002 Determination were lower than the flat rate of JA$7 Digicel had suggested to CWJ in July 2003. This flat rate of JA$7 would have come on stream during the period the OUR had suspended the operation of RIO 4 and by then it was before the courts in the **Mossel** case. Thus the extant MTR would be RIO 3 and the February 2001 Determination.

[106] There is an additional point which needs to be made regarding the RIO 4 Determination. It is not being said by CWJ that the maximum retail price set in the RIO 4 Determination was exceeded by Digicel. The submission is that Digicel was overpaid by CWJ because the retention ought to have been charged on a per minute basis and not on a per second basis. This means that on the premise that RIO 4 came into force, on May 30, 2007, and had set new and lower retail prices below what Digicel had instructed CWJ to charge, in July 2003, CWJ"s case is not based on the MTR being exceeded but rather on the calculation of the retention.

[107] It was said in CWJ's submissions that Digicel was only entitled to the MTR set in 2002 which it is said came in to force by 2007 and to the extent that CWJ overpaid then it ought to be refunded. The court is not clear on what is meant by the Digicel only entitled to receive new MTRs set in 2002 but came into force in 2007. The court did not understand that CWJ was saying that Digicel directed rates that CWJ set prices that in fact exceeded the MTRs set in the 2002 Determination. What the court understood was that because the retention was not properly calculated Digicel ended up getting more than it was supposed to get and not that Digicel had set a dollar figure per minute that in fact was greater than the MTRs set in 2002. Thus even if Digicel had used the February 21, 2001 Determination as the basis for setting the rate and not the May 2002 Determination, it was not the case that Digicel selected a figure that was in fact greater than the MTRs set by the May 2002 Determination. The court is of this view having read all of Mr Nelson's witness statements. No specific dollar figure

per minute was stated by CWJ by which it is said that Digicel exceeded the MTR in the May 2002 Determination.

[108] The reason for this is not hard to find. It is common ground that the retention was a fixed sum. Despite the fact that dollar figure would differ according to whether the FTM call was regional or national those figures (the regional and the national) were fixed and that fixed figure would be multiplied by the actual duration of the call on a per second basis. Therefore, it did not matter what Digicel instructed CWJ to charge per minute when it switched to per minute. CWJ's part of the revenue did not change unless CWJ started retaining on a per minute basis. Thus the sum claimed by CWJ, as understood by the court, was the difference between the per minute and per second measure for the retention and not the actual dollar figure Digicel told CWJ to charge its subscribers for making FTM calls. From this perspective, to say that Digicel should only get what it is contractually due is not very illuminating since that is what the court thinks Digicel has always received.

[109] In its counterclaim CWJ alleges that it discovered a billing error. It made this discovery in September 2006. The alleged error was said to be based on this difference between per second and per minute billing and the retention (para. 48 of witness statement of Mr Nelson dated December 20, 2011). CWJ began communicating with Digicel on this alleged error by letter said to be dated September 12, 2006. The error occurred since 2003. CWJ asked for a review and suggested that Digicel hand over JA$525,485,742.46, the total sum said to be owed to CWJ by Digicel arising from this error.

[110] CWJ attempt to go back to the February 21, 2001 Determination to say that its new-found Damascus Road revelation was always what was meant by the Determination. It was blind and now it sees. The scales also fell from the OUR's eyes. Understandably, Digicel's response was one of studied indifference. CWJ claimed that there was an equation which set out how the retail rate was charged. Based on that equation if the retail rate was charged per minute then for

the equation to balance then all rates would need to computed on a per minute calculation. The same was said to apply to a retail rate charged on a per second basis.

[111] What led to this revelation? The trigger appears to have been Digicel's letter to CWJ in November 2008 stating that FTM call rates were to go up to JA$8.50. CWJ wrote to the OUR by letter dated December 5, 2008 complaining that Digicel's proposed price increase was discriminatory and anticompetitive (agreed bundle vol 1 p 504). In that letter CWJ referred to Determination 2.5 in the OUR's May 22, 2002 Determination. Based on CWJ's view of automatic change to the ICA whenever a Determination came into force (and this one came into force on May 30, 2007 and had capped MTR below JA$7), this increase was not lawful. However, on Digicel's view that there was no inevitable and automatic change to the ICA and it was quite permissible unless the ICA was changed in accordance with the procedures laid down in the ICA itself.

[112] The OUR's initial response to CWJ was by letter dated December 17, 2008 (agreed bundle vol 1 pp 512 – 514). The OUR promised a more fulsome response.

[113] The real motivation for CWJ trying to recast things is perhaps best explained by Mr Nelson (para 53 of his December 20, 2011 witness statement). Mr Nelson explained that while this issue of fixed to mobile rates from CWJ to Digicel was going on, Digicel had apparently introduced fixed lines and was charging JA$4 to make a Digicel fixed to Digicel mobile. The implication being that Digicel was attempting to get CWJ's landline customers to jump ship to Digicel's landline by having a higher rate for CWJ fixed to Digicel mobile. CWJ complained about this and it was this constant complaint from CWJ that has apparently caused the OUR to have a new vision under its 'Clarification' issued in June 2009.

[114] The promised fulsome response from the OUR came on June 5, 2009. It bore the imposing title of 'Clarification of Interconnection Pricing Between Cable and

Wireless Jamaica Limited's Fixed Network and Mobile Networks' (agreed bundle vol 1 p 523). It is appropriate to set out this crucial bit of the OUR's document since it has provided grist and fuel for CWJ's mill and engine. The document sets out Determination 2.5 of RIO 4 which has been set out above and continues:

> *The Determination reflects the fact that the cap on retail rate for fixed to mobile (FTM) calls is calculated using the formula:*
>
> *FTM retail = Retention Rate + Mobile Termination Cost + Imputed Cost of Spectrum*
>
> *Applying this formula it was intended that LIME could set its retention as approved by the Office and the mobile carrier would be free to charge any price for termination subject to the maximum FTM cap determined by the Office.*
>
> *The Office assumed at the time of issuing its determination that LIME being a monopoly provider of fixed line services would always charge the maximum retention rate and as such the retail rates would be set by the whatever rate a mobile carrier opted to charge for termination limited by maximum FTM rate as stipulated by the cap. Thus LIME was expected to charge the maximum retention rate and so only the termination rate could change. Consequently it was assumed that any variation in the FTM retail rate would be a result of a change in the mobile termination rate. This explains the wording of Determination 2.5 viz 'the price of FTM calls shall continue to be set by participating mobile carriers subject to a cap.'*

The situation has now arisen where LIME has enquired if it were to opt for a charge on its network that is lower than that approved by the Office, whether the participating mobile carrier may simply insist on being paid the difference between the retail rate charged and LIME's new retention rate plus the imputed cost of spectrum.

