**[2021] JMCC COMM. 11**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**COMMERCIAL DIVISION**

**CLAIM NO. SU2019CD00219**

| | | |
|---|---|---|
| **BETWEEN** | **PHOENIX PRINTERY LIMITED** | **CLAIMANT** |
| **AND** | **ASHCAR PRINTING SOLUTIONS LIMITED** | **DEFENDANT** |

**IN OPEN COURT**

**Mr Litrow Hickson and Mr Matthew Royal, instructed by Myers, Fletcher & Gordon Attorneys-at-law for the Claimant**

**Mr Ruan Barrett instructed by Malcolm Gordon, Attorneys-at-Law for the Defendant**

Heard 22nd, 23 and 26th March 2021

**Contract – Pre-Incorporation contract- Whether adopted- Whether subsequent contract executed – Whether breach of contract to pay commission – whether breach of contract by claimant releases defendant from obligation to pay sums due under contract**

**LAING, J**

**Background**

**[1]** The Claimant is a company duly incorporated under the laws of Jamaica which operates as a full-service commercial printing company.

**[2]** The Defendant is a company which was duly incorporated under the laws of Jamaica on 8 December 2017. Mr. Ashbourne Wynter ("Mr Wynter") is its sole shareholder and one of its two directors.

**[3]** Mr. Wynter was employed to the Claimant as a sales representative from 2001 until he resigned from that post effective 31st of October 2017. His main responsibility was to solicit customers for the Claimant, for which he would be paid on the basis of a 10% commission on total sales.

**[4]** On the 30th October 2017, an agreement was entered into, the recitals stating it to be between the Claimant on the one part and "Ashcar Solutions Ltd ("Agent), (sic) a company incorporated under the laws of Jamaica with registered offices at 202D Old Hope Road, Kingston 5". The Execution clause however had the name of the party as "ASHCAR PRINTING SOLUTIONS LIMITED/ASHBOURNE WYNTER" This agreement referenced a schedule with the names of a number of clients. I will refer to this agreement herein as the "2017 Agreement". Mr. Wynter executed the 2017 Agreement on behalf of this entity, but there is no assertion by him that there was a duly incorporated entity with this name on that date.

**[5]** **Section 29 subsections (1) and (2) of the Companies Act** which bears the marginal note "*Pre-incorporation contracts*", provides as follows:

> *29.-(1) Except as provided in this section, a person who enters into an oral or written agreement or contract in the name of or on behalf of a company before it comes into existence or who purports to enter into such an agreement or contract, is personally bound by the agreement or contract and is entitled to the benefits of that agreement or contract.*
>
> *(2) Within a reasonable time after a company comes into existence, it may, by any action or conduct signifying its intention to be bound thereby, adopt an oral or written agreement or contract made in its name or on its behalf before it came into existence.*

There is no evidence to suggest, nor is it being asserted by the Claimant or the Defendant, that the Defendant did not adopt the 2017 Agreement.

**[6]** The Claimant avers that on the 19th February 2018 an agreement in writing was entered into between the Claimant on the one part and "ASHAR PRINTING SOLUTIONS LIMITED", the Defendant, which was executed by Mr. Wynter on behalf of the Defendant ("the 2018 Agreement"). The 2018 Agreement also referenced a schedule with the same clients as contained in the schedule to the

2017 Agreement. The Defendant denies that it entered into the 2018 Agreement with the Claimant and denies that Mr. Wynter executed any such agreement in February 2018. Accordingly, the Defendant averred that the terms of any agreement between the Defendant and the Claimant is contained in the 2017 Agreement.

**The Claim**

**[7]** The Claimant of avers that pursuant to the 2018 Agreement the Defendant agreed to act as an independent contractor specified in the schedule to the said agreement and to secure additional customers for the Claimant. In return for its services it was agreed under clause 9 of the 2018 Agreement that the Defendant would receive a twelve percent commission of the charge made by the Claimant for printing services which the defendant sold or placed.

