



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

CLAIM NO. 2014 CD 00124 (Formerly Claim 2014 HCV 03350)

BETWEEN	TRAILLE CARIBBEAN LIMITED	CLAIMANT
AND	CABLE & WIRELESS (JAMAICA) LIMITED (TRADING AS LIME)	DEFENDANT

**Contract-Interconnection Agreement-Deposit-Whether deposit is to include tax-
Whether 30% exemption applies – Whether Interim Mandatory Injunction has
effect of rendering a party in breach of contract.**

Mr. Sylvester Hemmings for the Claimant

**Mrs. Denise Kitson Q.C. and Trudy Ann Dixon Frith instructed by Grant Stewart &
Company for the Defendant**

**Heard: December 16, 2015, December 17, 2015,
February 5, 2016 and April 15, 2016**

COR : BATTS J,

[1] This case concerns the interpretation of an Interconnection Agreement entered into between the parties to this matter on the 4th March, 2014. It also involves the impact on the terms of the said agreement by a subsequent taxation measure in the form of the Telephone Calls Tax. That tax was levied by the Government of Jamaica pursuant to the Provisional Collection of Tax (Telephone Calls Tax) Order, 2012. The Telephone Calls Tax which I will refer to as the “TCT” is payable on all telephone calls including international calls originating overseas and terminating on local networks.

[2] The Claimant Trille Caribbean Limited and the Defendant Cable and Wireless (Jamaica) Limited (Trading as LIME) are both players within the telecommunications industry, the industry which the government had targeted for revenue under the TCT.

[3] At the commencement of this matter the following were the bundles before me ;

- A Bundle marked Index to Core Bundle which was filed on the 7th December 2015 and labeled 'A';
- A Bundle marked Index to Core Bundle which was filed on the 26th November 2015 volumes (1) to (4) and labeled 'B'; and
- Finally, the bundles entitled Index to Agreed Bundle of Documents volume 1 and 2 filed respectively on the 10th and 15th December 2015, they were both labeled as Bundle Number 1.

[4] It is regrettable that notwithstanding the several pre-trial hearings and directions with regard to documentation the parties were not able to agree upon all documents to be tendered in evidence. The result is that documentation was tendered as the case progressed.

[5] Mr. Hemmings in a brief opening on behalf of the Claimant, asserted that the case concerned an agreement for interconnection which the Defendant breached by failing to turn on the switch. They were, he said, obliged to turn on the switch as his client had fully paid the relevant tax to the authorities. The first witness for the Claimant was Mr. Rory Robinson, the Chief Executive Officer of the Claimant Company. His witness statements of 28th September, 2015 and 17th November, 2015 stood as his evidence in Chief.

[6] Mr. Robinson deponed that in October 2012 the Claimant purchased a call centre in order to enter the telecommunications industry. It is a facility which is located in Jamaica but answered international calls for a service fee. By 16th May, 2013

the Claimant had obtained various licenses. The Claimant had also negotiated with four international carriers to terminate calls to mobile phones in Jamaica.

[7] On the 4th March 2014 the Claimant entered into a written agreement with the Defendant to terminate calls from overseas carriers to mobile numbers in Jamaica. This I will call the Interconnection Agreement. After testing systems and making physical connections through fibre optic cables and various software the Claimant on the 23rd June 2014 was formally notified by the Defendant that the system was fully ready.

[8] The interconnection agreement provided for the provision of a guarantee or security deposit by the Claimant, see clause 28.1 and 28.2 (pages 38 -39 bundle 1).

[9] Mr. Rory Robinson asserts the following in his Witness Statement dated the 28th September 2015 ;

“ 20. The Claimant has offered to comply as per the signed agreement despite the fact that the Defendant did not do the due diligence as indicated that the Claimant did not have sufficient immovable fixed asset

21. The Defendant refused to accept the sums of J \$ 1, 710, 900.00. The result was that the Defendant LIME was unwilling to open their switch for trafficking of international calls from Traille to LIME mobile customers.