The Office wishes to make clear that an interpretation of Determination 2.5 that would bring about such a result is anomalous to its intentions in issuing the Determination Notice regarding FTM termination and specifically Determination 2.5 and would be misguided. This should be clear from that fact (sic) that such an interpretation could result in"

i. Levying multiple rates for termination of traffic to a single mobile carrier.

ii. Denying consumers the benefit of a reduction in retention rate while providing a windfall to participating mobile carrier.

iii. Ant-competitive advantage to the participating mobile carrier

…

In view of the above, THE OFFICE HEREBY EXPLAINS AND CLARIFIES ITS DETERMINATION as follows:

(a) LIME shall pay only the contractually agreed termination rate to participating mobile carriers.

(b) Any decrease in retention rate by LIME shall be passed on to the consumer.

In this regard, the OFFICE HEREBY CLARIFIES Determination 2.5 [of RIO 4] as follows:

The Office sets the retail prices of FTM calls subject to the cap. LIME and the participating mobile carrier are allowed to vary the retention and termination rate respectively subject to the FTM cap as stipulated by the Office. The cap for domestic FTM rates shall be the sum of the maximum approved mobile termination costs plus the imputed cost of spectrum plus the maximum retention for the fixed network costs, which includes an allowance for bad debt.

[115] The court makes several observations about this passage. First, it is really an admission that the language of the Determinations issued in respect of RIO 3 and RIO 4 was not precise enough on the issue. Second, it does not make the assertion that the interpretation advanced by Digicel regarding the February 21, 2001 Determination (and in particular that part of it which indicated that the regime is CWJ keeps its retention and the revenue left goes to the mobile carrier) is not consistent with the grammar and syntax of the February 21, 2001 Determination. The OUR is really stating what it meant and thought that it had communicated. This court must say that even with the most generous and purposive interpretation the Determinations based on RIO 3 and 4 simply cannot bear this ex post facto interpretation. The regime established in 2001 was simple. CWJ collects the revenue from FTM customers, deduct the retention and hand over the rest.

[116] It is well established that in interpreting documents, the courts do not readily assume that something has gone seriously wrong with the language used especially if the document is the product of careful preparation. Yes, it is possible that the wrong language was used but that must be apparent either on the face or from the relevant background facts. In such circumstances a departure from the conventional understanding of the words would be justified (**John Thompson v Goblin Hill Hotel**). The result of Digicel's interpretation is not bizarre. The fact that CWJ and the OUR were not alert to this possible interpretation is of no moment. A hard and uncomfortable outcome does not change the meaning of the words used. In this case each party has received what it contracted for within the parameters set by the OUR. Digicel should not now be penalized because of its astuteness in recognizing the gap and taking full advantage of it. In this case the proverbial horse has not only bolted but he is now safely ensconced on the other side of the valley of contractual interpretation never to return.

[117] This court wishes to make the point that the OUR's explanation coming as it did in the 2009 'Clarification' will be ignored. The question is not what the OUR intended but the meaning of the words used. The meaning is decided on an objective basis and not on the subjective opinion of the OUR. It is well known that the maker of a document may wish to say a number of things but in the end the meaning of the document is decided by determining what an objective reader would understand the words to mean in the context in which they were used having regard to the background available or might reasonably be available to the maker of the document at the time the document was made.

[118] This clarification now advanced by the OUR and relied on by CWJ cannot support the proposition that there was an error in billing. There was no error. There was no breach of the ICA. There is no legal foundation for claiming Digicel was overpaid. The evidence that the OUR had made the assumption that CWJ being a monopolist, at the time, in relation to fixed lines would always charge the maximum retention rate and that any variation in the FTM rate would be the

result of a change in MTR rate and that this assumption explains the wording of Determination 2.5 based on RIO 4 will not be used to give the words a meaning that they do not bear on their face at the time they were used.

[119] CWJ refers to the 'Clarification' of the OUR which spoke to CWJ paying to mobile carriers (Digicel) only the contractually agreed termination rate. It is not clear what was meant by this for the reason that the regime established and maintained was that the price to CWJ's land line customers comprised the rate Digicel instructed CWJ to charge and a retention (however comprised). The retention was supposed to be cost based. What the OUR did was to resort to a price cap applicable to mobile carriers and left it to the parties to operate within the cap and gave the mobile carriers the ability to choose the rate within the cap. There was never in any real sense a fixed contractually agreed termination rate. The OUR was primarily concerned with CWJ setting its retention on a cost basis. It wanted to make sure that CWJ did not get more than the cost of providing the service. The OUR was not keen to set a FTM rate that mobile carriers could charge and thus the price cap regime was the chosen solution. It was this thinking that best explains why the OUR set a fixed retention to cover CWJ's costs and permitted the mobile phone operator to operate under a price cap regime. Obviously, what the OUR was hoping was that the mobile phone operator, when setting its price to the fixed line operator, would be prudent and would want to maximize revenue through higher call volumes rather than higher prices.

[120] CWJ refers to an equation which included what is called spectrum costs. This equation was referred to by the OUR in its 'Clarification.' According to the OUR if, for example, there was a reduction in spectrum cost, then this should lead to a reduction in FTM charges because Digicel should only get what the MTR is. According to CWJ and the OUR, Digicel would not be entitled to get what is left after the retention including spectrum costs are deducted. But why not? The wording of the documents prior to the 'Clarification' did not say this at all. This

much was acknowledged by the OUR when it said in the 'Clarification' that this interpretation would be contrary to the intention behind the Determination. This statement can only mean that the words actually used can in fact carry the meaning Digicel has put on them and with which this court agrees. Digicel's interpretation is not strained but well within the linguistic range of the words used.

[121] Another thing here is that the ICA was approved by the OUR. Let it be stated another way, there is no evidence that the present ICA was disapproved by the OUR. Since the statute required all ICAs to be submitted to the OUR then it must follow that the OUR was aware of clauses 10 and 23 in their present form. The OUR must be taken to be aware of the notice requirements and procedure for amending the ICA. There is no evidence that the OUR ever told the parties that the present form of the clauses was not acceptable. What the evidence reveals is that in the run up to the ICA the OUR suggested things that should be in the ICA and that was done. This must mean that the OUR permitted the parties to make a contract on the basis that it could regulate how changes were to be incorporated. Having done so, the regulator cannot simply turn around and say, in effect, the provisions of clauses 10 and 23 are of no moment.