**[8]** A dispute arose between the parties arising from amounts which the Claimant asserted were due to it and on 7th February 2019, the 2018 Agreement was terminated by the Claimant. The Claimant's case is that it submitted invoices to the Defendant for the period 1 January 2018 to 18th March 2019 for a total sum of $38,131,697.28. The payments made by the Defendant to the Claimant for the period 1st January 2018 to 18th March 2019 was $29,502,002.88 and the difference between the invoiced amount and the payments is $8,629,694.40 which represent the amount outstanding from the Defendant to the Claimant as at 28th March 2019.

**[9]** The Claimant admits that it has itself collected payments totalling $2,720,793.92 from one customer, Coast to Coast Publishers Limited and as a consequence, as at 24th February 2020 the sum of $5, 908, 900.48 remains outstanding.

**The Defence**

**[10]** The Defendant has filed a Further Amended Defence and Counterclaim in which it asserts that it did not execute the 2018 Agreement and does not owe any sums of money to the Claimant. It averred that to the contrary it is owed the sum of

$1,343, 733.27, the subject of the Counterclaim which represents the commission it earned between 1st January 2018 and 1st January 2019 which was not paid to it by the Claimant in breach of the contract between the parties.

**Which is the operative agreement which governs the relationship between the parties?**

**[11]** The forgery of an agreement which is supposed to govern the commercial relationship between parties constitutes an egregious breach of trust. The party against which the forged document is being used will usually be forceful in its assertion of the forgery. The individual whose signature is forged, usually vehemently denies having signed the document. In this case, although the Defendant sought further and better particulars as to some components of the claim, notably, it sought no particulars as to the circumstances in which the 2018 Agreement was executed. The Defendant has not used any expert evidence which would tend to prove that the signature on the 2018 Agreement is not that of Mr. Wynter. Instead, Mr. Barrett has simply made the bald assertion that the signatures are not the same and has emphasized the fact that unlike the 2017 Agreement there were no witnesses to the execution of the 2018 Agreement.

**[12]** I appreciate that the Claimant has presented the 2018 Agreement as being entered into between the parties but it has not led any direct evidence of the execution of it by Mr. Wynter on behalf of the Defendant. Nevertheless, the Defendants assertion that it was not executed by Mr. Wynter is flaccid having regard to the seriousness of the allegation that the document is a forgery. Mr. Wynter denied that it was his signature but also said "*I can't recall signing anything with Phoenix in 2018*." In this regard, I was unimpressed with his evidence. He was unconvincing especially viewed in the context of such a serious issue. For these reasons as hereinbefore expressed, on a balance of probabilities, I accept that the 2018 Agreement was executed by Mr. Wynter on behalf of the Defendant and as a consequence it represents the contract entered into by the parties.

**What is the implication of the 2018 Agreement being the operative agreement How does this affect the case?**

**[13]** The parties are agreed that there are no significant differences between the 2017 Agreement and the 2018 Agreement save that clauses 5 and 11 of the 2017 Agreement are not contained in the 2018 Agreement. This difference is material because it is an alleged breach of these clauses on which the Defendant rests its defence that the Claimant is in breach of contract, thus relieving the Defendant of its obligations to pay any further sum to the Claimant. I will address this defence subsequently.

**[14]** The practical operation of the agreement between the parties from the perspective of the Defendant is reflected in paragraph 3 its Amended Defence and the Counterclaim which was substantially repeated by Mr. Wynter in his evidence while he was being cross-examined. Paragraph 3 states as follows:

> *3. The defendant denies that the customers listed in the schedule to the October 30, 2017 Sale Agent Agreement or any other agreement were those of the Claimant. The customers are those of the Defendant. In the course the dealings between the Claimant and the Defendant, the customers would approach the Defendant company for a quotation for job. The Defendant would in turn request a quotation for the said job from the Claimant. Once the quotation addressed to the Defendant is received from the Claimant, the Defendant would send a pro forma invoice on its own letterhead to the customer. When the customer agrees and job is done and the items delivered to the customer. The customer would in turn make payment to the Defendant company. The Defendant company would then deposit payments into its own account and then pay the Claimant cheques or cash or bank transfer. The foregoing constituted the practice and conduct of the commercial dealing between the parties and is in accordance with clause 5 and 11 of the October 30, 2017 agreement. However, those two clauses are ominously missing from the new Sale Agent Agreement dated February 19, 2018 which purports to display Mr. Wynter's signature.*

**[15]** The process of accounting for the transactions between the parties, from the perspective of the Claimant, is captured in paragraphs 14 and 15 of the witness statement of Mrs. Nicola deMercado-Barbar who has been the Managing Director of the Claimant for in excess of 20 years. It is worth reproducing as follows:

> *14. To monitor orders procured by Ashcar, Phoenix Printery maintained on its ledger/books a discrete record of those orders entitled "Ashcar Printing Solutions Ltd", whose customer ID is ASHC-1980. Orders produced by Aschar (sic) on Phoenix Printery's behalf were posted to that ledger record. Each time an order was placed by Ashcar with Phoenix Printery on a customer's behalf, an invoice was generated by Phoenix Printery for Ashcar's account and the amount posted to Ashcar's ledger record. The invoices sometimes bore details of the customers with whom Ashcar was interfacing on Phoenix Printery's behalf. The invoices posted to Ashcar's ledger record span from January 2018 to November 2018.*
>
> *15. Once the job was executed by Phoenix Printery, Ashcar would receive payments directly from the customers and remit the funds to Phoenix Printery. The payment would then be applied by Phoenix Printery in reduction of the amount outstanding on the total invoices posted to Ashcar ledger.*

**[16]** The Claimant has produced a large volume of documentation which supports how the amount claimed was arrived at. It has exhibited copies of all the invoices it submitted to the Defendant for payment amounting to $38,131,697.28. It has exhibited evidence of receipts totalling $32,320,868.88. The difference between these two figures is $5,810,828.40. The Claimant also added the amount of three invoices totalling $98,072.08 which it asserts were not paid to arrive at the figure claimed of $5,908,900.48. I will address these three invoices subsequently and for the time being I will use the figure of $5,909,900.48 which is the figure claimed by the Claimant in its Amended Claim Form, after credit is given to the Defendant for payments made by clients after the filing of the Claim form.

**[17]** It should be noted that the claim in the Claim Form filed 11th June 2019 was for $8,629,694.40. By a Request For Information dated 13th June 2019, the Attorneys-at-Law representing the Defendant, included the following request:

> *"Under paragraph 14 of the Particulars of claim*
>
> *Of "As at March 28, 2019, the sum of $8, 629, 694.40 remained outstanding from the Defendant to the Claimant, broken down as follows:*
>
> | *Particulars* | *Total* |
> |---|---|
> | *Invoices for the period of January 1, 2018 to November 2018* | *$38,131,697.28* |

*Payments made by the Defendant to the Claimant for period*

*January 1, 2018 to March 18, 2019* *$29,502,002.88*

*Amount due to the Claimant from the Defendant* *$8, 629, 694.40*

*Requests*

*1. Please identify the alleged invoices for which payments are outstanding and provide copies of each."*

**[18]** The Claimant in its response asserted that the Defendant made periodic lump sum payments to the Claimant without identifying the specific invoices in respect of which the payments were being remitted. The Claimant further responded as follows:

> *"Accordingly the $8,629,694.40 figure set out in paragraph 14 of the Particulars of Claim is the result of the total payments due from the Defendant to the Claimant for all invoices rendered for the period January 2018 to November 2018 minus the total payments received by the Claimant from the Defendant."*

**[19]** The Claimant also attached copies of all the invoices totalling $38,131,697.28 and copies of all the receipts for payments received by the Claimant from the Defendant totalling $29,502,002.88. Mr. Wynter confirmed when he was being cross-examined that the Defendant did not always identify to the Claimant the particular customers from which it had received the payment which was being forwarded because they would pay on account and these payments would include a consolidated lump sum of payments received from more than one customer.

