[2023] UKPC 19
Privy Council Appeal No 0028 of 2021

JUDGMENT

Traille Caribbean Ltd (Appellant) v Cable & Wireless Jamaica Ltd (Trading as Lime) (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Briggs
Lord Kitchin
Lord Hamblen
Lord Burrows
Lord Richards

JUDGMENT GIVEN ON
1 June 2023

Heard on 22 March 2023

Appellant
Dr Lloyd Barnett
Weiden Daley
Shaydia Sirjue
(Instructed by Simons Muirhead Burton LLP (London))

Respondent
Denise E Kitson KC
Kevin A Williams
Rachel Kitson
(Instructed by Axiom DWFM (London))

LORD HAMBLEN AND LORD BURROWS:

1. Introduction

1. Traille Caribbean Ltd ("Traille") and Cable & Wireless (Jamaica) Ltd (trading as Lime) ("CWJ") are companies involved in the telecommunications industry in Jamaica. Traille's business model has been to enter into agreements with overseas telecommunications companies under which Traille is paid to terminate overseas mobile phone calls on various networks in Jamaica: ie Traille's role is to connect the overseas calls to, and in that sense terminate those calls on, those networks. This model was dependent on an interconnection agreement ("the contract") entered into on 1 November 2013 between Traille and CWJ, which had a network in Jamaica. The overseas calls would terminate on the CWJ network or would be transferred by CWJ to another network (in particular the network of a company called Digicel Jamaica Ltd).

2. This case is concerned with a dispute as to the interpretation of the contract between Traille and CWJ and, in particular, the impact of the Telephone Calls Tax ("TCT") which was introduced by the Provisional Collection of Tax (Telephone Calls Tax) Order 2012 ("the 2012 Order") and came into force on 30 August 2012. The TCT imposed a charge of US$0.075 per minute on international calls terminating on a network in Jamaica.

3. Under clause 28.2 of the contract, CWJ was entitled to insist on an initial security deposit. CWJ has argued throughout that it was entitled to add the TCT to the amount required to be paid by Traille as the security deposit and that, until the security deposit including the TCT was paid, CWJ was contractually entitled to refuse to turn on the switch enabling Traille to connect international calls to CWJ's network. On 1 May 2014, the Office of Utilities Regulation ("OUR") determined in favour of CWJ that it was appropriate for CWJ to include the TCT in the security deposit.

4. A further dispute arose as to the 30% tax exemption from TCT provided for in the 2012 Order. Traille considered that that exemption meant that there should be a 30% deduction from the tax element in calculating the security deposit but CWJ disagreed.

5. In July 2014, Traille brought an action for breach of contract against CWJ for failure to turn on the switch to allow Traille to terminate international calls on CWJ's network. On 15 August 2014, Brown J granted Traille an interim mandatory injunction

requiring CWJ, once the deposit without the inclusion of the TCT was paid, to turn on the switch. In obtaining that interim injunction, Traille gave the usual undertaking in damages (ie it undertook to compensate CWJ for loss caused if it transpired at trial that the interim injunction should not have been granted).

6. On the trial of the substantive issues, Batts J in a judgment dated 15 April 2016 largely held in favour of CWJ and gave CWJ permission to pursue recovery on Traille's undertaking in damages. On 22 May 2017, Laing J delivered judgment on the undertaking in damages holding that CWJ was entitled to recover as its loss J$22,600,680.19 plus interest at the rate of 6% per annum from the date of judgment plus costs.

7. Traille appealed against the decisions of both Batts J and Laing J. The appeals were consolidated. The judgment of the Court of Appeal (Brooks JA, with whom Sinclair-Haynes and Williams JJA agreed) was delivered on 31 July 2020. The appeals of Traille were dismissed with costs. Traille now appeals to the Board.

8. Although several other issues have been canvassed over the course of the dispute, there are four issues which the Board has to decide in order to determine this appeal. They are as follows:

(i) Issue 1: who was liable under the 2012 Order for the payment of TCT to the Tax Administration Jamaica ("TAJ")?

(ii) Issue 2: was CWJ contractually entitled to include the TCT in calculating the amount of the security deposit?

(iii) Issue 3: was CWJ contractually entitled to refuse to turn on the switch because of the non-payment of the deposit demanded (and taking into account that there was a 30% tax exemption)?