22. The Defendant LIME contends that they require before they open the switch J \$ 8, 933, 400 in the form of a bank guarantee”.

[10] The witness asserts that the reason for the Defendant's erroneous calculation is based on the view, wrongly held, that a call tax is to be paid by the Defendant. This tax was introduced on the 30th August, 2012 and amounts to USD\$ 0.75 per minute on international calls terminating on the Defendant's network. It is the Claimant's contention that clause 28 of the Interconnection Agreement requires only a three month usage charge for the initial deposit and does not include any amount for taxes.

- [11] Mr. Robinson also referenced clause 9.5 of the interconnection agreement [page 26 bundle 1] and asserted that the Defendant had a duty, notwithstanding the existence of a dispute, to turn on the switch. The Claimant approached the Office of Utilities Regulation (OUR) which ruled against the Claimant. Mr. Robinson contends that the OUR did not understand the issues and therefore fell into error. The call tax, asserted Mr. Robinson, was imposed by Gazette dated 30th August, 2012 [page 10 bundle 1] and is to be paid by the Claimant; furthermore even if the tax is to be paid by the Defendant the call tax is not to be a part of the calculation of the deposit. Mr. Robinson contends at paragraph 38 of his witness statement that the OUR was wrong to rely on the Ministry of Finance's Technical Notes as these were issued prior to the Gazetted new taxes in issue.
- [12] Mr. Robinson at paragraph 41 takes issue with the Defendant's calculation of the deposit due even assuming the tax is to form a part of it. Additionally, the Claimant contends that it has contracts with international carriers to be honoured and the requirements of an additional J\$7.2 million would be damaging. It contends that LIME is attempting to keep competition out of the market.
- [13] By interlocutory Order made on the 15th August, 2014 the Honourable Mr. Justice Glen Brown ordered the Defendant to perform the contract pending the final determination of this action. Mr. Robinson states that since then the Claimant has been duly paying the call tax as a provider and is current in its payments to the tax authorities. The Claimant is seeking an award of damages for revenue lost of USD\$236,500.00, as well as general damages due to conduct which was malicious, deliberate, aggravated and calculated to make a profit.
- [14] In his further statement Mr. Robinson outlines his qualifications and experience. He asserts that it was this which enabled him to accurately state the tax payable and paid by the Claimant.
- [15] Claimant's Counsel applied for and was given permission to ask further questions in chief. This resulted in the admission into evidence of three documents by consent:

Exhibit 1 -Schedule 1 to 2 Transfer of shares

Exhibit 2 – Letter dated 16th May, 2013

Exhibit 3 – Letter dated 22nd November, 2012

[16] When cross-examined Mr. Rory Robinson stated that the Claimant has five licences and these included a carrier's licence. He admitted that his company sent calls from overseas to the carriers in Jamaica. The calls come via fibre optic cables. His company does not own these cables. The telephone traffic comes from an overseas telecommunications company. He admitted also that when call traffic comes in, in order for it to go to the network of LIME or Digicel or Flow he had to interconnect with a local interconnection network. The contract entered into with Columbus Communications Ltd. (Flow) to set up a collocation site was admitted as **Exhibit 4**. It is dated 25th July, 2013. The witness admitted the only business done was with international call traffic through fibre optic cables which terminate on various networks. The following exchange occurred

“Q : In that interconnection agreement you signed with LIME, LIME is the provider of services?”

A: Yes

Q: You are the service taker

A: Yes”

The witness admitted that as he had no interconnection agreement with Digicel, LIME, also provided a transit service for which the Claimant paid. This allowed for routing of calls to Digicel. He admitted that the industry was dynamic but “at this moment 90 % of calls have been going to Digicel.”

[17] There followed an important exchange :

“Q: To the charge per minute for each call they add a special telephone tax

A: I don't know

Q: *Suggests that Digicel adds tax for each minute of call sent through the network*

A: *Very unfortunate*

Q: *LIME charge you tax on each invoice*

A: *I told them the Court says they should not do it*

Q: *Have they invoiced you with the tax on each*

A: *Yes they have*

Then a little later,

“Q: *You have been billed for tax by LIME*

A: *Every month*

Q: *You have not paid it*

A: *As per Court Order”.*

The witness was shown clauses 9.1 to 9.8 of the Interconnection Agreement (pages 25 to 26 bundle 1) ,thereafter came an exchange of questions and answers.