**[20]** The Defendant was therefore acutely aware of the basis of the claim and the methodology employed in arriving at the amount claimed. The Defendant was also in possession of the relevant evidence on which the claim was based since service of the response on 20th June 2019.

**[21]** During his cross examination of Mrs deMercado-Barbar, Mr Barrett explored the issue of some of the Invoices prepared by the Claimant for the Defendant not identifying the ultimate client on whose behalf the services were to be provided

and suggested that there were a number of such invoices. Mrs deMercado-Barbar stated that she could not say whether this was correct.

**[22]** Mr Barrett also cross examined Mrs deMercado-Barbar in respect of some of the receipts which did not have the name of the ultimate customer who had received service and who had made the payment to the Defendant which had been forwarded to the Claimant. Mrs deMercado-Barbar admitted that there were occasions when the Claimant issued receipts to the Defendant for a sum which was a consolidation of more than one payment received from the Defendant. However, Mrs deMercado-Barbar rejected the suggestion that this created a high probability of errors in the accounting of the payments made by the Defendant. Other than making this suggestion, Mr Barrett did not demonstrate by the use of any concrete example, how the issuing of receipts for a lump sum which was a consolidation of multiple payments caused an error.

**[23]** The Court notes that the evidence of Mr. Wynter was that the payments to the Claimant took two forms. There were direct payments from the Defendant and in addition the Defendant was credited for commission order to it in the form of a set off. However, it was not demonstrated to the Court that the Defendant was incorrectly credited for any portion of commission due to it, but which was not actually paid by a physical transfer of funds. When asked if it is correct that the Defendant received commissions totalling $9,273,765.23 Mr. Wynter said he could not verify that. Mr. Hickson directed him to paragraph 9 of the Further Amended Defence and the Counterclaim filed where the Defendant admitted that it [was] paid $9,273,765.23 between 1st January 2018 and the 31st January 2019. On being confronted with that admission, Mr. Wynter said he could not recall confirming that. However, in terms of the methodology to be employed, Mr. Wynter also accepted during cross-examination that it would be correct to subtract the total of the payments made by the Defendant (together with the commissions withheld from it pursuant to the set off arrangement), from the total of the invoices in order to determine how much money is outstanding.

**[24]** In his closing submissions Mr. Barrett described the accounting arrangements between the parties as “haphazard” and submitted that this organization should not inure to the benefit of the Claimant to the detriment of the Defendant. Counsel again criticized as being “irregular”, the manner of accounting for payments and receipts. He posited that this coupled with weaknesses inherent in the collection of monies paid on invoices issued by the Defendant, whittles down the probability that the Claimant is owed the sum it claims.

**[25]** It is important to appreciate in assessing the evidence, that the Defendant did not by its pleadings or evidence challenge the figures produced by the Claimant in a clear logical and convincing manner. Mr. Wynter admitted on cross-examination that the total of the invoices which the Defendant procured was thirty eight million dollars. Therefore, there is no substantial dispute as to the figures which are being relied on by the Claimant. The case of the Defendant rests on the proposition that there is inherent in the Claimant’s accounting methodology, a weakness and or weaknesses which increases the probability of error. However, this has not been demonstrated by evidence, logic or example and I do not find any merit in this assertion.

**Alternative defences**

**[26]** It is not averred in the Further Amended Defence that the Defendant is denying liability on the basis that it has not been paid to the Defendant by the ultimate clients. Neither is the Defendant asserting that its liability to the Claimant is conditional on the Defendant being paid in respect of the invoices it has issued on its own letterhead. Mr. Wynter has stated that after the Claimant started to demand that the Defendant pays a lump sum amount whenever it was collected from the customers, he sent an email to Mr Kharela Morrison the Claimant’s Accountant, indicating, *inter alia*, that the money was not yet collected by Ashcar from these customers. I observe that there is no provision in either the 2017 Agreement or the 2018 Agreement which makes the liability of the Defendant subject to the payment by the customers.