(iv) Issue 4: if the interim mandatory injunction ordering CWJ to turn on the switch should not have been ordered (because CWJ was contractually entitled to refuse to turn on the switch), what loss is CWJ entitled to be compensated for under Traille's undertaking in damages?

9. The first three of these issues concern the Court of Appeal's decision on the appeal from Batts J and the fourth issue concerns the Court of Appeal's decision on the appeal from Laing J.

2. Relevant provisions of the 2012 Order

10. The 2012 Order was gazetted, and therefore came into force, on 30 August 2012. The provisions that are relevant to this case are as follows.

> "**2. Interpretation**
>
> In this Order—
>
> '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; …
>
> 'carrier' has the meaning assigned to it by section 2 of the Telecommunications Act; …
>
> 'service provider' has the meaning assigned to it by section 2 of the Telecommunications Act; …
>
> 'telephone service' means the provision of telecommunications comprising wholly or partly of real time or near real time audio communications utilizing a telephone; …
>
> **3. Tax on telephone call services**
>
> Subject to the provisions of this Order, every applicable taxpayer who provides telephone service in Jamaica shall pay to the Commissioner General, a tax on telephone calls (hereinafter referred to as 'the tax') as provided—

(a) …

(b) …

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

4. Rate of tax

(1) The tax payable under paragraph 3, is the amount calculated based on the duration of the telephone calls, measured in the total number of minutes, during the taxable period at the rates specified in the First Schedule. …

5. Exemptions

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

(a) …

(b) in respect of thirty per cent of the taxable call minutes in each transaction month for each call category;…

6. Returns required from applicable taxpayer

(1) An applicable taxpayer shall, within the calendar month next following the preceding taxable period, whether or not he provides a telephone call service during that taxable period—

(a) furnish to the Commissioner General a return in the form set out in the Second Schedule; and

(b) pay to the Commissioner General the amount of tax, if any, payable by that applicable taxpayer in respect of the taxable period to which the return relates. …"

11. Under the First Schedule, the "Rate of Tax Payable" on "Telephone calls provided from a point originating outside of Jamaica and terminating on a public mobile network in Jamaica" was specified as being US$0.075 per minute.

3. Relevant provisions of the contract (between Traille and CWJ)

12. In the contract, CWJ is referred to under its trading name as LIME; and Traille is referred to generically as "Telco" or "a Telco" or "the Telco".

13. Clause 9 of the contract is headed "Charges and Payment" and clauses 9.1 and 9.7 read as follows:

"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."

14. Clause 28 of the contract was headed "Guarantee and security deposit". Clauses 28.2 and 28.3 provide as follows:

"28.2 In addition to the guarantee required pursuant to Clause 28.1, LIME may require a Telco without sufficient immovable 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 the 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.
>
> 28.3 In the event that Telco's Services usage during the first seven days of a Billing Period reasonably indicates to LIME that the Usage Charges which will be payable by Telco to LIME at the end of such Billing Period shall exceed the Deposit, LIME may request that Telco shall, within a minimum period of five (5) Business Days of the request from LIME, increase the Deposit. The increased Deposit shall be a sum which covers the projected Usage Charges for the Billing Period based on the Services usage during the first seven days of that Billing Period."

15. In the Definitions provision, "Charges" are defined as "The amounts specified in the Tariffs Schedule and described in the Service Descriptions which are payable pursuant to Clause 9 of the [Contract]." "Usage Charges" are defined as "The usage related charges that are specified in the Tariffs Schedule and are payable by Service Taker to Service Supplier."

4. The judgments of Batts J and the Court of Appeal on the first three issues

(1) Issue 1

16. Batts J dealt with the first issue at paras 45-49 of his judgment. His reasoning was that, applying paragraph 3 of the 2012 Order, in order to be the applicable taxpayer one must provide a telephone service in Jamaica. Traille was not providing a telephone service in Jamaica because it had not established a network and was rather collecting calls from international carriers and passing them on to CWJ. Applying

paragraph 3 of the 2012 Order, it was therefore CWJ and not Traille that was the applicable taxpayer.