“Q : *Only service taker is Traille*

A: *Yes*

Q: *Service taker is the person who has to pay for the service*

A: *Yes*

Q: *Clause 9.7, you agree by that to pay all applicable taxes*

A: *Call tax is not an “applicable” tax. Call tax is not applicable. This is not appropriate.*

Q: *Suggest the telephone call tax is an appropriate tax to be added.*

A: *Don’t agree completely wrong”.*

[18] The witness admitted that the returns at page 180 of vol 2 of the Agreed Bundle of Documents did not reflect the total traffic to LIME. The reason was, “Because

in computation of form government says exemption of 30% of all international calls coming in. On return I reduce by 30% and then make return 30 % less than volume traffic every month.”

[19] It was suggested to the witness that incoming overseas calls were not entitled to the exemption. This was denied.

[20] The witness’ computation of damages was also challenged. When re examined the witness said each month the invoice was sent he objected to the call tax portion. That is the USD \$ 0.75 per minute charge. In answer to the court as to what was his understanding of what was the applicable tax the witness said, “applicable” tax payer is one registered under the GCT Act and who is granted a licence as a carrier and service provider. I am the carrier. I collect the money from overseas and bring the call. I pay LIME for that service and nothing more.”

In answer to questions arising from the judge’s questions the following exchange ensued:

“Q: Just as I would go to Flow for business you do not provide that to the public, offer internet service

A: No

Q: No domestic telephone service to public

A: No, only thing I do is carrier service for international telephone service to Jamaica.

Q: No telephone service in Jamaica

A: No, I have the licence to do it but don’t want to”.

[21] The Claimant’s second witness was Livingstone Chatto. **Exhibit 5** was a document entitled Revised Revenue Measures for Fiscal Year 2012/2013. Mr. Chatto’s witness statements dated 11th November, 2015 and 17th December, 2015 with amendments he inserted were allowed to stand as his evidence in chief. He describes himself as a telecommunications consultant. He was involved with the Claimant in the aspect of network design implementation and

management of its telecommunication facilities. He is a Director of the Claimant Company.

[22] Mr. Chatto says that the Claimant is connected to LIME and other local networks through the Public Land Mobile Network (PLMN). He was party to the development of the RIO 6 negotiations between the Claimant and the Defendant which resulted in the Interconnection Agreement. He states in his witness statement that:

“ 21. Where it speaks to LIME as service supplier and Traille Caribbean Limited as service taker and it is so said for mere description within the context, but is not technically or legally applicable.

22. For reason under the Tariff Schedule page 3, Traille Caribbean pays Lime for this International Joining Services but not Interconnection Services which is described as International as stated in the definition : at page 6 in the definition. This is paid to the International or Overseas carriers as oppose [sic] to LIME the Defendant. It has meaning given in the Act. (and Is the Interconnection Party in this agreement and the Act recognizes Traille Caribbean as the Interconnection Licencee.

23. The special call tax is levied at the International carrier and it is Traille Caribbean that collects call tax revenue from the International/ Overseas carriers and should pay it over to the Commissioner General.

24. The International carrier connects to LIME or any other company, the local carriers will collect the TAX and therefore pay it over to the TAX Administration. The question of liability for tax rests with the person who collects it.”

[23] In his Further witness statement dated 17th December, 2015 he referenced the revised revenue measures for 2012/2013 and stated that the Claimant is entitled to a 30% exemption.

[24] In cross examination he admitted that the Defendant does not send traffic to the Claimant. The traffic goes from the Claimant to the Defendant via the fibre optic cable. He admitted he did not set up the physical cable. The following exchange is important,

“Q: So when traffic goes to LIME it is at Carlton Exchange that determination arrangements are made, LIME sends traffic through

A: Yes it is an interconnect point.