[122] The reasons for this conclusion are as follows. First, the wording of the February 21, 2001 Determination regarding the retention does not point to such a conclusion. Second, it must have been obvious to all that a per minute rate of retention would lead to the possibility of retentions being calculated for calls made that were not exactly 60 seconds, 120 seconds and 180 seconds. The obvious question would be what about calls for 64 second, 129 second or 183 seconds? Digicel, undoubtedly saw this possibility and ensured that in the ICA the retention was nailed down on a per second increment measure. The fact that Digicel realized what was happening and took steps to specify the increment measure cannot be used against it. Third, CWJ has not lost anything because its retention is calculated on the actual usage. CWJ has actually received its costs per second for each call that originates on its fixed line and interconnects with

Digicel's mobile network. Fourth, the ICA has a mechanism by which CWJ could seek to alter the per second increment measure. This is to be found in clauses 10 and 23 of the ICA. These two clauses, together, govern how the parties were to change charges and other matters between themselves. CWJ did not seek to utilize any of these provisions when it sought to change from per second to per minute increment measure for calculating that portion of the retention that represented its costs of delivering the interconnection service.

[123] In any event, it is difficult to see how the interpretation of the ICA on this increment measure for the cost of interconnection service could be any different. Cost-based assessment cannot change simply because one may think that the other contracting party has stolen a march. The fact that the regulatory framework had a gap which was exploited is nothing to the point. Businessmen have never held themselves out to be the Mother Teresa's of this world. Their objective is simple: make as much money as they can within the legal framework and if there is a gap to be exploited to increase revenue and hopefully profit, then take advantage of it if you can. There are under no obligation to subject themselves to emotional torture trying to figure out whether what they are doing is morally correct. They are free to pursue their self-interest within the bounds of the law. The only question is whether what they are doing is lawful.

[124] It follows from this that CWJ is not entitled to calculate and keep retention based on a per minute basis.

[125] Just before leaving this point, the court notes that this submission by CWJ in this case is not new. It arose in 2003 when CWJ sought to alter the basis on the retention calculation by saying that it would be calculated on a per minute basis. Ironically, it was the OUR itself that quashed this view advanced by CWJ in the same 2003. It appears that six years later, the OUR has revised even that position that it took in 2003. A further reason for rejecting judicial deference in matter of interpretation of the law governing a regulator.

[126] This court agrees with Mr Hylton that CWJ's assertion that it discovered this billing error in 2006 must be rejected. It is the same argument made in November 2003. There was no undetected billing error. From as early as 2003 CWJ had doubts about the correctness of the view taken regarding the retention calculation. It sought to get around the prevailing interpretation and the OUR kept it in line. Yet it went ahead on that basis and made the payments. In any event, the parties to the ICA have created their own 'statute of limitations.' The parties have established a regime to deal with errors. That regime was not activated according to the provisions of the ICA. CWJ, regrettably, cannot now raise that issue. It is simply too late. Thus CWJ's request to Digicel on March 27, 2007 that it should amend invoices for the period September 2003 to September 2006 is outside of the three-month period established by the parties to raise these issues.

Devaluation

[127] The OUR issued several Determinations, in a document dated November 19, 2004, in respect of RIO 5 and the tariff schedule raised in RIO 5A. The Determination says in its abstract, that the approved RIO was to take effect on November 26, 2004 and was to be 'incorporated into existing agreements as provided for in the terms of those contracts' (agreed bundle vol 1 p 415). This is a clear recognition that the contracting parties have an agreement in place and that any incorporation into the agreement should take place in accordance with the terms of the agreement. It may be argued, as indeed CWJ has suggested, that 'as provided for in the terms of those contracts' means that if the ICA has provision for and contemplates that the ICA would be amended by changes introduced by the OUR then those changes are automatic and need no further action by the parties are or indeed the OUR.

[128] The evidence is that until RIO 5 there was no RIO that expressly addressed the question of devaluation. In Mr Nelson's witness statement of September 6,

2011, he concedes that the proposed changes to CWJ's costs arise from devaluation and not from the actual change in actual costs (para 20). According to him, the costs submitted by CWJ are those 'based on the United States Dollar and converted to Jamaican dollars' (para. 20). Therefore the costs based on the United States dollar have not changed. The real issue here is whether the changes in the Jamaican dollar equivalent of the United States currency stated costs are changes to charges within the existing ICA and if yes, are they permissible under the existing ICA. Digicel has argued that changes introduced by the RIO 5/5A cannot change the existing ICA unless the parties agree. CWJ has said that the very terms of the existing ICA permits changes to charges as contemplated by devaluation and even if it did not, RIO 5/5A has changed the ICA and that change automatically becomes part of the ICA and enforceable as of the date the OUR says that it comes into effect.

[129] It will be recalled that the Board in **Mossel** had expressed the view that clause 23.5 appeared to constitute an agreement that the ICA would be amended to reflect the revised RIO. Just to remind ourselves. Clause 23.5 states:

> *If the event giving rise to the review is approval in whole or in part of a revised RIO submitted by C&WJ, the Parties agree that the relevant amendments will include amendments to reflect the principles in the approved RIO.*

[130] CWJ relies on the wording of clause 10.4 as it stood before RIO 5/5A to say that that clause expressly took into account that charges may change because of OUR action. To give some perspective to clause 10.4 clauses 10.2 and 10.3 will be repeated here. Those clauses read:

> *10.2*
> *C&WJ may from time to time notify the Telco [Digicel] of changes to the Usage Charges made by C&WJ Mobile for its*

PLMN Terminating Access for Calls originating from PSTN Subscriber Connections, corresponding changes to Telco's Charges shall automatically be made to relevant Usage Charges of the Telco's with effect from the date of the changes to the Usage Charges made by C&WJ Mobile for its PLMN Terminating Access Services.

10.3

In the event that the Telco's Charges are set by reference to the Usage Charges made by C&WJ Mobile for its PLMN Terminating Access Service for Call originating from PSTN Subscriber Connections, corresponding changes to the Telco's Charges shall automatically be made to relevant Usage Charges of the Telco with effect from the date of the changes to the Usage Charges made by C&WJ Mobile for its PLMN Terminating Access Service.