**[27]** Mr. Hickson submitted that the averment by the Defendant in paragraph 6 of the Further Amended Defence and the Counterclaim that "*The Defendant will say that it paid over all the sums received from it's customers to the Claimant and does not owe the Claimant any money whatsoever*" would be inconsistent with a defence that the sums being claimed by the Claimant are not due and owing to it because the clients who received the service have not paid the invoices submitted to them by the Defendant. I find that there is considerable force in the submission. In any event, the Defendant is not making a robust reliance on the non-payment by the ultimate customers as a part of its defence and accordingly, there is no need for me to address this issue any further.

**[28]** The defence raised in the alternative is that due to the Claimant's breach of the 2017 Agreement the Defendant is relieved of his obligations under that agreement which include the obligations to pay the invoiced sums. I have already found that the 2018 Agreement was the document that governed the relationship between the parties and on that basis this defence fails. Nevertheless, I will explore it as a purely academic exercise. The Defendant grounds this argument on clause 5 and clause 11 of the 2017 Agreement, both of which I will reproduce hereunder:

> ***5. Customers***
>
> *Neither party shall interfere in any way with the other party's relationship with any customer. Breaches regarding this section should be remedied pursuant to Section 2 of this agreement.*
>
> …
>
> **11. Non-Solicitation**
>
> *With respect to the clients described in Schedule A and a section 5 of this agreement, both parties agrees (sic) that the Company shall not solicit or grant the right to any person to compete with Ashcar Printing Solutions Ltd for any jobs relating to any clients listed in Schedule A.*
>
> *Both parties agree that any breach in this section whether by Agent or the Company will not be acceptable and must be remedied immediately.*
>
> *Except as expressly permitted by this Agreement, the Agent shall not, during the term of this Agreement or at any time following termination of this Agreement, making use of any list of the Companies customers listed*

*in schedule A or diverge any trade secrets or other confidential information of the Company.*

**[29]** The pleaded Defence, is that the Claimant, in breach of the Agreement, solicited and collected payments from some of the customers, including Coast to Coast Publishing Limited, without referring to the Defendant. In his Witness Statement as originally filed, Mr. Wynter included a number of statements from customers as to statements attributed to the Claimant's representatives. The only possible purpose of these statements would be to support the assertion of the Claimant's breach of contract. It is 1 of the founding principles of the law of evidence at common law that hearsay evidence is inadmissible. Phipson on Evidence, thirteenth edition at paragraph 16-02 states that "*Formal statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them*…" These statements in Mr. Wynter's witness statement embodies the classic, "textbook" infringement of the hearsay rule which has been consistently recognized by these courts, and accordingly, these statements were struck out, on the application of the Claimant.

**[30]** There was therefore no direct evidence from a witness before the Court which could support the assertion that the Claimant breached the 2017 Agreement. However, the Claimant has admitted that it collected payment from Coast to Coast Publishing ("Cosst to Coast") and Mr. Hickson has submitted that this would not amount to a breach as asserted by the Defendant. The act of the Claimant collecting payment from Coast to Coast is very odd because there is no evidence that the Claimant had a contract with Coast to Coast. The contract was between Coast to Coast and the Defendant, which issued the invoices to Coast to Coast. On this basis it is arguable that the conduct of the Claimant could potentially amount to a breach of an implied term of the 2018 Agreement not to interfere with the clients. Of course the issue would be raised as to which parties' clients are they and I add the caveat that this was not explored fully at trial so the court does not have evidence as t the circumstances under which these sums were collected. I

have not found it necessary to resolve these issues for reasons which I trust will become apparent later in this judgment.