Q: You pay a fee for interconnection facility

A: Yes”.

[25] It was suggested to the witness that there is no jointly owned network by the Defendant and he denied that. In re examination he explained his denial thus,

“It is a joint network as the fibre cable and fibre optic transport system construction of fibre cable and fibre optic terminal equipment and LIME facility at Carlton. There is a terminal on both sides. One is owned by LIME and one by Traille”

[26] The Claimant closed its case.

[27] On that evidence the Claimant urges the Court to find that the Defendant has acted in breach of the contract which comprised :

- (a) Legal Framework
- (b) Joint working manual
- (c) Parameter schedule
- (d) Service description
- (e) Service schedule
- (f) Tariff schedule
- (g) Definition

[28] The Claimant says in paragraph 16 of it's Particulars of Claim filed on 16th July, 2014 that the Defendant's failure to perform its terms has caused loss and the Claimant seeks specific performance , damages for breach of contract and negligence, costs and interest.

- [29] Counsel, for the Defence, opened her case by referencing the special telephone call tax imposed by the government in 2012. It was intended to raise revenue and hence impacted call termination charges. Reference was made to exhibit 5 [The Gazette 30.8.12] page two paragraph five. It was a special tax on in bound calls. Queen's Counsel further indicated that the exemption of free minutes was offered to 'service providers.' It was submitted that the Defendant was the only service provider in the case. The exemption she submitted related to those international calls that originated on the domestic network. The ones going out. Reliance was also placed on the Technical Note issued by the Government [see page 1 of the Agreed Bundle].
- [30] In her opening Queen's Counsel also indicated that evidence would be led that the Defendant had paid the tax (which was in excess of sixty million dollars). The Claimant she asserted is not an 'applicable taxpayer' as it does not provide a telephone service. This question is to be answered by the construction of the relevant Gazette. The Interconnection Agreement, it was further submitted, was subject to payment of the deposit. The deposit with tax was not paid. The Claimant also refused to pay that portion of the invoice with the tax. The Defendant paid the tax and has counterclaimed for the payments made. The Defendant's Amended Defence and Counterclaim reference clause 9.7 of the interconnection agreement. The Defendant also relies on the ruling of the OUR on the matter and alleges that the Claimant accepted the ruling.
- [31] The Defendant's first witness was Ms. Pamela Folkes the Deputy Financial Secretary in the Ministry of Finance. A witness summary was filed on her behalf and she was allowed to give her evidence in chief orally. She stated that the special telephone tax came with two rates: (a) Fixed and mobile domestic rate of 30 cents for all domestic calls and (b) 0.75 cents per minute for all international calls. Three technical notes were issued by the Ministry for guidance to advise tax payers. These referenced the exemptions. She explained that the 30 % exemption was allowed because industry players Cable & Wireless, Digicel and Columbus Communications said they offered free minutes in bundles. The tax

was not intended for the free minutes. No exemptions were allowed on incoming international minutes. Her precise response was :

“Q: What exemption applied to incoming international minutes

A: There were none. Policy was to tax both incoming and domestic without exemption. But exemption only applied to domestic calls originating in Jamaica where free minutes are offered.

“Q: How or what was implemented

A: The effective date of tax was 15th July 2015. Original date was June 1, 2015. Because industry players asked for 6 weeks to get systems ready. What was implemented was the technical note. Final note of July 13, 2012. The three notes guided.

Q: So the one at page 1 of bundle [agreed bundle] is final one

A: Yes that is what was implemented”.

[32] When cross-examined Mrs. Folkes described the Technical Notes as guidance not a recommendation. She said it should be followed. The following relevant exchange occurred.

“Q: Since 2012 have other players entered industry

A: Not to my knowledge

Q: Only Digicel, Cable & Wireless and Flow provide telecommunications business

A: These provide a public and private network and offer service”

And again,

“Q: Do you agree if registered [one is] liable to pay tax

A: If registered under the Act and provide telephone service. Many registered for GCT but not providing a service and has network.

