



[2018] JMCC Comm 51

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2016 CD 00001

BETWEEN	ADS GLOBAL LIMITED	CLAIMANT
AND	FLY JAMAICA AIRWAYS LIMITED	DEFENDANT

Kent Gammon and Miss Shemel Wright instructed by Kent Gammon and Associates for the Claimant

Ms. Stacey Knight instructed by Knight Junor Samuels for the Defendant

Heard: 17, 18, 23, 24, 25, 26, 27, 30, 31 July; 8 and 9 October and 20 December 2018

CONTRACT – AGREEMENT FOR THE PROVISION OF TELECOMMUNICATION SERVICES – SERVICES PROVIDED UNDER THREE SEPARATE CONTRACTS – CONTRACTS SUSPENDED FOR NON-PAYMENT ON INVOICES – ONE CONTRACT PROVIDED FOR MANNER IN WHICH INVOICES PRESENTED FOR PAYMENT SHOULD BE DISPUTED – WHETHER THERE WAS ANY LEGITIMATE DISPUTE OVER INVOICING – WHETHER THERE WAS ANY RIGHT TO SUSPEND OR TO TERMINATE ALL CONTRACTS FOR NON-PAYMENT OF INVOICES DUE UNDER ONE CONTRACT – WHETHER DAMAGES PAYABLE AS A RESULT OF THE TERMINATION OF SERVICES UNDER THE CONTRACTS

EDWARDS, J

Introduction

[1] This is a claim for breach of contract filed by ADS Global Limited (ADS) against Fly Jamaica Airways Limited (Fly Jamaica). ADS is a private limited liability company offering telecommunications services in Jamaica under a reseller's agreement with Columbus Communications Limited. The defendant is a private airline incorporated in Jamaica and providing airline passenger carrier services.

[2] The three contracts under which the parties operated were the;

(a) Provision of Services Agreement dated 30 March 2012;

(b) 10 MB Fibre Direct Dedicated Internet Agreement dated 25 July 2012;
and

(c) ½ SIP Trunk and Direct Inbound Dial Business Agreement dated 10 December 2012.

[3] ADS claims that Fly Jamaica was in breach of all three contracts it entered into with ADS, based on the non-payment of invoices sent to Fly Jamaica for payment for the services rendered to it by ADS. Fly Jamaica counterclaimed for damages for breach of contract by ADS, resulting from the suspension of all services provided, by it, to Fly Jamaica. On 24 July 2018, during the trial, three applications were made to the court. The first was an application by Fly Jamaica to amend its counterclaim to bring it in line with the evidence. This amendment was permitted over the objection of counsel for ADS. As a result, on the 25 July 2018, ADS filed and served an amended reply to defence and amended counterclaim. The second application was made by ADS to amend the claim by adding 8 additional invoices. This application was refused. The third application was made by ADS, to call a witness for whom no witness statement or witness summary had been previously filed or served but whom counsel claimed would be a rebuttal witness. This application was also refused.

[4] Having heard evidence in this case over several days, on 20 December 2018, I made the following orders:

- (i) On the Claimant's claim for damages for breach of contract for failure to pay outstanding invoices with respect to the 10 MB Fibre Direct Dedicated Internet Agreement and the ½ SIP Trunk and Direct Inbound Dial Business Agreement, the claimant's claim fails.

- (ii) On the Claimant's claim for damages for breach of the terms of the Provision of Services Agreement for failure to pay outstanding invoices, the Claimant succeeds. The defendant to pay to the claimant the total found due on the outstanding invoices up to the 18 May 2014 under the Provision of Services Agreement, namely; 14319, 14327, 14333, 14334, 14336, 14346 and 14349, with interest at the commercial rate of 12% per annum, from 4 May 2014 to 20 December 2018 and at a rate of 6% thereafter, until the date of payment.
- (iii) The Claimant's claim to be entitled to payment after the date of termination of services, as damages for breach of contract, fails.
- (iv) Judgment for the defendant on the counterclaim for breach of the Provision of Services Agreement, the 10 MB Fibre Direct Dedicated and the ½ SIP Trunk and Direct Inbound Dial Business Agreement. No damages awarded for breach of the 10 MB Fibre Direct Dedicated and the ½ SIP Trunk and Direct Inbound Dial Business Agreement, as no loss was proved. Damages awarded for breach of the Provision of Services contract in the sum of Four Million Two Hundred and Eighty –Three Thousand Nine Hundred and Sixty United States Dollars (US\$4,283,960.00) with interest at 6% from 20 December 2018 to the date of payment.
- (v) Each party is to bear their own costs.