**[31]** It is trite law that a party to a contract may rescind it when faced with repudiation by the other party. Even if one assumes for the sake of argument that this act of collection constituted a breach of the 2018 contract it must be appreciated that it is not every breach of a contract which amounts to a repudiation entitling the innocent party to rescission. Rescission in its strictest sense is the right of an innocent party to have the contract avoided ab initio which is a "*wiping clean*" of the contract so that the parties are placed in the position they were in before the contract However **Halsbury's Laws of England/Specific Performance (Volume 95 (2017))/3.** States that:

> *'Rescission' is, however, frequently and confusingly used in a broader sense to describe a different act, namely, the acceptance by one party to a contract of a repudiatory breach of contract by the other party. Acceptance of repudiation discharges both parties from further performance of their executory obligations under the contract, but the contract is not avoided ab initio and the innocent party may claim damages for breach of contract.*

**[32]** In **Woodar Investment Development Ltd v Wimpey Construction UK Ltd** - [1980] 1 All ER 571 Lord Salmon examined a number of cases including the following which I find to be of assistance:

> *In Mersey Steel and Iron Co Ltd v Naylor, Benzon and Co ((1884) 9 App Cas 434 at 439, [1881–5] All ER Rep 365 at 368 ) Lord Selborne LC, after approving what Lord Coleridge CJ said in Freeth v Burr ((1874) LR 9 CP 208 at 213, [1874–80] All Rep 750 at 753), went on to say:'… you must examine what the conduct is, as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part … 'In Spettabile Consorzio Veneziano di Armamento e Navigazione v Northumberland Shipbuilding Co Ltd ((1919) 121 LT 628 at 634–635, [1918–19] All ER Rep 963 at 968) Atkin LJ said:'A repudiation has been defined in different terms—by Lord Selborne as an absolute refusal to perform a contract; by Lord Esher as a total refusal to perform it; by Bowen, L.J. in Johnstone v Milling as a declaration of an intention not to carry out a contract when the time arrives, and by Lord Haldane in Bradley v H. Newsom, Sons, & Co. Limited as an*

> *intention to treat the obligation as altogether at an end. They all come to the same thing, and they all amount, at any rate to this, that it must be shown that the party to the contract made quite plain his own intention not to perform the contract.'*

**Conclusion on the claim for breach of contract**

**[33]** In my opinion, in the present case it does not appear that the evidence of the Claimant receiving funds from customers comes anywhere near demonstrating a repudiation of the Contract by the Claimant as described in the cases to which I have just referred and which would entitle the Defendant to rescission in the broader sense referred to in the previously quoted paragraph of Halsbury's (supra) and which would relieve the Defendant of its executory obligations (even if the customers were the Defendant's customers. The position posited by the Defendant is represented by the party (B) in the following extract which shows that, in any event, the Defendant would still be required to perform his obligation to pay the outstanding amounts of the invoices it received from the Claimant and the alleged breach by the Claimant does not provide a defence to the claim. Halsbury's Laws of England/Contract (Volume 22 (2019))/8. Discharge of Contractual Promises/(4) Discharge by Termination for Breach of Contract/(iv) Rights of Innocent Party/357:

> *If the innocent party (B) can and does elect to terminate following a repudiatory breach by the other party (A), all the primary obligations of the parties under the contract which have not yet been performed are terminated. This termination does not prejudice the rights of the party so electing to claim damages (B) from the party in repudiatory breach (A) for any loss sustained in consequence of the non-performance by A of his primary obligations under the contract, future as well as past. Nor does the termination deprive the party in repudiatory breach (A) of the right to claim, or to set off, damages for any past non-performance by the other party (B) of that other party's own primary obligations, due to be performed before the contract was terminated. (reproduced without footnotes)*

**[34]** Furthermore, the Counterclaim is a breach of contract claim, albeit it is a claim for commission and not for interference or collection of money from the customer by Phoenix.