10.4

In addition to the changes to Charges notifiable under Clause 10.2, C&WJ may from time to time notify the Telco of changes to Charges being

(i) Charges approved by the OUR; or

(ii) Charges changed as result of changes made by Third Party Telecoms Providers to their Charges

Such notice shall specify the date on which the variation is to become effective. In the case of changes falling within (i) above, the changes will take effect from the effective date approved by the OUR. In the case of changes falling within (ii) above, the changes will take effect from the date set out

> *in the notice as being the effective date, such date being at least 5 weeks from the date such notice is deemed to be received unless C&WJ does not receive sufficient notice from the Third Party Telecoms Provider. In the case of changes falling within (ii) above, to the extent that C&WJ does not receive sufficient notice from the Third Party Telecoms Provider to give at least 5 weeks notice of any changes C&WJ will give as much notice as is reasonably practicable*

[131] Clauses 10.2 and 10.3 deal with charges arising from changes made by CWJ mobile. Those clauses do not apply here because this case deals with FTM calls. Clause 10.4 is relied on because it says CWJ may notify Digicel of other charges arising from changes to the charges approved by the OUR. The court needs to set out the factual background to this aspect of the case.

[132] CWJ in a letter dated September 13, 2006 relied on what it said was an OUR approved clause 10.4 to adjust interconnection fees based on devaluation of the Jamaican dollar in relation to the United States dollar (agreed bundle vol 1 p 446). The court needs to state what the letter says and what the OUR document provided to the court really says in order to make the point that OUR document did not say verbatim what CWJ said it said. First, the CWJ letter:

> *In the event that the Jamaican Dollar devalues or revalues against the US dollar by 5 percent or more in any six month period concluding during the Term of this Agreement,* ***C&WJ reserves the right to review and amend the charges to reflect such currency devaluation re revaluation upon giving the Telco at least five weeks (sic) notice, such***

notice to specify the date the change is to become effective. (added emphasis)

[133] How did CWJ come to this position? The history must be traced. In the Determination based on RIO 5/5A dated November 19, 2004, document there is a chapter four there is a chapter headed 'Non-Tariff issues in RIO 5.' There is a section headed 'Amendments to the Legal Framework' and within that heading there are various subheadings. The relevant paragraphs are numbered 4.5 – 4.12 and these paragraphs are distributed under the subheadings referred to.

[134] Paragraph 4.5 noted that '[d]uring the consultation on RIO-5 the Office received a number of comments and suggestions with respect to various clauses of the legal framework, notably: Clauses 9.2, 10.1, 10.2, 10.3, 10.4, 24.3, 24.4 of the legal framework.' Digicel had submitted comments on other clauses as well as those just mentioned.

[135] The court enquired, by email from the parties after submissions were completed, whether there was a separate document called legal framework. Both sides responded by saying that the OUR was referring to the ICA. The concern still remains because paragraph 4.6 of the November 19, 2004 document refers to comments from Miphone, another mobile service provider. Miphone, as far as the evidence goes, was not a party to the ICA executed between CWJ and Digicel and one wonders why they would be commenting on a document to which they were not privy. They were not part of the contract between CWJ and Digicel. The ICA specifies that the contracting parties are CWJ and Digicel. Indeed, Digicel is referred to as 'the Telco.'

[136] Paragraph 4.8 noted that Digicel had proposed changes to clauses 10.1 – 10.4 which would be clauses 10.1 – 10.4 of the ICA. The relevant part of the proposal from Digicel reads:

> *For the avoidance of doubt, the Charges (sic) which are not subject to regulatory controls or permissions may be charged as follows:*
>
> *1/ …*
>
> *2/ by C&WJ or the Telco in the event that the Jamaican dollar devalues or revalues against the US dollar by five percent or more in any six month period concluding during the term of this Agreement, in order to reflect such currency devaluation or revaluation.*

[137] Paragraph 4.9 noted that Digicel's proposal was 'in respect of the following wording proposed by C&WJ in respect of the same clauses.'

[138] From the OUR document, the impression is that both Digicel and CWJ were proposing changes to the ICA. CWJ's proposal as recorded in paragraph 4.9 of the November 19, 2004 document reads:

> *In the event that the Jamaican dollar devalues or revalues against the US dollar by five percent or more in any six month period concluding during the Term of this Agreement, in order to reflect such currency devaluation or revaluation*

[139] Paragraph 4.10 noted an objection from Miphone in respect of the proposed 10.4. Paragraph 4.11 found 'neither of the above wording to be totally acceptable,' that is the wording of Digicel and CWJ. It was a pox on both their houses, to misquote Mercutio in Shakespeare's Romeo and Juliet. In paragraph 4.12 the OUR noted that the proposed 10.4 should be modified 'to indicate that

the provision with regard to devaluation or revaluation shall apply equally to all parties.'

[140] We now come to the crucial decision (Determination in the November 19, 2004 document). It reads

> ***The Office has determined that Clause 10.2 shall be modified to read:*** *(bold in original)*
>
> *10.1 …*
>
> *10.3…*
>
> *10.4*
>
> *By C&WJ or the Telco in the event that the Jamaican dollar devalues or revalues against the US dollar by five percent or more in any six month period concluding during the Term of this Agreement, in order to reflect such currency devaluation or revaluation.*

[141] As can be seen this clause is incomplete. It is not a complete sentence. Indeed there is not even an independent clause contained in this sentence. There is no finite verb with CWJ or the Telco as the subject and neither is there an intransitive verb or state of being verb in relation to CWJ or the Telco. If these words are rearranged to read '*In the event that the Jamaican dollar devalues or revalues against the US dollar by five percent or more in any six month period concluding during the term of this Agreement, in order to reflect such currency devaluation or revaluation … . C&WJ or the Telco'* it is still incomplete because it does not say what is to be done by C&WJ or the Telco.

[142] Thus the final approved wording does not contain verbatim, the paragraph cited by CWJ in its September 13, 2006 which it attributes to the OUR. It may well be that the clause 10.4 should now be understood to be saying what CWJ is saying but that is very different matter from what the specific word for word clause approved by the OUR.

[143] This was the **wording proposed by CWJ** and this was quoted by OUR at paragraph 4.9 (page 23 of the actual pagination of the document) (agreed bundle vol 1 p 435). And even this is not a complete sentence. In the event of the events named specified occurring then what? Thus the proposed wording of CWJ and the wording actually approved by the OUR is not the paragraph quoted in CWJ's September 13, 2006 letter. The part of CWJ's letter in bold does not appear in either the text proposed by CWJ or the approved wording of the OUR.