[5] At the time I made these orders, I promised to give my reasons in writing and I do so now.

The factual background

[6] The factual background to this claim and counterclaim is that Fly Jamaica entered into an arrangement with ADS; which said arrangement was contained in the three (3) contracts referred to in paragraph [2] above. I will refer to the three agreements in the manner they were commonly referred to by the parties in the evidence at trial. The first was the call centre agreement; the second was the internet service agreement and the third was the telephone service agreement. ADS claimed damages for breach of all three (3) agreements. The gravamen of its case was that Fly Jamaica breached the aforementioned "telecom services contracts", as a

result of which it suffered loss and damage. It also claimed that, due to a persistent failure by Fly Jamaica to pay on the invoices as they fell due, it had no choice but to suspend services under the contracts and claim for payment. The claim is in respect of 12 invoices amounting to USD\$303,029.33.

- [7] Fly Jamaica, however, contended that ADS had no contractual right to suspend its services, as the invoices which were not paid on the call centre agreement, were "disputed invoices". Fly Jamaica also asserted that no invoice was outstanding on the remaining two agreements and therefore, at the time all services were terminated, it was ADS who was in breach of all three contracts.
- [8] The parties' relationship began sometime in January of 2012 with a contract for the sale of a PDX box by ADS to Fly Jamaica, which said contract is not in dispute in this claim. Following negotiations in 2012 the parties entered into the three written contracts now in dispute. After the parties began operating under the contracts, invoicing for payment was done by e-mail and payment on the invoices was done by electronic funds transfer.
- [9] On three previous occasions when invoices became outstanding, ADS advised Fly Jamaica by email correspondence that services would be suspended if payments were not made. So, on 20 May 2013, 11 October 2013 and 22 October 2013, ADS advised Fly Jamaica in writing, that it would suspend services under the contracts, if outstanding payments were not made on certain invoices. On those occasions Fly Jamaica did make the required payments on the outstanding invoices. On the fourth occasion, 15 May 2014, ADS advised Fly Jamaica that all its services would be disconnected, if the full amount due on the outstanding invoices were not paid. In response, Fly Jamaica, by email dated 16 May 2014, denied that any invoices for internet and telephone services were outstanding and requested that ADS refrain from disconnecting those services. They also requested a break-down of

all the hours for which they had been billed under the call centre agreement, from February 2013 – April 2014 and 10-14 May 2014.

[10] By email dated 17 May 2014, ADS responded that it was unable to grant the request not to suspend telephone and internet services, as the accounts were in major default. It also indicated that it could not continue to offer services and that all services provided by ADS would be affected. It asked for all payments to be made in accordance with its "service agreement", as any deviation would be a breach of contract. ADS disconnected the call centre services on 18 May 2014. It disconnected the telephone and internet services on 20 May 2014, allegedly due to non-payment of invoices by Fly Jamaica.

[11] At the time of the disconnection of the services, the Chief Operating Officer for ADS was John Spencer, however, the individuals involved in the transactions were Tina Bowen and Kerry Lawrence at ADS and Andrea Ramtallie, Chief Accountant at Fly Jamaica. John Spencer gave evidence for ADS and was cross-examined. Andrew Fazio from Columbus Communications also gave evidence on ADS' case. Andrea Ramtallie, Roxanne Reece and Claudia Buckley all gave evidence for Fly Jamaica and were cross-examined. Constance Hall was called as an expert having provided an expert report to the court.

[12] The invoices in the issue were:

- 1) 14319
- 2) 14327
- 3) 14333
- 4) 14334
- 5) 14336

6) 14346

7) 14349

All those above invoices 1-7 Fly Jamaica asserts were disputed –

8) 14351

9) 14352

10)14354

11)14356

12)14357

Invoices 8-12 Fly Jamaica asserted were sent after the suspension of services.