**Conclusion on the claim for breach of contract**

**[35]** I find that the Claimant has adduced sufficiently cogent evidence to support the accounting methodology it employed in arriving at the amount it has claimed. The Claimant has also presented accompanying supporting documents and helpfully tabulated summaries save for one area to which I earlier alluded briefly. That has to do with the three invoices totalling $98,072.08. The explanation for their inclusion was not convincing and having regard to their dates I find that they should not be included. For that reason, I will reduce the figure claimed of $5,908,900.48 by $98,072.08 and give judgment in the sum of $5,810,828.40.

**The claim in the alternative for monies had and received**

**[36]** Having found that the Claimant has succeeded on the breach of contract claim it is not necessary for me to consider the claim for moneys had and received.

**The counterclaim**

**[37]** The Amended counterclaim is in the following terms:

> *Ashcar Printing Solutions Limited Claim against the Claimant:*
>
> *To recover the sum of $1,343,733.27, together with interest. This sum represents commission earned by the Defendant between January 1, 2018 and January 1, 2019 but not paid over by the Claimant in breach of contract between the parties.*
>
> *The Claimant collected sums of money from the Defendants Client directly but did not pay over the commission to the Defendant due from those moneys collected.*
>
> *The Defendant therefore seek damages for breach of contract and any other relief this Honourable Court deems appropriate.*

Mr. Hickson has complained that the pleadings are devoid of sufficient particles necessary for maintaining the claim for outstanding commissions. I will excuse the pleading deficiency because the oral evidence of Mr. Wynter is that the commission which is being claimed is that which is the product of Phoenix Printery Limited (“Phoenix” for purposes of this portion of the judgment addressing the

counterclaim). Having collected ten million dollars from independent publishers but only paying the Ashcar Printing Solutions Limited ("Ashcar") a commission in respect of $8 million. He explained that this was one of the customers that went directly to Phoenix, and so whereas ASHCAR did not procure that contract directly, the customer went to Phoenix, paid Phoenix directly and Phoenix advised Ashcar.

**[38]** Mr. Wynter's explanation is interesting because it is based on the assertion which was not expressly pleaded but which was made by Mr. Wynter while being cross-examined, that Ashcar was entitled to a twelve percent commission on all invoices, whether the customers ordered the services through Ashcar or whether they went directly to Phoenix for such services. This is in conflict with Clause 9.1 of the 2018 the Agreement provides that "*ASL shall be paid at Commission equivalent to twelve percent (12%) of the charge made by the Company for Printing Services which ASL has sold or placed.*" Notwithstanding Clause 9.1, the evidence suggests that Phoenix did pay Ashcar a commission for printing services which it did not sell or directly place. This can be demonstrated mathematically. The amount invoiced by Ashcar was $38,131,697.28. Twelve percent of this figure is $4,575,803.66 yet Ashcar received $9,273,765.23. $9,273,765.23 is twelve percent of $77,281,376.92, a figure which almost doubles the amount invoiced by Ashcar.

**Conclusion on the Counterclaim**

**[39]** On the evidence the counterclaim is clearly unsustainable on a balance of probabilities. Ashcar received a sum in excess of that to which it was strictly entitled under the terms of the 2018 agreement and a sum which is in excess of the amount claimed on the Counterclaim. Accordingly, I am obliged to find in favour of Phoenix on the Counterclaim

**[40]** For the reasons stated herein I make the following orders:

1. Judgment is awarded in favour of the Claimant on the claim in the sum of $5,810,828.40.

2. Judgment is awarded in favour of the Claimant, on the Counterclaim.

3. The claimant is awarded $20, 000.00, representing Court fees of $10,000.00 and Attorneys Fixed Costs on issue of $10,000.00

4. Interest is awarded on the judgment sum at the rate of 6% per annum from 27th November 2018 until the judgment herein is satisfied in full.

5. The costs of the Claim and Counterclaim are awarded to the Claimant to be taxed if not agreed.