Q: Suggest it is not in the law

A: *I cannot speak to the law only the policy.”*

[33] The witness clarified the relevant policy in the following exchange:

“Q: *So, look at page 12(c) , you agree whatever carrier brings in telephone calls from outside Jamaica*

A: *It is terminating carrier has the liability because we have no jurisdiction over international carrier. Technical note refers to interconnection agreement between companies and they should enter arrangement to collect the tax. We are not asking international carrier to pay taxes”.*

[34] The Defendant’s next witness was Simone Wynter. She is employed to the Defendant as Operations Manager in the Carriers Service Division. Her witness statements of the 18th and 19th November, 2015 stood as her evidence in chief. The first witness statement discussed the interconnection agreement between the Claimant and Defendant and how it came about. She explained in detail with reference to the relevant clauses in the agreement the rationale for the Defendant’s refusal to activate the switch for interconnection. She explained why and how the deposit was calculated. The Claimant she asserts remained insistent that the TCT (tax) was not to be paid on the security deposit. They maintained that position even after the OUR by letter of 1st May 2014 issued a determination on the matter. Her statement also included details of the sums allegedly paid and sums allegedly due from the Claimant.

[35] In her second witness statement Ms. Simone Wynter explained a transposition error in the Defendant’s pleadings. By way of amplification the witness was asked to comment on various documents in the agreed bundle.

[36] When cross examined there followed interesting exchanges:

“Q: *Is there a requirement in the contract that you should ask Traille for immovable assets before ask for deposits*

A: *No such condition. We may or can ask for fixed immovable assets.*

Q: *That was not done*

A: No

Q: Why

A: *Immoveable assets determined by network investments. Customers like Traille based on type of service it is not an investment that would mean enough to cover the guarantee. If had a public network that is heavily invested in the island. Customers like Traille can go without notice. So we ask for cash or bank guarantee”.*

And,

“Q: You don’t agree Traille is an applicable tax payer

A: No, says “who provides telephone service”

Q: Do you agree Traille brings telephone service to Jamaica

A: Yes”.

And,

“Q: Do you agree that adding the taxes proactively would have created difficulty for small players

A: Maybe but that’s the requirement.

Q: A challenge to small players

A: And a challenge if Cable and Wireless pays the money and not get paid by small players.

Q: You have that experience

A: Yes”.

[37] The Defendant’s third witness was Mr. Charles Douglas. His witness statement dated 18th November 2015 stood as his evidence in chief. He is the Regional Regulatory Manager employed to the Defendant. His evidence related to the implementation of the special telephone tax. When cross examined he denied that the Technical Note issued by the Ministry of Finance was a recommendation. He said it was a guideline for implementation. He admitted to not having read the implementing Act in detail. The witness was asked detailed questions on the construction of exhibit 5 (the Ministry Paper) and Gazette.

[38] At the close of the Defendant's case the matter was adjourned to the 5th February 2016 for written submissions to be filed and oral submissions, being a response to the written submission of each other. I am very grateful for the submissions provided. I will not restate or summarize these submissions but Counsel must rest assured that they have been of immense assistance to me.

[39] It is apparent that the resolution of the issues before me turn largely on a construction of the interconnection agreement and certain legislative provisions. The evidence has served mainly to provide background as well as explanations of some very technical matters. In this regard I am mindful that where Parliament has established specialized agencies a Court pays some deference to that agency's decisions on technical matters and does not lightly depart from them. However statutory interpretation is at the end of the day a matter for the Court and we will not shirk from that responsibility.

[40] Three issues fall to be determined. They are;

(a) Firstly, whether the Defendant is entitled to include the special telephone tax when computing the required deposit.

(b) Secondly, whether it is the Defendant's duty to collect and pay that tax; and

(c) Thirdly, whether the Claimant is entitled to claim a 30% exemption and if so how is it computed.

[41] I will now address the first issue.

[42] The computation of the deposit is dealt with at clause 28.2 of the Interconnection Agreement [page 38 agreed bundle].