[13] ADS also claimed that the three contracts were one “telecoms contract” and that its policy was to apply all payments to the oldest invoice. In that regard, it claims that payments made by Fly Jamaica on 2 May 2014 and 21 May 2014 for telephone and internet services were applied to the oldest invoices which were 14316 and 14319 which were call centre invoices. Fly Jamaica, however, maintained that the agreements were separate independent agreements and that ADS had no basis on which to apply the payments made on a specific invoice under a contract to an invoice issued pursuant to a different contract.

The issues

[14] The overall question to be determined is whether Fly Jamaica was in breach of all three agreements, thus entitling the claimant to suspend all three agreements when it did so. This gives rise to the need for the court to determine several issues which are as follows:

- 1) Whether the three (3) contracts were separate independent contracts.
- 2) Whether the defendant had a 15 days' or 30 days' credit period under the contracts with the claimant.
- 3) Whether there were any outstanding invoices for telephone or internet service at the time those services were disconnected.
- 4) Whether the call centre invoices were disputed by the defendant in accordance with clause 4.3 of the Provision of Services Agreement.
- 5) Whether the claimant had the right to suspend all services due to non-payment of invoices under the Provision of Services Agreement.
- 6) Whether all three agreements were repudiated by Fly Jamaica when it refused to pay outstanding and future invoices.
- 7) Whether ADS acted in breach of the agreements entitling Fly Jamaica to damages on its counterclaim.

Issue 1 – Whether the three (3) contracts were separate independent contracts

Claimant's submissions

- [15] Counsel Mr Gammon, on behalf of ADS, submitted that the outstanding invoices were related to all three (3) “telecom services contract”. Counsel submitted further that, notwithstanding that the “telecom services agreements” were executed on different dates, they were all performed under the Provision of Services Agreement, which he referred to as the “services agreement”. Counsel maintained that the term was used interchangeably by ADS and that the internet and telephone agreements were entered into for the full operation of Fly Jamaica’s call centre. Counsel argued therefore, that the three contracts operated under the same terms and conditions.
- [16] Counsel cited the cases of **Jamaica Public Service Co. Ltd v Rose Marie Samuel** [2012] JMCA Civ 42 and **McCutcheon v David MacBrayne Ltd** [1964] 1 All ER 430, in support of ADS’ contentions. Counsel submitted that based on the course of dealings or on the course of performance of the contracts, the parties

accepted that all three contracts operated under the Provision of Services Agreement.

Defendant's submissions

[17] Fly Jamaica maintained that the three agreements were separate and distinct agreements. Counsel for Fly Jamaica, Miss Knight, argued that there was no basis on which to treat the three separate contracts as one "telecoms contract". Counsel pointed to the fact that the contracts were all signed and made effective on separate dates which were months apart. In that regard counsel postulated, breach of one contract could not be treated as breach of the others.

[18] Counsel also pointed to the fact that the call centre agreement stated clearly at clause 9.3 that it is an entire agreement. Clause 9.3 states as follows:

"Entire Agreement: This agreement contains the entire understanding of the parties and there are no commitments, agreements, or understandings between the parties other than those expressly set forth herein. This agreement shall not be altered, waived, modified or amended except in writing signed by the parties hereto and notarized."

[19] Counsel pointed out that the call centre agreement was the first of the three and was executed March 30, 2012. Counsel pointed to the evidence which, she said, showed that the need for internet and telephone services to be provided by ADS did not arise until July 2012. Counsel also pointed out that the second agreement, which was the internet agreement, was signed July 25, 2012 for Internet Services to be provided by ADS. Counsel argued that this agreement made no reference to the call centre agreement.

[20] Counsel denied that a provision in the internet agreement could be relied on as evidence of the incorporation of all three (3) agreements into one "telecoms agreement". That provision states that:

"I, the undersigned, hereby agree to the above service requests and agree to be bound by the ADS Global Limited Services Agreement which are incorporated herein together with any other attachments, as noted above, which form a part of this agreement."

Any reliance by ADS on that provision in support of its contention, according to counsel, was misconceived.

[21] Counsel argued further, that the "ADS Global Limited Services Agreement" referred to in that clause is unfamiliar and unknown to Fly Jamaica. Its terms, she says, are not known, and it is clear that it is not a reference to the call centre agreement. Counsel submitted that those (2) agreements are, therefore, separate contracts.