17. In support of that interpretation, Batts J relied on a Technical Note on the Special Telephone Call Tax, produced by the Ministry of Finance and Planning (the "Technical Note") dated 13 July 2012 (which was over a month prior to the coming into force of the 2012 Order). That Technical Note contained the following:

> "The tax is to be paid by a terminating carrier in the case of international incoming calls … Terminating carrier means a carrier who provides termination services on its public network… 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…"

18. In considering that Technical Note, at para 49 of his judgment, Batts J found it clear on the evidence that the terminating carrier was CWJ. Traille was not a terminating carrier and had no public network. It was therefore CWJ and not Traille that was legally bound to pay TCT to the TAJ.

19. The Court of Appeal upheld Batts J on Issue 1 at paras 36-54 of Brooks JA's judgment. However, in contrast to Batts J, Brooks JA regarded paragraph 3 of the 2012 Order as not being determinative. In his view, one could interpret that paragraph as referring to both CWJ and Traille rather than just CWJ. For Brooks JA, therefore, it was the Technical Note (and he cited para 49 of Batt J's reasoning on the Technical Note) that was crucial in deciding that it was CWJ, not Traille, that was liable under the 2012 Order for the payment of TCT to the TAJ.

(2) Issue 2

20. Batts J dealt with Issue 2 at paras 41 to 44 and 50 of his judgment. He held that, although by clause 28.2 the security deposit should not exceed three months usage charges, that clause had to be read along with clause 9.7. And under clause 9.7, TCT was an applicable tax that was to be added to the charges. The correct interpretation, therefore, was that the amount of the security deposit was to be calculated according to the estimated usage charges including the TCT payable. Further, any other

interpretation would mean that the security deposit would not fulfil its purpose of providing protection against default.

21. Brooks JA upheld Batts J's decision and reasoning on Issue 2 at paras 55-71 of Brooks JA's judgment. He rejected the submission on behalf of Traille that Batts J had confused the deposit with the usage charge. Although the Tariffs Schedule expressly stated that all tariffs were subject to General Consumption Tax ("GCT"), that did not mean that the applicable tax to be added to the charges under clause 9.7 was confined to GCT. CWJ was liable to pay over both GCT and TCT to the TAJ. Additionally, the purpose of the security deposit indicated that TCT should be included in the amount of the deposit.

(3) Issue 3

22. On issue 3, dealt with by Batts J at paras 51-57 of his judgment, he decided that, while there was a 30% tax exemption, CWJ were contractually entitled not to turn on the switch because Traille had failed to tender the properly computed deposit; and payment of the correct deposit was a precondition to interconnection.

23. The decision and reasoning of Batts J on Issue 3 were upheld by Brooks JA at paras 72–93 of his judgment. Having considered the relevant emails, he said that, strictly speaking, Traille had not made an offer to pay the deposit including the TCT (minus the 30% tax exemption). Traille's stance had been that the deposit should not include TCT. Moreover, Traille should have accepted the ruling of the OUR– that it was appropriate for TCT to be included in the deposit – as final and binding.

5. The judgments of Laing J and the Court of Appeal on the fourth issue

24. The consequence of Batts J's decision that CWJ was contractually entitled not to turn on the switch was that the interim mandatory injunction granted by Brown J ordering CWJ to turn on the switch should not have been made (as viewed, with the benefit of hindsight, after the determination of the issues at trial). CWJ was therefore entitled to damages to compensate for its loss under the undertaking in damages given by Traille. The enquiry as to damages under the undertaking was conducted by Laing J.

25. Laing J decided that, prima facie, the loss comprised the shortfalls in monthly payments of charges made by Traille plus lost interest on those shortfalls. Traille made

the monthly payments less the TCT. The correct amount of monthly charges should have included that TCT minus the 30% exemption. At paras 15–24, Laing J rejected a number of submissions by Traille to the effect that CWJ's loss had been mitigated (ie that there were benefits that offset the loss) and that CWJ had failed in its duty to mitigate.

26. However, it transpired that Traille had been paying direct to TAJ the TCT (minus the 30% exemption). The TAJ had therefore been receiving two lots of payments of TCT (minus the 30% exemption), one lot by CWJ, who was legally bound to pay the TCT, and the other lot by Traille. As explained by Laing J at para 25, the TAJ would be giving CWJ a set-off, of the TCT paid by Traille, against CWJ's future liability to pay TCT.

27. The outcome of that set-off was that CWJ would almost entirely recoup the shortfalls in monthly charge payments that Traille should have been making to CWJ. What CWJ was therefore entitled to as damages was not compensation for the loss comprising the shortfalls (because they had been recouped through the set-off) but compensation for the lost interest from not having had the use of the full monthly payments.

