[2017] JMCC COMM14

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMERCIAL DIVISON

CLAIM NO. 2014CD00124

BETWEEN	**TRAILLE CARIBBEAN LIMITED**	**CLAIMANT**
AND	**CABLE & WIRELESS JAMAICA LIMITED (Trading as LIME)**	**DEFENDANT**

IN OPEN COURT

Mr. Sylvester Hemmings for the Claimant

Mrs. Denise Kitson Q.C., Mr. Kevin Williams and Mr. David Ellis instructed by Grant Stewart Phillips Attorneys-at-law for the Defendant

15th December 2016, 30th March, 2nd May and 22 May 2017

Assessment of Damages – Enforcement of undertaking as to damages – Whether loss arising from Court ordered mandatory injunction - Whether loss suffered by Defendant ought to be calculated at the contractual or commercial interest rate

LAING, J

[1] This is an application by the Defendant to enforce an undertaking as to damages. Before embarking on the enquiry it is necessary for the court to give a brief history as to the factual matrix which led to the need for this exercise.

The Background

[2] The Claimant is a company duly registered under the laws of Jamaica. It was the intention of the principals behind the Claimant that it would enter the telecommunications industry and the Claimant negotiated with international carriers in the USA to terminate calls to mobile phones in Jamaica.

[3] The Defendant is one of the main telecommunications providers for the island of Jamaica and the services it provides include permitting the termination of international calls on its network and permitting international calls to transit its network for onward termination on other local networks.

[4] The Claimant and the Defendant ("the Parties") entered into a written interconnection agreement dated 4th March 2014 which provided the terms and conditions pursuant to which the Claimant would be permitted to connect its equipment to the Defendant's public network and by which the Defendant would connect its public voice network to the Claimant's equipment ("the Agreement").

[5] The physical infrastructure to enable the Agreement was put in place. All that was required thereafter was for the Defendant to "turn on the switch" to activate the connection. However a dispute arose between the Parties as to the methodology to be employed in calculating the deposit that the Claimant was required to pay pursuant to the Agreement.

[6] Clause 3 (c) of the Provisional Collection of Tax (Telephone Call Tax) Order 2012 ("the Call Tax Order ") provides, *inter alia*, that every applicable taxpayer who provides telephone service in Jamaica shall pay a tax on telephone calls from a point originating outside Jamaica and terminating on a public mobile network in Jamaica (referred to herein as the "Call Tax"). The Defendant contended that the three months deposit provided for in the Agreement should include an amount for "Call Tax" based on the forecast of the anticipated call

traffic. The Claimant on the other hand asserted that the Deposit should not include a sum for Call Tax.

[7] The Parties were unable to resolve the dispute and the Claimant filed its claim seeking specific performance of the Agreement, damages for breach of contract and other relief. The Defendant in its defence denied that it had breached the Agreement and relied on what it asserted was its legal obligation to pay the Call Tax.

[8] By Order of his Lordship Mr. Justice Glen Brown made on 15th August 2014, ("Justice Brown's Order") a mandatory injunction was granted compelling the Defendant "*to turn on the switch to allow the Claimant's to terminate international calls on its network until the trial of the claim herein*". Justice Brown also ordered the Claimant to pay the deposit "*excluding the Telephone Call Tax, as required under the terms of the Interconnection Agreement dated March, 4, 2014 executed between the parties*"." The Claimant paid the sum of J$1,710,900.00 to the Defendant on 12th September 2014. This sum represented the initial security deposit of the forecasted three months usage charges but excluded the applicable Call Tax. Once the Defendant commenced providing service to the Claimant, Call Tax would have been incurred in accordance with the Call Tax Order. Unfortunately, neither the Claimant nor the Defendant returned to the Court to seek clarification and/or directions as to which party was responsible to effect the payment of the Call Tax directly to the Government.

[9] Instead, the Defendant appealed the grant of the injunction to the Court of Appeal and sought a stay of the Order pending appeal. The application for the stay was considered on paper and a judgment delivered by Brooks, JA on 21 August 2014, refusing the application for a stay (the "Order of Brooks JA").

[10] The Defendant subsequently invoiced the Claimant for all applicable charges including the Call Tax but the Claimant did not make payments in respect of the Call Tax to the Claimant. In response to this non-payment, the Defendant by

way of an amended defence and counterclaim filed on 4th November 2015 also sought damages arising primarily from the Claimant's failure to pay the Call Tax in respect of which it had been invoiced. The Defendant also sought a Declaration that it is entitled to terminate the contract due to the Claimant's failure to pay the Call Tax portion of each monthly invoice.