[144] There does not seem to be any factual basis for CWJ saying in its letter of September 13, 2006 that the OUR had approved:

> *In the event that the Jamaican Dollar devalues or revalues against the US dollar by five percent or more in any six month period* ***C&WJ reserves the right to review and amend the charges to reflect such currency devaluation re revaluation upon giving the Telco at least five weeks (sic) notice, such notice to specify the date the change is to become effective***.' (emphasis added)

[145] As can be seen this clause is quite different grammatically and syntactically from the specific wording approved by the OUR. CWJ's version has both a dependent clause (the portion not in bold) and an independent clause (the portion in bold). The independent clause makes a complete statement saying that CWJ reserves the right to amend charges to reflect currency devaluations or

re revaluations. CWJ is to give five week's notice to the Telco (Digicel) and tell the date when the change comes into force. While this clause makes complete sense it does not tell what the trigger event is for the exercise of this power. This is where the dependent or subordinate clause comes in. It does not make complete sense on its own. It specifies the event which is movement of the Jamaican dollar in relation to the US dollar by five or more percent in either direction.

[146] When the clause quoted by CWJ in its September 13, 2006 letter is compared with the actual Determination of the OUR what the OUR actually approved was a subordinate clause. Subordinate clauses by definition cannot stand on their own; they do not make complete sense on their own and must be combined with an independent clause for there to be a complete sentence. This was not done here.

[147] Mr Nelson's September 6, 2011 witness statement actual quotes the passage from the OUR document of November 19, 2004 as the wording approved by the OUR and not the content from the September 13, 2006 letter.

[148] In Mr Nelson's March 24, 2014 witness statement cites the wording proposed by CWJ as the wording approved by OUR. He then refers to paragraph 4.12 of the November 19, 2004 document and stated that the OUR approved the wording subject to modifications. This does not appear to be the case. What the OUR said was that 'the Office has determined that it will accept the wording proposed by C&WJ subject to the following changes' (agreed bundle vol 1 p 436). CWJ's wording, as recorded in the OUR November 19, 2004 document, did not have the wording set out in CWJ's September 16, 2004 letter. From the structure of the OUR's Determinations based on earlier RIOs, this part of the document citing the various positions is not the operative part. It functions more like a recital by recounting who said what in relation to any proposal and after setting out the rival positions, the OUR then expresses its decision. Where the OUR expresses its final conclusions it is usually prefaced by, 'The Office has

determined that …' followed by the actual decision. In this case the actual decision does not have the wording proposed by CWJ and neither that quoted in the September 13, 2004 letter.

[149] Finally on this. The wording quoted by CWJ in the September 13, 2006 letter does not reflect what the OUR said it would approve, namely, 'Clause 10.4 should be modified to indicate that the provision with regard to devaluation or revaluation shall apply equally to both parties' (agreed bundle vol 1 p 463, para. 412). The dependent clause approved by the OUR actually refers to CWJ and the Telco and not CWJ alone. Thus, it is not clear how CWJ came by the clause it quoted and attributed to the OUR. It is not present in the agreed bundle of documents.

[150] The court must refer to a March 16, 2007 document. It is a Determination from the OUR said to be based on RIO 5A. CWJ had requested a rewording of Determination 4.2 in the November 19, 2004 Determination. The document reveals that CWJ requested that wording approved by the OUR in the November 19, 2004, be modified further to read:

> *In the event that the Jamaican dollar devalues or revalues against the US dollar by five percent or more in any six month period concluding during the term of this Agreement (sic),* ***the parties reserve the right to vary charges*** *in order to reflect such devaluation or revaluation.* (emphasis added)

[151] It must be noted that this CWJ refinement proposed in the March 16, 2007 document is identical in all respect except one to the wording proposed by CWJ and which was quoted by the OUR in paragraph 4.9 of the November 19, 2004 Determination. Whereas CWJ's proposed wording in the November 19, 2004

Determination did not have the words in bold, the March 16, 2007 document inserted these words 'the parties reserve the right to vary charges' between the word 'Agreement' and the preposition 'in.' What was happening here was that CWJ was actually putting forward its proposed wording for a second time with the words in bold added.

[152] In the March 16, 2007 OUR document CWJ's proposed refinement was placed after the OUR repeated what it said was its approved wording stated in the November 19, 2004 document. Obviously, it was now appreciated that Determination 4.2 of the November 19, 2004 Determination did not say what CWJ wanted it to say or the OUR hoped it had said. If the November 19, 2004 document was as clear as CWJ is now saying why propose what was said to be a wording to remove doubt?

[153] The court will quote in extenso the relevant part of the March 16, 2007 OUR document to support the court's reasoning and conclusion.

> *C&WJ has requested a modification of Determination 4.2 which relates to the eventuality of a devaluation or revaluation of against the US dollar. The determination as stated allows either party to unilaterally and automatically vary charges in the event of a devaluation or revaluation against the US dollar in excess of 5% in any six month period. It appears to the Office that the effect of the restatement as proposed by C&WJ is that both interconnection parties would have to agree to the variation. The Office is not in principle opposed to this proposal but envisages that it may still lead to dispute if the parties cannot arrive at an agreement.*

> *Having regard to all of the above and to minimize (sic) the possibility of deadlocks, the Office accepts C&WJ's request for a modification of Determination 4.2 and directs that it shall be amended to read:*
>
> *Determination 4.2*
> *In the event that the Jamaica dollar devalues or revalues against the US dollar by five percent or more in any six month period concluding during the term of this Agreement (sic), either party reserves the right to vary the charges in order to reflect such devaluation or revaluation. Notwithstanding, any such change shall only become effective after approval by the Office.*

[154] This latest decision of the OUR represents for the first time a coherent clause approved by the OUR. By coherent it is meant a simple sentence with a dependent clause and an independent clause which makes complete sense as a matter of grammar and syntax. The words from 'either party' to 'revaluation' is the independent clause because it forms a complete sentence (with finite verb which itself has the subject word 'party'). The earlier part of the sentence is the dependent clause. The very last sentence is completely new. It is this last sentence that prompted the CWJ to say that between November 26, 2004 (the date the November 19 document was to take effect (agreed bundle vol 1 p 415)) and March 16, 2007 that it was entitled to make adjustments to the charges based on devaluation and therefore between these dates CWJ was entitled to implement the devaluation provision without OUR approval. Hence Digicel cannot reclaim the sum taken under the devaluation provision.

[155] This reasoning of CWJ was supported and adopted by the OUR in the OUR's final decision dated May 16, 2013 (agreed bundle vol 1 p 642 – 643).