[22] Counsel further submitted that the third contract was the telephone agreement entered into on December 10, 2012, which did not make any reference to the first two (2) agreements. Neither, she said, does the other two (2) contract refer to it. Counsel pointed out also that the telephone agreement was not an entire agreement but was a "service order" governed by and subject to another third party agreement. The governing clause, she said, stated:

"The Services identified in this Service Order shall be governed by and subject to the Columbus Communications Master Services Agreement(s) (MSA) and service attachment(s), or such other applicable agreement(s), (if any) between Customer and Columbus Communications Jamaica, Ltd. (hereinafter referred to as "Columbus") (the MSA, its attachments and amendments shall be collectively known as the "Agreement"). In the event that Customer has not executed the Agreement with respect to the Services, then Columbus' standard Master Service Agreement (as of the date of this Service Order) shall govern, a copy of which is available upon request..."

- [23] Counsel argued that none of the references above could be construed as a reference to either the call centre agreement or the 10MB internet agreement between ADS and Fly Jamaica. The reference to a Master Services Agreement (MSA), counsel said, was to an agreement between Columbus Communications Limited and the Customer, which is Fly Jamaica. No such executed MSA between Columbus and Fly Jamaica, she pointed out, had been tendered into evidence. Hence, counsel opined, the standard MSA would govern. Counsel argued however, that even without seeing this standard MSA, it is evident that the standard MSA between Columbus Communications Ltd and its Customer could not be referring to a contract between ADS and the Customer. Columbus' standard MSA could not in any way be related to the call centre agreement or the telephone service agreement between ADS and Fly Jamaica.
- [24] Counsel submitted also, that other than the Columbus MSA, the clause above also referred to service attachment(s) or other applicable agreement(s) between Customer and Columbus Communications Jamaica Ltd. Counsel asked the court to note that there was no service attachment to the document, and no express mention of any other applicable agreement. But even more important, she opined, was the fact that, on a proper reading and understanding of the clause quoted above, it was referencing agreements between Columbus and the Customer, not agreements between the Customer (Fly Jamaica) and a third party (ADS).
- [25] Counsel argued therefore, that the telephone agreement was a service order between ADS and the customer Fly Jamaica which was governed by the MSA of Columbus Communications, which was the ultimate provider of the telephone service which was being ordered. Counsel submitted that it was clear that the telephone agreement was a separate and independent agreement from the other two (2) agreements.

[26] Counsel pointed out finally that, pursuant to the agreements between the parties, ADS sent at least eight (8) invoices to Fly Jamaica each and every month of each year. These, counsel described as follows:

"a) One (1) type of invoice is for internet related charges, under the 10MB Fibre Direct Dedicated Internet Service Business Agreement, and has the following description:

i. Monthly charge for 10MB Fiber Direct Internet – monthly recurring charge of US\$1,625.18.

b) Three (3) invoices are for telephone related charges under the ½ SIP Trunk and Direct Inbound Dial Business Agreement and have the following descriptions:

i. ½ SIP Trunk and 50 Direct Inward Dialling (DID) Numbers – a monthly recurring charge of US\$348.34;

ii. Toll Free Charges – variable sum, based on charges for toll free calls for the preceding month;

iii. Inbound & Outbound Long Distance Services – variable sum, based on charges for Inbound & Outbound long distance calls for the preceding month.

c) The remaining four (4) invoices are for weekly billable hours under the Provision of Services Agreement ("Call Centre Agreement") which invoices had descriptions as follows:

i. Actual Billable Hours (week 1)

ii. Actual Billable Hours (week 2)

iii. Actual Billable Hours (week 3)

iv. Actual Billable Hours (week 4)"