'28.2 In addition to the guarantee required pursuant to clause 28.1 LIME may require a Telco without sufficient immoveable fixed assets to provide an initial security deposit by the Ready for Service date of the first joining service provided pursuant to this agreement (the initial deposit). The amount of such initial deposit shall not

exceed the sum of three months usage charges for all services forecast to be used by the Telco in the Forecast agreed pursuant to the Joint Working Manual. On the expiration of a period of twelve months after the Ready for Service date of the first Joining service, the deposit should be revised to a fair amount that covers the average amount payable by the Telco for billing and credit for the collection cycle applicable to the Telco. Any deposit provided under this clause shall be returned to the Telco with interest, less outstanding charges in the event that the Agreement is terminated. For purposes of this clause, "sufficient immovable fixed assets" means fixed assets of the Telco located in Jamaica of a value which would reasonably cover the amount of any security deposit calculated in accordance with this clause [Emphasis mine]."

The question therefore is what is comprised in a usage charge. This is defined in the Definition Schedule of the Interconnection Agreement [page 204 Agreed Bundle].

"usage charges. The usage related charges that are specified in the Tariffs schedule and are payable by service taker to service supplier."

And,

"Charges: The amount specified in the Tariffs schedule and described in the service descriptions which are payable pursuant to clause 9 of the Legal Framework"

The Tariff schedule is found in the Interconnection Agreement [page 195 of the Agreed Bundle of Documents:

"PLMN Terminating Access Service"

Usage Charges

Payable by service taker to service supplier. In keeping with Determination Notice for Cost Model for Mobile Termination Rates (Tel 2013001- DET001) the usage charge for the PLMN Terminating Access Service is as follows:

Call duration charge per 60s

J\$1.10

In Incoming International Call Termination Service on PSTN. The following table shows the usage charge payable by service taker to service supplier for calls conveyed pursuant to the incoming international call termination service on PSTN for international calls carried by a licensed international carrier terminating on the service suppliers (LIME's) network.

Call duration charge for

Per 60 S(J\$)

\$1.447”

[43] The Defendant contends, and I agree, that the rates quoted in the Tariff Schedule do not tell the entire story. This is because clause 9 of the Interconnection Agreement addresses how charges are to be computed. [page 25]

“9.1 Each party shall pay to the other the relevant charges applicable to each service as more particularly described in the (service) descriptions and tariffed in the tariffs schedule.”

“9.7 where appropriate any value added or other applicable tax shall be added to all or any part of the charges under this agreement and shall be paid by the party responsible for making such payment”

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

[45] The Claimant has endeavored to demonstrate that the tax is not payable by the Defendant and hence is not to be included. However this secondary argument

also fails. In this regard I reference the gazette of 30th April 2012 [page 10 agreed bundle].

*“applicable taxpayer means a carrier or service provider who is registered pursuant to section 27 of the General Consumption Tax Act **and is liable to pay tax under this Order**” [emphasis mine]*

“Carrier and service provider are defined as having the meaning assigned to it by section 27 of the Telecommunications Act.

The Telecommunications Act defines them thus:

“Carrier” means a person who is granted a carrier licence issued under section 13.

“Service provider” means a person who is the holder of a service provider licence issued under Section 3.

[46] The Gazette in section 3 provides,

*“3. Subject to the provisions of this Order, every applicable taxpayer **who provides telephone service in Jamaica** shall pay to the Commissioner General a tax on telephone calls (hereafter referred to as the tax) as provided –*

- a. Between points originating and terminating in Jamaica on a public fixed network (other than a transit service)*
- b. From a point originating in Jamaica from a fixed public network or mobile network and a point terminating outside of Jamaica*
- c. From a point originating outside of Jamaica and terminating on a public mobile network in Jamaica.” [emphasis mine]*

The words of importance here are “who provides telephone service in Jamaica.”

The Defendant argues, and I agree, that the Claimant does not provide a telephone service in Jamaica.