[156] Was the devaluation provisions approved by the OUR a change to charges as contemplated by clause 10.4 of the ICA as signed by parties on April 18, 2001? Clause 10.4 speaks to charges approved by the OUR. It seems to this court that the devaluation provision as worded was not a charge approved by the OUR but rather a mechanism by which the charge may be determined. The entire clause 10 seems to be predicated on the charges being clearly stated either by way of a specifically stated sum (for example the fixed retention) or a range from a lower figure to a higher figure (for example, the MTR rates). While it is true that the OUR's devaluation provision did not explicitly state that the OUR was to approve the sum arrived by CWJ, clause 10 of the ICA contemplated that only OUR approved changes to the charges would be implemented. Thus even if what was done could be described as a change to charges it was not OUR approved. The circumstances that could trigger the alteration to the charge was certainly approved but the actual dollar figure was not approved and therefore was not an OUR approved change. CWJ had no lawful basis to implement its devaluation charges. The whole logic of clause 10 contemplated that the OUR was to approve the charges before they were implemented. This explains why the Determination approved the trigger event and did not state a specific dollar figure or a cap.

[157] In addition the ICA had provisions for changes to the ICA. Clause 23 has already been cited. It speaks to review and amendment. Indeed clause 23.5 dealt with the very situation that arose in relation to the OUR's Determination in respect of RIO 5. Clause 23.5 stated that if the trigger event for review was a revised RIO submitted by CWJ then both parties would amend the ICA to reflect the principles in the approved RIO. Clause 23 has the procedural steps that the parties were to take. It is common ground that CWJ did not follow the procedural

steps set out in clause 23 of the ICA when it effected its changes to charges based on the devaluation of the Jamaican currency.

[158] CWJ seeks to make an end run around this conclusion by saying that clause 23 is of no moment because clause 10 of the ICA covers what has happened. CWJ submits, in effect, that changes in its costs due to devaluation are changes to charges and therefore once the five week's notice is given in accordance with clause 10, the changes become effective. Full reasons have been given for not accepting this submission.

[159] The OUR approved the devaluation provision as it had the statutory right to do but the parties also agreed on a methodology by which the changes introduced by the OUR were to be managed. What the OUR did was to create a mechanism to adjust for devaluation but that is not an adjustment to the charge. The actual change to the charges itself was not justified because (a) it was not a charge approved by the OUR and (b) neither did CWJ follow the procedure to adjust the ICA to reflect the changes brought about by the OUR. CWJ's adjustment was therefore unlawful. The sums kept by CWJ during the period November 26, 2004 to March 16, 2007 should be handed over to Digicel.

Bad debt

[160] This issue of bad debt is connected to the retention issue dealt with earlier. From the totality of the evidence it appears that there was concern, from early 2001, about the possibility that some of CWJ's fixed line subscribers who placed calls to Digicel' network might not pay their bill. In this situation the customers would have received the benefit of the interconnection service for which CWJ would still have to pay even if CWJ had not collected any revenue from the customer. From what this court has gathered Mr Hewitt was unsure whether the OUR had established a specific percentage for bad debt. He seemed to have been saying at one point that the retention initially set was thought to be sufficient to provide for CWJ to recover all its costs including that which arose from non-

paying customers. At another point he seemed to be saying that 8% was established as the bad debt percentage. In any event, the OUR documents of April 6 and 18, 2001 make specific reference to 8% of the MTR as the bad debt figure (agreed bundle vol 1 pp 102, 110).

[161] Eventually a figure of 8% was arrived at as representing the amount CWJ may retain from the revenue it collected from its customers. The problem here is the interpretation of the relevant documentation. CWJ says that it was entitled to retain up to 8% whether or not there was in fact any bad debt. Digicel on the other hand submitted that CWJ could only retain actual bad debt and this up to a maximum of 8%.

[162] The relevant part of the ICA reads (clause 9.2):

> *C&WJ is entitled to retain a figure of up to 8% of the Call Duration Charges that relate to calls to the Telco's PLMN Subscriber Connections and which originates from C&WJ's PSTN Subscriber Connections and which are conveyed pursuant to the PLMN' Terminating Access Service Description and Telco is entitled to retain a figure of up to 8% of the Call Duration Charges that relate to Calls to C&WJ's PSTN Subscriber Connections and which originates from the Telcos PLMN Subscriber Connections and which are conveyed pursuant to the PSTN's Terminating Access Service Description pending adjustment of the C&WJ's Retention to include an element to reflect bad debt ('a Bad Debt Sum). Accordingly each party will notify the other from time to time of any Bad Debt Sum*

that it will withhold from such Charges due and payable to the other. A Bad Debt sum so notified will be withheld from amounts due to the other Party under the next invoice in respect of such Charges submitted by the other Party.

[163] Do recall that PLMN refers to a mobile network and PSTN refers to a landline network. What this clause is therefore saying is that CWJ is entitled to retain up to 8% of the call duration charge of those calls that originate on CWJ's landline network and end up on Digicel's network. An identical arrangement was made for calls going in the reverse direction. The clause also says that this arrangement was to continue until the CWJ's retention was adjusted to reflect bad debt. The provision indicated that whichever of the two entities is withholding sums for bad debt then that person will notify the other, that is to say, tell the other party of the specific sum being withheld on the basis of bad debt.

[164] Digicel advances the difficult argument that this means that the clause means that CWJ can only retain actual or proven bad debt up to a maximum of 8% and it did not entitle CWJ to an automatic 8% retention on bad debt. No issue is joined on whether this was an appropriate deduction by CWJ. The issue is over whether the percentage should be based on an actual stated figure clearly identifiable as debt not paid by CWJ's customers.

[165] CWJ advances the automatic retention on a number of grounds. First, it relied on the OUR document entitled 'Proposed Modifications to the existing interconnection Regime: Consultative Document dated October 30, 2001' (agreed bundle vol 1 p 334). Second, a Determination Notice dated November 22, 2001 which was said to be modifications to RIO 3. Third, a consultative document issued by the OUR in respect of RIO 4 dated December 17, 2001. Fourth, the Determination issued in respect of RIO 5.

[166] As previously stated, this court is not interested in what the OUR may have thought it meant but is only interested in the words used. Therefore the first and third documents relied on by CWJ to make its case will be ignored by the court because those documents at best represent the OUR's reflection on the issue. The court will take into account the Determinations since those are what state the OUR's final position.