28. Laing J explained that the shortfalls amounted to J$73,202,881.33. But there was an agreed reduction in respect of the month of March 2016 so that that sum was reduced to J$65,986,564.57 (see Laing J at paras 14, 25, and 32(ii) and the affidavit explaining this of Simone Wynter dated 16 May 2017). Laing J decided, at paras 30-31, that the interest as damages on those sums should be calculated using the base lending rate of the Bank of Jamaica (rather than the contractually agreed interest rate based on the Bank of Nova Scotia base lending rate plus 2%). In addition, Traille did not pay all the tax it should have done ie it still owed J$1,415,075.19 to TAJ so that that would not be recouped by CJW.

29. As a result of this reasoning, Laing J assessed the damages, at para 32, as being:

(i) J$1,415,075.19 (as the shortfall of sums of TCT paid by Traille that CJW could not set off);

(ii) Interest on J$65,986,564.57 = J$20,556,493

(iii) Interest at a daily rate of J$28,596 from May 1, 2017 to date of judgment on 22 May 2017 = J$629,112.

30. Therefore, the overall assessment of damages was J$22,600,680.19 plus statutory interest at 6% from 22 May 2017 (the date of judgment).

31. The Court of Appeal upheld the decision and reasoning of Laing J. At paras 147–162 Brooks JA rejected a number of submissions on causation, the duty to mitigate, and mitigation of loss put forward on behalf of Traille. For example, Brooks JA rejected the submission that CWJ should have stopped paying TCT to the TAJ once it knew that Traille was paying the tax directly. In the view of Brooks JA, CWJ had acted reasonably in a situation where it was legally liable to pay TCT on pain of paying a penalty of 15% for non-payment. Traille also submitted that CWJ should have used section 8(1)(a) and (b) of the Telephone Calls Tax Act 2017 to avoid paying the tax on the basis that the non-payment was not due to wilful neglect or default on the part of the taxpayer. But as Brooks JA pointed out at para 158, that Act was not in force during the relevant period.

6. The Board's reasons for dismissing the appeal on all four issues

(1) Issue 1: who was liable under the 2012 Order for the payment of TCT to the TAJ?

32. Under paragraph 3 of the 2012 Order, TCT was to be paid by "every applicable taxpayer" who "provides telephone service in Jamaica" (see para 10 above).

33. Counsel for Traille, Dr Lloyd Barnett, submitted that Traille was an "applicable taxpayer" as this is defined in paragraph 2 as "a carrier or service provider who is registered pursuant to section 27 of the General Consumption Tax Act" (see para 10 above) and Traille was so registered. Further, under the contract Traille was recognised as providing telephone services.

34. Batts J found, however, that Traille did not provide a telephone service in Jamaica within the meaning of the 2012 Order (para 47). That is the critical question; not whether Traille may have been treated as a service provider under the contract. Although Traille had a carrier's licence and a service provider licence it had chosen not to establish a network in Jamaica, as was confirmed by its principal witness in evidence, Mr Robinson. He agreed in terms that Traille did not provide a telephone

service in Jamaica and that, although Traille had a licence to do so, he did not want to. As the Judge found, it was CWJ, not Traille, who provided a telephone service and therefore CWJ, not Traille, who was liable to pay TCT.

35. This conclusion is confirmed by the Technical Note which Dr Barnett accepted could be relied upon as an aid to interpretation provided it did not contradict the terms of the 2012 Order. It makes clear that it is the "terminating carrier" who is to pay TCT.

36. Batts J found that the terminating carrier was CWJ, not Traille. At para 49 he said:

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

37. The Court of Appeal confirmed that finding. At para 54 Brooks JA said:

> "Accordingly, from a reading of the statutes and the Technical Note, it must be found that CWJ is the terminating carrier, with responsibility to pay the TCT to the tax administration. This finding has repercussions…"

38. Dr Barnett submitted that in acting as the terminating carrier CWJ was acting as Traille's agent and that it should therefore be regarded as the terminating carrier. The identity of the terminating carrier depends on how the carrier acts, not on how its role is described in contractual arrangements. In any event, the Court of Appeal was justified in finding that CWJ was not Traille's agent (para 53). As Brooks JA pointed out,

there was no evidence to show, for example, that CWJ had any authority to create legal relations between Traille and third parties.