Discussion and findings on issue 1

- [27] I agree with the submissions of counsel for Fly Jamaica. The Provision for Services Agreement was for the operation of the call centre. ADS was retained to handle inbound reservation calls, provide emergency response services and to market such products and services designated by Fly Jamaica. It was generally agreed that this involved the provision of a call centre, a position supported by agent resources under scope of work in Appendix C to the agreement. It was also generally agreed that the call centre was located in Montego Bay. A functioning call centre was one of the first legal requirements for the airline to operate in Jamaica.
- [28] The 10 MB Fibre Direct Dedicated Internet Service Business Agreement and the 1/2 Sip Trunk and Direct Inbound Dial Business Agreement were contracts for the internet and telephone services, respectively. As counsel for Fly Jamaica submitted, they were entered into on three separate occasions and were for three separate services. I agree with counsel that they were separate contracts and were not in fact or in spirit, or even by implication, one "telecoms service agreement" as contended by counsel for ADS.
- [29] The nomenclatures "Provision of Services Agreement", the "Services Agreement" or "the Agreement", all of which is referenced in the agreement itself, was between Fly Jamaica as "the client" and ADS as "the contractor". It was for the provision of named services to be provided by the contractor to the client on the mutually agreed terms set out in the contract. It had an entire agreement clause at 9.3 which effectively meant nothing could be implied into the contract or incorporated therein which was not expressly there stated. It cannot therefore, be claimed by ADS as its master services agreement.

[30] Under the 10MB Fibre Direct Dedicated Internet Services Business Agreement dated 25 July 2012, internet services were to be provided to Fly Jamaica. The agreement was for a term of three years, automatically renewable unless notification is given within 30 days to the contrary. Thirty days' notice was also required to terminate this service.

[31] The internet agreement stated at the heading "Authorization" that:

"I the undersigned, hereby agree to the above service requests and agree to be bound by the ADS Global Limited Services Agreement which are incorporated herein together with any other attachments, as noted above, which forms a part of this agreement."

However, no "ADS Global Limited Services Agreement" was tendered into evidence and there is no evidence from the witness, Mr Spencer that such an agreement existed or of its terms. It also could not be a reference to the Provision of Services Agreement, which is a different nomenclature and which agreement was effected for the benefit of both parties.

[32] The only attachment "as noted above" in the internet agreement was the "Rights in Disclosure" clause which stated that:

"FLY JAMAICA AIRWAYS LIMITED and its employees agree not to divulge, release or transmit any information in whole or in part, contents or recommendations developed or obtained in connection with the performance of this contract negotiation and business agreement, and not otherwise available to the public, without the prior approval of ADS Global Limited and Columbus Communications Jamaica in writing."

[33] The call centre agreement had a termination clause requiring 14 days' notice. The internet agreement had a termination clause requiring 30 days' notice. The term of the call centre agreement was 3 years with an option to renew. The internet agreement was also for three years but it would automatically be renewed unless

notice was given otherwise. These terms in each of these contracts are inconsistent with each other and would create conflicts, if as ADS maintains, the internet contract was incorporated into the call centre contract. In any event, even if it was, there is still no evidence as to how that would translate into all three agreements becoming one “telecoms service agreement.”

[34] The ½ Sip trunk and Direct Inbound Dial Business Agreement was made on a service order to provide telephone services to Fly Jamaica. The service was bought from Columbus Communications by ADS and then on-sold to Fly Jamaica. It was therefore, a simple order for services from Columbus Communications by ADS on Fly Jamaica’s behalf and was governed by Columbus Communications Master Agreement and not by any ADS Service Agreement. Mr Spencer, in his evidence, agreed that separate invoices were sent at separate times for all three contracts.

[35] I find, therefore, that all three agreements were separate and independent agreements entered into by the parties.

Issue 2 – Whether the defendant had a 15 days’ or 30 days’ credit period under the contracts with the claimant

Claimant’s submissions

[36] Counsel, on behalf of ADS, submitted that pursuant to the clauses under the Provision of Services Agreement a 15 days’ credit period and a 2% late fee charge was applicable.

[37] Counsel pointed to Clause 4.3 which stated that:

*“...The client shall within thirty (sic) (15) days of receiving the invoice, pay all undisputed amounts to **ADS Global Ltd**. In the event that The Client shall dispute any sum referred to in the invoice, The Client shall be required to give written notice to **ADS Global Ltd** and to give the reasons for the dispute within five (5) working days at the request*

of ADS Global Ltd and to substantiate such sum with such documents and records as are reasonable in the circumstances. Payment terms are detailed in Appendix A.”

- [38] Counsel asked the court to read clause 4.3 and appendix A of the agreement together in order to ascertain the true construction of clause 4.3. Appendix A, he pointed out, made it clear by stating that:

“Fly Jamaica credit terms are “net 15 days”, meaning that payment is due 15 days after the date of ADS Global Ltd’s Invoice. If payment is not received in 15 days then a 2% payment charges will be added effective on the sixteenth day following the invoice date.”