[167] In the Modification to RIO 3 Determination dated November 22, 2001, the OUR noted that the allowance for bad debt will be 8% 'which is consistent with C&WJ's overall experience with bad debt' (agreed bundle vol 1 p 351). The document also notes that Digicel observed that if C&WJ was to retain 8% of the retail fixed to mobile price for bad debt then the maximum permitted retail prices must increase by more than 8 percent if mobile carriers were to retain their current margins (agreed bundle vol 1 p 351). Arising from this the OUR decided that the maximum retail prices for fixed to mobile calls should be increased by 8.7% on the premise that this 'amount allow C&WJ to retain 8 percent of the higher price (for bad debt) and mobile carriers to retain their current margins' (agreed bundle vol 1. P 352).

[168] This decision by the OUR was put into effect. Mr Fraser, for Digicel, Mr Nelson for CWJ and Mr Hewitt for the OUR all said that the decision was put into effect.

[169] Digicel's interpretation is not possible because of the surrounding context. The context was that this ICA was entered into before Digicel had begun operating in Jamaica. There was no actual data for Jamaica to which anyone could refer to measure the bad debt that would or may arise under the CPP system in respect of CWJ's landline subscribers originating a call and terminating it on Digicel's network. In the absence of actual data the parties were making their best estimate of what was likely to happen. In order to prevent CWJ or Digicel gobbling up the entire retail price under the guise of bad debt the parties agreed the cap of 8% of call duration charges. This had nothing to do with whether that

was the actual bad debt or not but simply a figure plucked out of the air which the parties felt was reasonable. The clause did not require proof of actual bad debt. Had that been the case they would have said so. What they did was to agree to rely on the mere assertion of the other without actual proof that the bad debt was, for example, 4% of call duration charges. This meant that each party was entitled to charge up to 8% whether there was in fact a bad debt of equal to, less than or greater than 8% of call duration charges.

[170] Another part of the context was that the OUR in its February 21, 2001 Determination had not addressed the issue of bad debt. However, in the documents issued by the OUR dated April 6 and 18, 2001, the OUR indicated that the percentage of the MTR for FTMR calls should not exceed 8% (agreed bundle vol 1 pp 102,110). Not only that, the OUR permitted an increased rate to Digicel in order to match the 8% retention for bad debt which was now explicitly identified.

[171] Digicel actually benefited from this decision by the OUR and it was the consumers who held the short end of the stick in this affair. Having agreed to act on the basis that CWJ could keep up to 8% and insisted that retail price be increased so that its revenue could be kept at the same level, this court is not convinced that Digicel can now turn around and insist on CWJ proving the actual bad debt. Digicel suffered no loss. In fact it got a .7% gain.

[172] Digicel's case theory is that the OUR's Determinations cannot automatically amend the ICA and so CWJ cannot rely on Determinations subsequent to the ICA to determine either (a) what the ICA means or (b) alter the meaning of the ICA. CWJ does not have to rely on subsequent Determinations. The context in which clause 9 was included in the ICA provides the answer. CWJ is entitled to keep back up to 8% for bad debt whether or not there is actual bad debt. It follows from this that Digicel is not entitled to any refund of any money from CWJ on the basis of unlawful retention of bad debt sum.

[173] Separate and apart from the actual construction of the clause, as Mrs Kitson pointed out, Digicel cried out for an increase to reflect the up to 8% deduction for bad debt. It was granted and the increase was not just 8% but 8.7%. It is ludicrous to suggest that in light of this Digicel was hard done by. All this was done at the expense of the consuming public who had to fork out more money than they might have otherwise had to pay because the agreement then and, it appears now, is that neither CWJ and Digicel is required to prove its actual bad debt but simply keep upto 8% of call duration charges as the bad debt figure. This leads to the last issue; that of Homefone.

[174] There is no legal foundation for Digicel to claim any refund from CWJ on the basis that it kept back too much for bad debt.

Homefone service

[175] The Homefone issue is part of the bad debt claim in that Digicel argues that this was a prepaid service and by definition cannot incur a bad debt because the service must be paid for in advance. In 2006 CWJ introduced a service called Homefone. It was a prepaid calling service using a fixed line. CWJ says that the price cap regime only applies to post paid customers of CWJ. The dispute here is whether it is a new service or not. If it's new then it is not subject to the ICA regime. If it is not a new service then it is subject to the ICA.

[176] CWJ claims that it is a new service. The basis of the claim needs to be examined. From Mr Nelson he said that the company had to make new investments in terms of equipment. This equipment was necessary because the existing machinery could not accommodate a prepaid service. The new service required that there be equipment that could (a) identify the prepaid card; (b) record its usage and (c) know when the purchaser had exhausted the credit on the card. Mr Nelson did not reject out of hand Digicel's witness Professor Cave. Mr Nelson said he understood the Professors' thinking but he (Nelson) was looking at it from a business perspective (transcript evidence vol 2 pp 760 – 762).

From that perspective CWJ was responding to the customers who were saying that they don't have five or six thousand dollars to pay for monthly post paid service but would like to be able to control their expenditure while still making landline calls.

[177] CWJ also relies on paragraph 1.9 of the OUR's document, called Specific Price Cap Rules – Notice of Proposed Rule Making, dated April 2001. That paragraph reads:

> *The Office takes the view that new products and services should not be subject to price cap regulation as this may present a deterrent to innovation. At the same time, there is a clear need to ensure that a service presented as new is not simply a repackaging of a pre-exisiting offering. As a safeguard, the Office takes the view that a service should qualify as a "new service" only if it is not currently being offered and has not been offered within the previous twelve months. Additionally, an existing service should not be withdrawn without the consent of the Office.*

[178] Finally, CWJ relies on the lack of objection from the OUR when CWJ introduced and classified the Homefone as a new service. The court must say that this is a difficult argument to understand. It is not apparent why the inactivity of the OUR should be interpreted to mean that it concluded that the Homefone service was new and therefore it was new. This is simply the judicial deference argument deployed to meet this difficulty.

[179] CWJ referred to Mr Nelson's evidence on the point both in his examination in chief and cross examination. Mr Nelson spoke to the infrastructure invested to

make the prepaid service a new service. He said that on the retail side of CWJ's operations they are regarded as different products.

[180] This court wishes to say that none of what CWJ relies on constitutes a definition of new service. Mr Nelson did not offer a definition. What he did was to describe how the prepaid system worked and then counsel asked this court to say that it is a new service. The OUR's evidence from Mr Hewitt confirmed what the court suspected which was that the OUR did not have a definition of 'new service' and so was not in a position to agree or disagree with CWJ's position that the Homefone was a new service. This shows another reason why the judicial deference proposition cannot be accepted. We now know that the OUR's lack of objection flowed out of its own indecision because it did not and had not developed a definition. What Mrs Kitson would be asking the court to do is to accept the OUR's acquiescence as a definition when the real fact was that it had none and so could not properly refute CWJ's assertion that the Homefone service was new. This would be a new principle – definition by non-response.