39. The Board agrees with both the Court of Appeal and Batts J that it was CWJ who was liable under the 2012 Order for the payment of TCT. That interpretation can be reached without reference to the Technical Note but, if there were any doubt about that, the Technical Note makes the position absolutely clear. That finding is relevant to the proper interpretation of the contract as one would reasonably expect it to provide for indemnification of CWJ in respect of any such liability. The extent of such liability depended on usage which was a matter outside CWJ's control. The liability was also significant, being many times greater than the charge for usage.

(2) Issue 2: was CWJ contractually entitled to include the TCT in calculating the amount of the security deposit?

40. The first matter to be addressed in considering this issue is whether Traille was obliged to pay TCT under the contract. Clause 9.7 of the contract provided that "where appropriate, any value added or other applicable tax" shall be added to the charges payable (see para 13 above). TCT was not a value added tax but it was an "applicable tax". As such, Traille was obliged to pay it to CWJ. This accords with the fact that it was CWJ who was liable to pay TCT to the tax authorities.

41. If the monthly charges are to include TCT one would expect an initial security deposit which is meant to represent three months of charges to do likewise. That would represent a consistent and coherent contractual regime. Dr Barnett, however, contended otherwise.

42. Clause 28.2 states that the amount of the security deposit "shall not exceed the sum of three months Usage Charges for all Services forecast to be used" (see para 14 above). "Usage Charges" are defined in the contract as being the "usage related charges that are specified in the Tariffs Schedule" (see para 15 above). The Tariffs Schedule does not specify for the payment of TCT. Accordingly, Dr Barnett submitted that the security deposit does not include payment of TCT and the courts below were wrong to hold otherwise.

43. It is to be noted that usage charges for Incoming International Call Termination Service (which is admitted to be the service being provided by CWJ to Traille) include charges such as a call duration charge and a call set up charge, as set out at clause

1.5.2 of the Service Descriptions of the contract, Part I and II. Clause 1.5.1 states that charges are "the sum of applicable Usage Charges" and that charges set out in the Tariffs Schedule for the incoming international call termination service "are payable in accordance with clause 9 of the Legal Framework". That is a reference back to clause 9 of the contract, including clause 9.7 and the obligation to pay applicable taxes, such as TCT.

44. Clause 9.7 itself provides that "where appropriate" TCT as an "applicable tax" is to be added to all "Charges under this Agreement". It follows that, where clause 28.2 provides for a security deposit in an amount not exceeding "three months Usage Charges", TCT should be added to that amount.

45. For all these reasons, the Board considers that, construing the contract as a whole, payment of the initial security deposit was to include TCT.

46. This conclusion is borne out by the fact that the evident purpose of the security deposit is to provide protection against default and it would fail to do so if TCT was excluded. As Batts J said at para 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."

47. The Court of Appeal also rightly stressed this important consideration. At para 68 Brooks JA said:

> "[I]f the deposit is intended to protect CWJ from a defaulting Service Taker, the protection should not only protect it for the charges covering its costs and profit margin, but should also protect it from its exposure to the tax administration for both GCT and TCT. Indeed, it is common ground between the

> parties that the TCT on each invoice rendered by CWJ, is multiples of the amounts charged for its service. It is plain that without the TCT being factored into the deposit, CWJ would have very little in the way of the protection envisaged by the deposit."

48. The commercial absurdity of Traille's argument is borne out by the facts. The security deposit being offered by Traille was J$1,710,900 excluding tax. That sought by CWJ including tax was J$7,222,500. It is evident that the deposit was not going to provide "security" if it did not include TCT.

49. The Board therefore agrees with the Court of Appeal, Batts J and the OUR that CWJ was contractually entitled to include the TCT in calculating the amount of the security deposit.

(3) Issue 3: was CWJ contractually entitled to refuse to turn on the switch because of the non-payment of the deposit demanded (and taking into account that there was a 30% tax exemption)?

50. The obligation to connect the CWJ system to that of Traille was set out in clause 3.1 of the contract which provided:

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

51. The obligation to connect and thereby turn on the switch was therefore expressly made "subject to clause 28". Clause 28.2 obliged Traille to provide the initial security deposit "by the Ready for Service date of the first Joining Service" (see para 14 above). The "date of the first Joining Service" is when the service is first connected. On the proper interpretation of the contract as a whole the provision of the deposit was a condition precedent to the obligation to connect, as the courts below held (see paras 57 (Batts J) and 85 (Court of Appeal).