“Telephone service” is defined in the Gazette:

Telephone service means the provision of telecommunications comprising wholly or partially of real time or near real time audio communications utilizing a telephone”

[47] The Claimant, as their witness indicates has a carrier’s licence and a service provider licence. However it has chosen not to establish a network. The Claimant collects calls from International Carriers and passes them on to the Defendant. It is the Defendant not the Claimant, who provides a telephone service in Jamaica, within the meaning of the Gazette.

[48] This then leads to the second issue. Whose duty was it to collect the tax The Technical Note of July 13, 2012 [page 1 Agreed Bundle], has to be read in light of the meaning I have given to the words contained in the Gazette. The Technical Note contains the following:

“Person liable to Tax

The tax is to be paid by a terminating carrier in the case of calls (domestic and international) originating in Jamaica. Terminating carrier means a carrier who provides termination services on its public network. Originating carrier means a carrier who provides origination service on its public network. Carrier means a person who is granted a carrier licence under section 13 of the Telecommunications Act.

And

“ PAYMENT OF TAXES

The terminating carrier should pay over the tax in respect of international calls terminated on its public mobile network to the Commissioner General of Tax Administration Jamaica (Commissioner General)

B.-C.

D. The tax shall be paid over to the Commissioner General as follows:

(i) –(ii)

(iii) in the case of incoming international calls that terminate on a domestic public mobile network by the terminating carrier at a tax rate of U\$0.75 per minute.”

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

[50] Insofar as the first and second issues are concerned. I find in the Defendant's favour. The Defendant was not obliged to turn on the switch until and unless the Claimant paid the contractually agreed deposit. That deposit was to be a pre-estimate of three months usage charge. Usage charges include any applicable tax. The defendant therefore failed to pay the requisite deposit

[51] I turn now to the matter of the 30% allowance or exemption, as it is called, see clause 5.7 of the Gazette [page 12 Agreed Bundle]

“5. Notwithstanding paragraph 3, no tax shall be payable in respect of telephone calls provided by a carrier or service provider –

- (a) Originating and terminating from points on the network of that carrier or service provider to –
- (b) Access to customer and technical product support services provided by that carrier or service provider to customer.
- (c) Facilitate the payment by customers of the telephone products and services contracted between that carrier or service provider and customers thereof
- (d) Facilitate communication of customers product and transaction queries, activation or deactivation of services with

the carrier or service provider and its customers, whether these telephone calls are provided in or outside Jamaica;

- (e) In respect of thirty percent of the taxable call minutes in each transaction month for each call category;
- (f) To access emergency services by calling telephone numbers specified under the telecommunications act for such use ; or
- (g) In respect of a telephone call service exempted by the Minister by Order published in the Gazette.” [emphasis mine]

[52] The exemption at (b) is general and does not have the limitation contained in the technical note. That note [page 4 Agreed Bundle] states,

“Recommended Exceptions

In relation to domestic calls the following should be omitted from the taxable base,

Where free minutes are offered, the free minutes are exempted from the tax base up to a maximum of 30% of the total call minutes (free and billed) in each transaction month for each call category.

Call category means on-net, off-net and international calls.”

[53] The Defendant places reliance on the Second Schedule to the Gazette. This is the Form of Return. It was submitted that Subhead D of the form limits the categories in respect of which an exemption can be claimed. I do not agree. The Form of Return cannot trump the substantive provision which grants the exemption. The form may be adjusted by the taxpayer as necessary when doing his return or by adding an explanatory note. Whatever the intent of the Minister (or policymaker) the words of the relevant statutory provision, takes effect. I agree, as submitted by Mr. Hemmings for the Claimant that a taxing Statute is to be construed liberally in favour of the subject, **Benion on Statutory Interpretation** 5th Edition page 375 *et seq* v. See also **Ramsay Ltd. v IRC** [1981] 1 All 865. Insofar, as the exemption is concerned there is no ambiguity in the words which grant the exemption.