- [39] Counsel cited the case of **Prenn v Simmons** [1976] 3 All ER 237 at 240, which he says, is the modern approach to interpretation of commercial agreements.
- [40] Counsel argued that the word thirty and the number 15 in parenthesis in clause 4.3 is ambiguous, therefore, the court should move beyond the language of the agreement and look at the objectives, arising from the circumstances. Counsel submitted that appendix A stipulated a penalty of 2% for late payment after 15 days and that, during the period of the contract, Fly Jamaica received and paid invoices for the 2% late payment penalty. Counsel pointed out that all penalty invoices for late payments had been paid, except for invoice number 14351, which he said was outstanding. Counsel also pointed to the evidence of Ms Ramtallie, whom he said, agreed in evidence that she knew that late payment after 15 days attracted a penalty.
- [41] Counsel pointed out further that Fly Jamaica had paid late fees on invoices numbered 14162, 14212, 14239, 14255 and 14279. These, he said, were late charges for several invoices. Counsel argued, that based on the course of dealings between the parties and Fly Jamaica having paid several late charges, Fly Jamaica could not reasonably maintain a position that it had a thirty days’ credit period.

Counsel cited Lord Hoffman's judgment in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 All ER 98 at 115.

- [42] Counsel submitted that based on the principles outlined in **Investors Compensation Scheme Ltd v West Bromwich Building Society**, the court should construct clause 4.3 in favour of ADS. Counsel asks the court to consider as a matrix of fact, that ADS is a reseller under contract to Columbus Communications Jamaica Ltd, who sells telephone and internet services. ADS on sells these services. ADS is contractually bound to settle invoices from Columbus Communications within 30 days. Counsel argues that it could not be the intention of ADS to give Fly Jamaica the same credit period as it receives from Columbus Communications. Counsel submitted that the 30 days in the agreement must be a typographical error. Counsel pointed out that all statement of account and all invoices contain terms net 15 days. Counsel cited **Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd** [1997] 3 All ER 352.
- [43] Counsel pointed out further that every statement of account has in the 5th column captioned terms net 15 days and all invoices had net 15 days. Counsel submitted that it was irrefutable, based on the evidence that the parties understood that invoices were to be paid within 15 days of receipt. Clause 4.3, he said, must yield to business common sense. Counsel submitted that invoices numbered 14319, 14327, 14334, 14336 and 14346 are outstanding and there is no dispute they have not been paid.

Defendant's submissions

- [44] Counsel submitted on behalf of Fly Jamaica, that clause 4.3 and Appendix A of the contract are in conflict, both as to the period and as to when time begins to run, that is, whether from the date of the invoice or from the date when Fly Jamaica actually received the invoice.

- [45] Counsel argued that it should be interpreted *contra proferentem* ADS who drafted the provisions, so that the invoice would be interpreted as due after Fly Jamaica received it. Counsel pointed out that in January of 2014 ADS Global began predating its invoices for the call centre, so that by the time it was received by Fly Jamaica it was already overdue.
- [46] Counsel conceded that ADS indicated on the invoices that payment was due within 15 days and that late payment charges of 2% was applied on several occasions. These late charges, counsel said, were always paid by Fly Jamaica. Counsel also submitted that, with regard to when time would run on the invoice, it could only be from the date on which Fly Jamaica received the invoice. The practice of predating, she said, was unconscionable. Counsel noted that the telephone agreement was executed after the reseller agreement was executed between ADS and Columbus Communications in August 2016. Under that agreement Columbus Communications gave ADS 30 days within which to pay its invoices. Counsel asked the court to note that Mr Andrew Fazio of Columbus Communications had given evidence that under their payment terms with ADS was 30 days, with a further grace period of 15 days. There was no reason, she said, for ADS to give Fly Jamaica only 15 days and to charge a late fee of 2%. She asked the court to reasonably conclude that payments for telephone charges were due 30 days after receipt of the invoice.
- [47] Counsel also pointed out that there were no express payment terms under the internet agreement. This agreement, counsel argued, only carried a monthly recurring fee of US\$1,395.00 plus tax totally US\$1,625.18. The invoices, she pointed out, indicated that payment was net 15 days with a 2% late charge.
- [48] Counsel claimed that Fly Jamaica was now challenging ADS' right to apply those terms to the contract as a reseller for Columbus Communication. Counsel argued that there was no evidence of the terms of the Columbus master contract which

was incorporated into the 10MB Internet Agreement. Therefore, counsel argued there is no document which definitively points to whether payment is net 15 or net 30 days or otherwise. Counsel pointed to the fact that the reseller agreement with Columbus Communication was entered into 16 August 2012. It was, she argued, not in effect at the time of the execution of the 10MB Internet Agreement on July 25, 2012.