[11] During the period that the Defendant provided service to the Defendant, another competing telecommunications provider, Digicel, issued its invoices to the Defendant in respect of termination charges for the international telephone traffic terminated by the Defendant on Digicel's network. These invoices included a charge for the applicable Call Tax for which Digicel had become liable by operation of the Call Tax Order. The Defendant settled these invoices in full.

[12] The Defendant therefore paid and remitted the sums accrued on the Claimant's invoices to the tax authority (directly and through its payments to Digicel). The Defendant asserts through its witness Mrs. Simone Wynter ("Ms Wynter"), the Manager in the carrier services division of the Defendant, that during the period September 2014 to October 2015 (when it received documents from the Claimant following an application to the Court) it was not aware that the Claimant was making payments in respect of the Call Tax directly to the Government and that as a consequence of the payments it made on behalf of the Claimant it has suffered loss. The Claimant on the other hand asserted that the Defendant was advised that it was paying its Call Tax directly and ought not to have paid it on the Claimant's behalf. The effect of the parties failing to resolve the issue of who should pay the Call Tax to the Government is that the state was paid twice.

[13] The Honourable Mr. Justice Batts heard the matter and on April 15, 2016 gave a written Judgment. The relevant findings for the purposes of this enquiry are to be found from paragraph 56 of his Judgment and I reproduce portions of the judgment *in extenso* since it evidences *inter alia*, the basis of the Defendant's application for the undertaking to be enforced. The learned Judge found as follows:

"[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.

[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 2/3 rd 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.*

[14] Ms. Wynter in giving evidence on behalf of the Defendant was permitted to amplify her witness statement dated 16th November 2015. She explained that the figure of $59,459,957.19 in her witness statement filed 18th November 2018 should in fact have been $58,742,945.52 which represents the Call Tax paid on the Claimant's behalf for calls terminated on the Defendant's network as well as Digicel's network up to August 2015. The sum of $63,269,593.35 being the sum due to September 2015. She further corrected her supplemental witness statement to indicate that the correct figure for the payment made by the Claimant to the tax office is $71,787,806.13. Ms. Wynter explained that although the total amount of Call Tax paid by the Defendant to the Government and Digicel was $104,575,544.75 the effect of the Court's ruling that only seventy percent of the Call Tax was payable meant that the figure should correctly have been $73,202,881.33.

[15] The first position advanced by the Claimant is that when one looks at the Defendant's final overall position in the round, the Defendant has not suffered any loss as a result of the injunction. The Claimant asserted though its witness and managing director Mr. Rory Robinson, that in actual fact, a result of the claim and the judgment of Justice Batts was that pursuant to clause 5 of the Call Tax Order, it was entitled to a thirty percent waiver of the Call Tax. The Claimant

asserted that as a result of the claim and Justice Batts' judgment as it relates to applicability of the 30 percent allowance or exemption, the Defendant stood to benefit in the sum of billions of dollars which it would have otherwise paid had Justice Batts not clarified this issue. He asserted that the Defendant became entitled to a significant rebate from the Government for the overpayment it had made to the Government before justice Batt's clarification. This benefit, the claimant argues was a consequence of the claim against the Defendant and the ensuing injunction and should therefore be set off against any direct monetary loss as result of the injunction. I did not find any merit in that submission and I have not been provided with nor have I identified any authority which supports a set-off in the manner which the Claimant submits ought to be done.

[16] The second position advanced by the Claimant is that pursuant to the order of Justice Brown it was not obliged to pay the Call Tax over to the Defendant. This position is arguably supported by the previously quoted finding of Justice Batts at paragraph 59 of his judgment which I again reproduce for emphasis.

> *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"...*

[17] The Claimant not only concluded that it was implicit in Justice Brown's Order that it not pay the Call Tax as required for the deposit to the Defendant but also that it should not pay the Call Tax as per subsequent invoices. However the genesis of the problem lies in the fact that the Claimant went further still and concluded that implicit in the order of Justice Brown was permission to pay the Call Tax directly to the Government instead. The Claimant therefore asserted that the Defendant ought not to have paid the Call Tax. In fact, the Defendant went further to ascribe a less than pure motive on the part of the Defendant in doing so when it was suggested to Ms. Wynter that the defendant "*deliberately and calculatedly paid Mr Robinson's taxes to build a case*".