52. Dr Barnett contended that, even if that was so, Traille offered to pay the deposit including TCT (less a 30% deduction which was held by Batts J to be justified) but that this was refused by CWJ who made it clear that they would only accept payment with no deduction. Since Traille was willing to include 70% of the TCT in the deposit, and CWJ was unwilling to accept that reduced figure, it followed that Traille was entitled to the interim injunction and that CWJ was not entitled to any damages arising out of the grant of the injunction. There are a number of difficulties with this submission.

53. First, the Court of Appeal found that the emails relied upon by Traille did not amount to an "offer" to pay 70% of the TCT (para 80). This is borne out by Mr Robinson's affidavit evidence, as addressed below.

54. Secondly, there was no tender of the deposit as found by Batts J and confirmed by the Court of Appeal. Batts J said at para 57: "[Traille] as I have found failed to tender the properly computed deposit…". Brooks JA said at para 82 that, up to the time of the grant of the injunction, "Traille had not tendered anything which purported to be a deposit". He further stated at para 114 that "Traille did not tender the amount that Batts J ultimately determined to be the correct figure".

55. On this issue there are therefore concurrent findings of fact. As this Board has frequently emphasised, it is only in exceptional and limited circumstances that such findings will be disturbed: see, for example, *Devi v Roy* [1946] AC 508; *Dass v Marchand* [2021] UKPC 2, [2021] 1 WLR 1788, paras 15-17; *Sancus Financial Holdings Ltd v Holm* [2022] UKPC 41, [2022] 1 WLR 5181. There are no such circumstances in this case.

56. Even if it be the case that CWJ was saying that they would not accept a deposit that did not include 100% amount of the TCT, Traille never put that to the test by tendering the appropriate deposit. That was the performance required and the appropriate way for Traille to protect itself.

57. Thirdly, in any event it is apparent from the affidavit evidence of Mr Robinson, which was relied upon to support the application for the injunction, that Traille's position remained that no TCT was required to be paid as part of the deposit. In para 12 of that affidavit Mr Robinson stated that Traille "has offered to comply as per the signed agreement and [CWJ] has refused to accept the sums of J$1,710,900". That was Traille's calculation of the deposit excluding any TCT. Mr Robinson then said that CWJ was insisting on payment of TCT and explained at length why this was based on an incorrect interpretation of the contract and that Traille did not agree that TCT was to

be included in the deposit. As Brooks JA said (para 82), despite the emails now sought to be relied upon by Traille as amounting to an offer:

> "…Traille's adamant position, as advanced to CWJ, to the court below, and to this court, has been that the TCT is not to be included in the computation, and it is Traille which bears the responsibility of paying over the TCT. Up to the time that Brown J granted the injunction, Traille had not tendered anything."

58. The Board therefore agrees with the Court of Appeal and Batts J that CWJ was contractually entitled to refuse to turn on the switch because of the non-payment of the deposit.

(4) Issue 4: if the interim mandatory injunction ordering CWJ to turn on the switch should not have been ordered (because CWJ was contractually entitled to refuse to turn on the switch), what loss is CWJ entitled to be compensated for under Traille's undertaking in damages?

59. The leading case on the undertaking in damages given in support of an interim injunction is *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295. In a helpful passage at p 361, Lord Diplock said the following:

> "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 contempts, 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 LJ, at p 427."

60. Dr Barnett made a number of submissions on behalf of Traille in relation to Issue 4 that were the same or similar to the submissions made to, and rejected by, the lower courts.

61. First, Dr Barnett submitted that the interim injunction did not cause, or did not directly cause, any of the loss suffered by CWJ. The injunction did not require CWJ to pay TCT. CWJ's payment of the TCT was because of CWJ's own interpretation of the 2012 Order which, as now accepted, was incorrect to the extent that it did not apply the 30% exemption. The Board rejects this submission. The consequence of the injunction was that the contract was performed by CWJ and partly performed by Traille. This meant that, in accordance with the contract, CWJ provided the interconnection for the international calls terminated by Traille on CWJ's network which triggered the payment of the TCT. The payment of the TCT – and hence the loss of use of that money (requiring interest as damages) - was therefore caused, and directly caused, by the injunction.