[54] Contrary to the evidence of Miss Pamela Folkes of the Ministry of Finance and to the recommendations in the Technical Note, the exemption on a literal reading applies to each call category. In this regard I am cognizant that the tax authorities are not party to this suit. Indeed one wonders, since both parties have been paying the same tax to them why where they not joined as an Ancillary Defendant for the purpose of indemnity or recovery. The authorities were however aware of the suit and also did not seek to intervene.

[55] The Defendant urged me to adopt a “purposive” approach and submitted that the Technical note revealed an intention to only apply the exemption to outgoing international calls. Heavy reliance was placed on ***Digicel v Fair Trading Commission [2014] JMCA Civ 48*** as authority for such an approach. That case and the other cases cited are authority for the proposition that where a commercial absurdity or grave injustice or unjustifiable inconvenience will result from a literal construction the court will adopt a more purposive approach. In so doing regard may be had to external sources. In this regard see also ***Her Majesty the Queen v Dean Ast, in his capacity as Executor of the estate of Harold Ast Deceased [1979] 3 FCR86 per Isaac CJ:***

“Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the Scheme of the Act, the object of the Act and the intention of Parliament.

Purposive interpretation cannot override the statutory language selected by Parliament if it’s meaning and applications are clear and plain.”

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

[57] The Claimant as I have found failed to tender the properly computed deposit. This means that the Defendant was not obliged to turn on the switch. The said payment being a precondition to interconnection. The claim therefore fails.

[58] The Defendant by way of counterclaim seeks damages being primarily the tax invoiced but not paid. The Defendant seeks also a Declaration that it is entitled to terminate the contract due to the Claimant's failure to pay the tax portion of each monthly invoice. The court has to bear in mind that by interlocutory Order of this court the Defendant was compelled to interconnect. By that Order the Claimant was ordered to pay the deposit "excluding the Telephone Call Tax." The parties did not return to court for directions in respect of whether the Tax was payable as per the monthly invoices and if so by whom.

[59] In these circumstances, the Claimant cannot be said to have acted in breach of the Interconnection Agreement when it paid the invoices without including the relevant tax. This is because implicit in the Order made by Brown J was a permission, until the trial of the action, for the tax not to be included in the invoice. Indeed Mr. Robinson, when giving evidence on behalf of the Claimant, said he paid the invoices without the tax "as per Court order." I therefore hold that the payments pursuant to the interlocutory order do not give a right of termination. The Defendant is protected by the Claimant's undertaking as to damages. See Affidavit of Rory Robinson filed on the 25th July 2014 at paragraph three. It is that to which the Defendant may have recourse given the final determination of these issues.

[60] The position is therefore as follows:

- a) The Defendant was entitled to include the relevant tax (with a 30% exemption) when computing the required deposit.
- b) This notwithstanding the Defendant by virtue of the interim order of the Court was compelled to provide interconnection thereby implementing the agreement, until the trial of this action.

- c) The monthly invoices were, consistently with the terms of the interim order, paid minus the relevant tax.
- d) The Court has now decided that the relevant tax (along with the appropriate exemption) is properly part of the deposit and ought properly to be invoiced.
- e) However the correct deposit was not demanded by the Defendant in the first instance, as no allowance was made for the exemption.
- f) In the event the Claimant does not now tender the appropriate deposit and/or in the event the Claimant fails to pay the monthly invoice (inclusive of the tax), the Defendant will be able to take such steps to enforce or terminate the agreement and/or claim damages as they may be advised.

[61] In the result, and for the reasons stated in this judgment, my decision, is as follows:

- 1) Judgment for the Defendant against the Claimant, the claim is therefore dismissed
- 2) The Defendant's counterclaim is also dismissed and there is judgment for the Claimant on the Defendant's counterclaim.
- 3) The Defendant is at liberty to pursue recovery pursuant to the Claimant's undertaking as to damages. The court will give directions accordingly after hearing further submissions.
- 4) The Defendant is awarded 2/3rd of the costs of this action because the greater time and effort was taken on the issues raised in the claim and because the Defendant succeeded in two of the three issues for determination. Such costs to be taxed or agreed.

David Batts
Puisne Judge
15th April, 2016