[18] The Claimant submitted that the Defendant could have attempted to take advantage of sections 8(1)(a) and 8(1)(b) of the Call Tax Act which provides that:

> *....where no payment of taxes made on the date on which tax is due and payable the Commissioner General may, if satisfied that the delay in payment is not due to any wilful neglect or default on the part of the applicable tax payer specify a time within which tax is to be paid".*

I do not find any merit in this submission. It would have been unreasonable for the Defendant to seek to use Justice Brown's order to justify its non- compliance with a clear statutory obligation. In any event, it is doubtful whether the Commissioner General or Digicel would have found the non-payment and this explanation therefor, acceptable.

[19] The issue was raised as to the point at which the Defendant became aware that the Claimant was paying the Call Tax directly to the Government and whether in view of this knowledge it was reasonable for the Defendant thereafter to pay the Call Tax on behalf of the Claimant. The Claimant submitted that the Defendant was informed from the 13th day of October 2014 that the Claimant was paying its Call Tax to the Commissioner General. The evidence of Ms. Wynter which I accept as true is that Mr Robinson of the Claimant did not provide any documentary evidence to support his assertion that the Claimant was paying the Call Tax directly to the Government. In any event, for reasons which will become apparent in subsequent paragraphs, I am of the view that the resolution of the issue as to when the Defendant was first notified that the Claimant was paying the Call Tax directly to the Government is not necessary to the assessment of damages.

[20] In my view it is clear that even if "*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"* as Mr. Justice Batts found, it was an unreasonable stretch by the Claimant to conclude that the Claimant was authorised to pay the Call Tax directly to the Government. As Counsel for the Claimant expressed in paragraph 5 of his written closing submissions:

> *"The Claimant took the view from this order [of justice Brown] that invoices were invoices and so any invoice that was referred to him pertaining to applicable tax he should pay over to the Commissioner General excluding the 30% waiver and so he paid to the Defendant the amount on all invoices save applicable tax and paid to the Government the amount of applicable tax submitted on the invoices where it was correct less the 30% waiver which he disputes is not applicable at all.*

[21] As a matter of law the payment of the Call Tax is primarily the responsibility of the Defendant, which recoups that Call Tax from its clients, such as the Claimant, where applicable. Justice Brown's Order did not have the effect of discharging the Defendant of that liability and responsibility. It remained the responsibility of the Defendant at all material times and the Claimant could not have unilaterally displaced the Defendant as the party responsible to make the payments. Similarly, the Claimant's bare assertion that it was making the payments could not provide a sufficient basis in law or as a matter of prudent commercial practice, for the Defendant to cease making the payments. The requirement for the Defendant to repay Digicel for its invoiced Call Tax expenditure further demonstrates why Justice Brown's Order could not have been intended to have that effect, since the Defendant's failure to pay Digicel, had it so failed, could have resulted in Digicel disconnecting the Defendant from its network with disastrous financial and reputational consequences for the Defendant.

[22] The Order did not expressly or by implication direct the Claimant to make payments directly to the Commissioner General or any other organ or agent of the Government. The Claimant voluntarily took the risk and at its own peril placed a construction on Justice Brown's Order which was not supported or justified in law and must bear the consequences of having adopted this course.

[23] The Claimant through its witness Mr. Rory Robinson also asserts that it found support for its decision to pay the Call Tax directly to the Government in the Judgment of Brooks, JA. As it relates to the possibility that the Claimant would not pay its bill as raised by the Defendant, Brooks JA commented as follows:

> *"...Secondly, the fear of being prejudiced has been predicated on the possibility that Traille may not pay its bill, by which payment LIME would*

> *recover the payment for TCT. Ms Hines gives no basis for contemplating the non-payment of the bill. She does not even suggest that Traille is likely to default in making payment".*

There is nothing in the Judgment of Brooks JA which indicates that the learned judge was contemplating that the Claimant would be paying the Call Tax directly to the Government nor is there any statement which expressly permits the Claimant to do. I am therefore unable to identify any portion of that judgment which could reasonably be construed as permitting that course and neither could Mr. Robinson which he was pressed in cross examination to do so.

[24] The effect of Justice Brown's Order was that the Defendant as a matter of operation of law, incurred Call Tax liability arising from its provision of interconnection to the Claimant and its payment of that Call Tax. The Defendant has also suffered loss and damages because it has not been compensated for its expenditure of $1,415,075.19 which it paid on the Claimant's behalf. In my enquiry, I therefore find that the Defendant ought to be compensated for the loss it incurred in having to pay this sum.