62. It is also noteworthy that Dr Barnett's submission flatly contradicts a finding of Batts J on an issue that is no longer in dispute on this appeal. Batts J accepted that Traille could not be liable to CWJ for breach of contract because it was implicit in the grant of the injunction by Brown J that, until trial, Traille was permitted to pay the monthly charges without TCT (see Batts J's judgment at para 59). It was inconsistent with that finding for Dr Barnett before the Board to say that CWJ's payment of the TCT to TAJ was not caused by the injunction. Put another way, the loss was either caused by a breach of contract by Traille or by the injunction. It was unacceptably blowing hot and cold for Traille to rely on there being no breach of contract and yet still to say that the loss was not caused by the injunction.

63. Secondly, Dr Barnett submitted that CWJ failed in its duty to mitigate its loss by continuing to pay TCT after it should have known that Traille was also paying the TCT. But CWJ did press Traille for information and proof that Traille was paying TCT to the TAJ and that was not forthcoming until a late stage. In any event, we agree with the

Court of Appeal that CWJ had acted reasonably in paying TCT in a situation where it was legally liable to pay TCT on pain of paying a penalty of 15% for non-payment.

64. Thirdly, Dr Barnett argued that section 8(1)(a) and (b) of the Telephone Calls Tax Act 2017 (but he must have been meaning to refer to the same provisions in the 2012 Order because the 2017 Act was not in force during the relevant period) could have reasonably been invoked by CWJ to avoid paying the tax on the basis that the taxation issue was unclear so that non-payment was not due to wilful neglect or default on the part of the taxpayer. But again one cannot say that CWJ was acting unreasonably by paying the TCT on pain of penalty for non-payment rather than seeking to raise a reason for non-payment that may or may not have succeeded.

65. Fourthly, relying on the well-known case of *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (where the replacement turbines turned out to be more efficient and profitable than the old turbines would have been if non-defective) Dr Barnett submitted that CWJ's loss had been mitigated because it had derived considerable benefits from Traille's performance of the contract which offset the loss. One type of benefit that he argued should be taken into account were the service charges which were invoiced on a monthly basis. Dr Barnett submitted that CWJ would not have received those charges if the injunction had not required CWJ to turn on the switch. The Board rejects this submission because the service charges were being paid in return for the provision of services by CWJ. They were not therefore a windfall accruing to CWJ as a result of the injunction but were earned by the provision of services. In any event, Traille cannot establish that CWJ would not have derived the same benefits from other customers had it not been dealing with Traille. Another type of benefit which Dr Barnett submitted should be taken into account as offsetting the loss was the benefit CWJ derived from the recognition of the 30% exemption. It was argued that without the litigation with Traille, and the ruling by Batts J that CWJ was entitled to a 30% exemption, CWJ would have carried on paying 100%. But this is an example of a collateral and indirect benefit that will not be taken into account in assessing damages in contract: see, for example, *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (as regards the profits from the Ventilation Co shares). In any event, it is pure speculation and cannot be proved by Traille that CWJ would not otherwise have become aware of its legal rights.

66. Finally, Dr Barnett submitted, in reliance on *Sagicor Bank Jamaica Ltd v Seaton* [2022] UKPC 48, that CWJ was not entitled to interest as damages because loss of use is only recoverable where it has been pleaded and proved. But there are no formal pleadings in respect of damages on an undertaking in support of an interim injunction

and the important question therefore becomes whether Traille had inadequate opportunity to argue against, and was therefore prejudiced by, the award of interest as damages by Laing J. Plainly that was not the case. At the enquiry into damages before Laing J Traille had ample opportunity to argue that interest should not be awarded. Again there is no problem here about proof of loss. CWJ was not seeking any unusual loss of use; and a commercial entity such as CWJ will clearly suffer a loss of use, appropriately measured by simple interest at the local commercial lending rate, where it is deprived of money (here, by having to pay it over as tax to the TAJ).

67. The Board's conclusion on Issue 4 is that the decision and the essential reasoning of Laing J and the Court of Appeal were correct, that Dr Barnett's submissions before the Board should be rejected, and that the appeal on Issue 4 should therefore be dismissed.

7. Overall conclusion

68. For all the above reasons, the Board will humbly advise His Majesty that the appeal should be dismissed.