[181] Professor Cave who testified on behalf of Digicel gave a definition which has not been subverted. Professor Cave stated that a service is new 'if it has a different functionality from existing services' (transcript of evidence vol 11 pp 485 – 486). He gave as an example text messaging. That was a new service when compared with voice calls because its functionality was different 'in the sense that instead of delivering the voice communication' it delivered text. The learned Professor added that a 'fixed to mobile which is prepaid exhibits the same functionality as a fixed to mobile call which is post paid in the sense that the nature of the services being delivered is the same' because what is happening is that a person is enabled from a fixed line to communicate by voice regardless of whether the payment is prepaid or post paid (transcript of evidence volume 11 pp 485 – 486). Neither Mr Nelson nor Mr Hewitt challenged Professor Cave's definition of new service. This court is of the view that the Professor's definition makes better sense than that put forward by CWJ.

[182] This court accepts Professor Cave's definition. It is this court's view that the Homefone is not a new service. There is no different functionality present. The Homefone permits the user to control his usage by virtue of purchasing a card which is then used to gain access to the CWJ network via a code or password of some kind. Once this is done then the card is activated. This permits CWJ to know when the card was activated and how much of the money on the card is used. It is also a landline that is capable of making landline to mobile calls. It is difficult to see what new functionality is present other than the time of payment.

[183] To suggest that 'new service' means '*if it is not currently being offered and has not been offered within the previous twelve months*' is not a definition. Putting in a new payment mechanism cannot make the service of making voice calls new in the way that sending a text is new when compared with voice calls. If that were the case, then the providers could offer quarterly payment plans and put in technology to support it and then say it is a new service. Mobile phone calls can legitimately be described as a new service because what was being offered was a completely new way of making and receiving calls. One did not have to be near a fixed line. The caller recipient could be, well … mobile including traveling overseas or on the high seas. The call itself would be moved from tower to tower as the recipient moved. This was indeed a new way of handling an old service but paying differently for the same service, that is, making a call from a landline to a mobile phone does not qualify as a new service. The transmission and handling of the call was not different in any way whatsoever. The caller from the fixed line still needed a fixed line. The Homefone is a method of FTM calls and is therefore subject to that regime.

[184] It follows from this that the Homefone was subject to the ICA and the price cap regime which means that CWJ could deduct up to 8% percent of the call duration charges for bad debt if it so chose even if there was no bad debt in fact. The reason is that, that was what the parties agreed in the ICA.

[185] Mr Fraser's evidence on the calculations of what CWJ's actual debt should be is not accepted. Not only is it not what was agreed but it proceeded on questionable and unverified assumptions. It was nothing more than intelligent guesswork, surmise and conjecture fit for use for Digicel's internal market intelligence analysis if it were trying to work out what their competitor's bad debt would be but it is not capable of being given serious consideration by a court when assessing revenue which Digicel claims CWJ ought to hand over to it. The entire foundation of and the actual calculation of the sums alleged to be recoverable is rejected.

[186] CWJ is entitled to include the bad debt in its retention on the Homefone service calculated on a per second basis. This 8% percent is in addition to the fixed retention that CWJ was entitled to keep for providing the service to its subscribers.

Conclusion

[187] In respect of Claim No 2007HCV01483 this court of the view that any RIO approved after the ICA was entered into does not automatically change the terms of the ICA. Approval by the OUR without more does not alter the ICA. The system of regulation was a combination of public and private law. The TA did not confer on the OUR the power to effect changes retrospectively to the ICA. It follows that even if the OUR approves new rates or indicates any changes to the regulatory framework the process outline in the ICA for alteration of the ICA must be followed. If this were not so then there would hardly be any point in the parties contracting with each other. The parties have freedom of contract but that right is circumscribed by the power of the OUR to determine terms and conditions including charges. However, the parties have agreed, by contract, how they would go about altering the ICA. There is no conflict between the private law arrangements and the public law mandate. Nothing is wrong with the parties agreeing how to give effect to changes in public law. What is not permissible is for the parties to contract to simply take it upon themselves to break the agreement under the guise of a public law mandate.

[188] The regulatory structure envisaged the harmonious working of the cogs of private law and public law. They need each other to function. Parties don't enter a contract with the expectation that it will be broken. It is expected that they will comply and if there is a breach, that it will be enforced by the courts should action be taken. The policy of contract law is to hold parties to their agreement. This is why exculpatory defences such as non est factum and frustration are not very successful. They do not succeed very often.

[189] The process of altering the ICA was not followed by CWJ either in respect of the per minute or per second controversy or in respect of the devaluation issue. CWJ must adhere to the contract it agreed. Any moneys deducted arising from CWJ's unilateral action was unlawful and should be accounted for to Digicel.

[190] Interest should be paid in accordance with clause 9.4 of the ICA on any sums found to have been unlawfully deducted. The interest is the Bank of Nova Scotia's base lending rate plus 2% from the day each sum was withheld until judgment.

[191] CWJ's counter claim is dismissed in its entirety. Costs to Digicel to be agreed or taxed.

[192] In respect of Claim No 2009HCV00472 the declarations sought by Digicel are not granted as framed. CWJ is not bound to account to Digicel for amounts withheld under clause 9.2 of the ICA. Like CWJ, Digicel must abide by the contract it agreed. In the context of the ICA, no one had in mind a direct correlation between actual losses and the amount to be deducted from the revenue. There was insufficient information and the OUR was reluctant to adopt such a policy. It might have been hoped that the parties would have behaved in that way but that was not what was stated in the ICA or the Determinations issued in respect of the RIOs on which the ICA was based. In any event, the

MTR was increased by 8.7% to accommodate Digicel's complaint that CWJ was taking 8% and so Digicel did not suffer any loss.

[193] CWJ is entitled to withhold up to 8% of the actual retail price as bad debt even if there is no actual loss. CWJ is also entitled to withhold any other retention which was entitled to keep under the CPP. CWJ is not entitled to keep any of the retention based on devaluation for the reasons given in relation to that issue. The rest of the revenue is to be handed over to Digicel subject that portion which is now statute barred. Interest on the sum found to be owed is to be paid in accordance with clause 9.4 of the ICA.

[194] Seventy percent of costs to CWJ on the basis that CWJ succeeded in defending the majority of the claim. Digicel succeeded on whether the Homefone service was a new service and this was an important part of the claim.

Disposition

[195] Counsel for the parties are to agree a form of order to give effect to these reasons for judgment.