[25] The issue as to whether the Claimant ought to be liable to repay the Defendant for the amount that the Claimant had in fact paid to the Government does not fall for determination by this Court. The Defendant is seeking to have the Government set off those payments against the Defendant's future Call Tax liability and consequently what the Defendant is seeking to recover as damages is interest on the Call Tax Paid only (save for March 2016 which is not included by agreement) and the shortfall of $1,415,075.19 which was Call Tax liability of the Claimant which it did not pay directly to the Government but which the Defendant paid on the Claimant's behalf.

[26] In the case of **F. Hoffman-La Roche & Co. A.G. & Others v Secretary Of State For Trade And Industry** Lord Diplock opined:

> *"The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the*

> *defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempt, but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant, that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction:* ***see Smith v. Day (1882) 21 Ch.D. 421, per Brett L.J., at p. 427."14***

The Claim for Interest

[27] Learned Queens' Counsel for the Defendant has submitted that damages should be assessed based on general contract principles and this being so the Agreement provided a mechanism for the payment of interest on sums which ought to have been paid by the Claimant to the Defendant. That agreed rate is the base lending rate of the Bank of Nova Scotia plus 2 percent. Evidence was produced to demonstrate that the base lending rate was 15.75 percent and it was submitted on behalf of the Defendant that the applicable interest rate ought to be 17.75 percent.

[28] The Defendant further submitted that the damages that the Court should award to the Defendant are those amounts derived by the method of computation outlined in the evidence of Ms. Wynter. Ms Winter has produced an "*Amended Spreadsheet Special Call Tax Invoices and Payments*" and a "*Revised Spreadsheet of Damages Claimed Interest Calculation on Payments by CWJ September 2014 -February 2016 Plus Shortfall and Per Diem Rate*": The interest calculation used is at the rate of 17.75 percent.

[29] In my view the undertaking as to damages given by the Claimant was to cover the loss occasioned by the Defendant having to provide interconnection services

pursuant to the order of Justice Brown. The damages suffered by the Defendant arise from al the payments paid to the Government and the cost to the Defendant or the loss occasioned by it as a result of it being kept out of this money. I find that this loss to the Defendant ought to be calculated at the commercial lending rate.

[30] In my view, in circumstances such as those under consideration, the Court in assessing the true loss of the Defendant is conducting an exercise similar to that of a Court assessing the loss of a Plaintiff being kept out of money. In this exercise, the Court ought to adopt a similar approach as would a Court compensating a plaintiff's loss by an award of interest. Forbes J in **Tate & Lyle Food Distribution Ltd. v Greater London Council & Anor** [1981] 3 All ER 716 as to the basis for awarding interest at page 722 as follows:

> *Despite the way in which Lord Herschell LC in London, Chatham and Dover Railway Co v. South Eastern Railway Co. [1893] AC 429 at 437 stated the principle governing the award of interest on damages, I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money. I think the principle now recognised is that it is all part of the attempt to achieve restitution in integrum. One looks, therefore, not at the profit which the defendant wrongfully made out of the money he withheld (this would indeed involve a scrutiny of the defendant's financial position) but at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates, the correct thing to do is to take the rate at which plaintiffs in general could borrow money."*

Notably, the Court also sanctioned the use of Bank of Jamaica Statistics as to the appropriate commercial rate.

[31] In light of that finding the Revised Spreadsheet of Damages Claimed in the form as originally filed and the per diem amount contained therein was not of any assistance to the Court in its assessment. I therefore invited Counsel to make

additional submissions on this point. Mr Hemmings submitted that it was impermissible for the Defendant to provide the Court with any further information as to the commercial interest rate since this was not pleaded and that if this were allowed the Defendant would be getting a third bite at the cherry. I do not agree with these submissions of Counsel. The Court is carrying out a mathematical exercise and there is no prejudice to the Claimant by the Defendant reformulating its spreadsheet using the Bank of Jamaica weighted average lending or commercial rate which is publicly available at its websites www.boj.org.jm and providing same by way of a filed affidavit as it has done. I accept the evidence provided by the Defendant as to the calculation of the interest on the amounts paid in accordance with the Revised Spreadsheet of Damages Claimed.

[32] In the premises, for the reasons stated above, the Court assesses the damages to be paid to the Defendant as follows:

(i). $1,415,075.19 being the shortfall of the Claimants payments to the Government of Jamaica which is irrecoverable by the Defendants as a set-off:

(ii). Interest on $65,986,564.57 in the sum of $20,556,493.00;

(iii). Per diem interest at $28,596.00 from 1st May 2017 to 22nd May 2017 in the sum of $629,112.00

Order:

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

2. Costs to the Defendant to be taxed if not agreed. (Amended and inserted pursuant to the slip rule)