- [49] Mr. Andrew Fazio from Columbus Communication gave evidence that ADS payment terms to it was net 30 days with a grace period of 15 days. Counsel for Fly Jamaica argued therefore, that ADS had no justification to charge Fly Jamaica 2% late fee on a 15 days' payment term. Counsel argued that this court could reasonably conclude that payment for Internet service under 10MB Internet Agreement was net 30 days of receipt of an invoice.

Discussion and findings on issue 2

- [50] I agree with the submissions of counsel for ADS. The payment terms under the call centre agreement, does appear to have an internal conflict between clause 4.3 and Appendix A, in so far as the latter refers to a 15 day period with payment due after the date of the invoice and the former to a 30 days' period with payment due after receipt of the invoice. The invoices for the call centre which were sent to Fly Jamaica also spoke to net 15 days. Fly Jamaica paid, without dispute, all late penalties charged to it under those terms. Therefore, based on the contract and the course of dealings between the parties, as far as the call centre agreement was concerned, I find that the payment terms was net 15 days. I find also that the payment period was accepted by both parties to be 15 days after the receipt of the invoice.
- [51] There were no payment terms in the other two contracts for internet services and telephone services, respectively. The internet agreement had a fixed monthly

recurring charge, plus tax, amounting to USD\$1,625.18. The telephone agreement had three separate charges, one for a monthly recurring charge and two for variable sums. However, the invoices sent to Fly Jamaica for payment, pursuant to each of these two contracts all spoke to a payment period of net 15 days, with a 2% penalty for late payment, which terms, Fly Jamaica, by conduct agreed to. In the absence of any reference to the payment terms in the agreement for the provision of telephone and internet services, I find that the terms which are applicable to those agreements, are those terms provided for in the invoices.

[52] I find therefore, that the payment period under all three contracts was net 15 days after the receipt of the invoices.

Issue 3 – Whether there were any outstanding invoices for telephone or internet services at the time those services were disconnected

Claimant's submissions

[53] Counsel for ADS submitted that applying payments on specific invoices towards older outstanding invoices is standard business practice, even if it was not expressly stated in the contracts. Counsel argued that if Fly Jamaica's accounts had been up to date, it was reasonable to infer that payments would have been applied to specific invoices. However, counsel noted that as Fly Jamaica's account was not up to date, the payments made on the 2 May 2014 and 21 May 2014 when applied to the statement of account, would have been applied to the oldest outstanding invoices. The oldest outstanding invoices, at the time of payment, he said, was a balance on invoice numbered 14316 and some of invoice numbered 14319.

Defendant's submissions

[54] Counsel submitted on behalf of Fly Jamaica, that the notice given by ADS on 15 May 2014 did not list any of the invoices for telephone services as being past due.

There were also, she said, no invoices for internet services outstanding or overdue, as at that date. The invoices numbered 14342, 14347, 14348 for telephone services which were attached to the notice of 15 May 2014, counsel argued, were issued on the 1 and 6 of May 2014, and even with a payment term of net 15 days, they could not have been listed as past due at that time.

- [55] Counsel submitted that with the exception of invoice numbered 14351 which Fly Jamaica never received, it took no issue with invoices presented by ADS to Fly Jamaica nor is there any issue with the total amounts invoiced over the period being US \$876,141.93. Neither is there any dispute that the total paid to ADS over the period by Fly Jamaica was US \$577,488.72. Counsel submitted that what was disputed was the validity of several of the invoices and ADS' claim that payments were not applied to specific invoices but to oldest invoices. Counsel argued that this is a material issue as it affects which invoices were outstanding at any particular point in time.
- [56] Counsel pointed to the fact that Mr Spencer admitted that the payments were specific to the sums invoiced on specific invoices, but nevertheless claimed that ADS applied these payments to the oldest invoices first.
- [57] Counsel submitted that Mr Spencer's assertions were fabricated because the documents from ADS accounting department supported Fly Jamaica's contention that payments were applied to specific invoices. Counsel pointed to the fact that Mr Spencer, as she said in her own words:

*"[T]old the court that his accounting staff uses a software programme called Quickbooks, from which they generate reports (see **Notes of Evidence July 18, 2018**). These Accounts Receivable reports from Quickbooks' are headed "**ADS Global Limited A/R Aging as of [Month, day, year]**". The reports were sent by the ADS Accounting Staff to Fly Jamaica periodically via email along with the invoices and demands for payment. Fly Jamaica accepted the statements from*

*ADS Accounting Staff and acted accordingly. John Spencer agreed that the reports seen in bundle 4 were the ones sent by his Accounting staff. These statements or reports generated from Quickbooks show which invoices were outstanding at the time of creation of the report (see for example **Bundle 4, pages 662,665 or 687**)."*

- [58] Counsel asked the court to question why Mr Spencer felt the need to generate exhibit H which showed a running total of the invoices, instead of using the Quick books software his staff used, which showed that payments were applied to specific invoices by ADS' accounting staff.
- [59] Counsel pointed out that the A/R aging statements from Quick books showed only those invoices that were outstanding at a particular date. Counsel noted that any invoice generated prior to the statement date, which did not appear on the statement, is to be presumed paid. Counsel noted that from time to time invoices appeared on the statements even where newer invoices did not appear which, she said, was proof that payments were being applied to specific invoices.
- [60] Counsel pointed out that as an example, as she said in her own words:

*"[O]n the statement dated **October 22, 2013**, to be found in the agreed **Bundle 4 at page 662**, invoices numbered **14222, 14225, and 14228** dated September 9, 16, & 23, 2013 respectively, are listed as outstanding. Some newer invoices numbered **14232, 14233, 14234 & 14235**, all dated October 3, 2013 do not appear on this statement at all because they were recorded as paid. If the sum of **\$30,995.27** which was paid on October 4, 2013 was applied to the oldest invoices then **14222** would have been partially paid, and instead we would see **14232, 14233, 14234 and 14235** on the statement as unpaid. The fact that this statement has older invoices listed while newer invoices have been paid disproves Mr. John Spencer's claim that payments were applied to the oldest invoices."*

[61] Counsel submitted that it was only after the telephone, internet and call centre services were terminated that ADS sent an email to Fly Jamaica stating that payments were applied to oldest invoices. She said they had never done that before. The email of 21 May 2014 by Kerry Lawrence, indicated that this action was taken on the advice of their counsel. Counsel pointed to terms of the letter from Kerry Lawrence where she wrote:

"We have applied all payments to the oldest invoice. Due to breach of your contractual obligations, this was the advice of our legal counsel. All past due invoices must be paid for services to be restored. Please see statement attached for outstanding amounts."

[62] Counsel pointed out that a new statement was sent to Fly Jamaica attached to an email dated 21 May 2014 which showed invoices deemed outstanding based on the application to oldest invoices, so that invoices numbered 14321, 14322, 14323 and 14324 now appeared as outstanding for telephone and internet services, even though they had been paid. Counsel argued that the effect was that when Fly Jamaica paid on invoices for telephone and internet numbered 14321, 14322, 14323 and 14324, ADS rerouted these funds to pay invoices under the call centre agreement (invoice 14316 and part invoice number 14319).

[63] This counsel noted, is what caused some confusion as to the amount being claimed for the oldest Invoice 14319, and explains why, in the list in the witness statement, the amount being claimed on that invoice (\$2,057.45) is less than the actual invoice amount of \$8,414.13. Counsel also pointed out that since, after the termination, ADS was applying all payments to the oldest invoice, the outstanding amount of \$267.20 by which Fly Jamaica had short-paid invoice number 14291 on 18 February, 2014 was also applied to the oldest invoice, invoice number 14319.

[64] Counsel argued that as at 15 May 2014, no invoices for internet services or telephone services, were past due.

Discussion and findings on issue 3

- [65] I agree with the submissions of counsel for the Fly Jamaica. I find that there were no payments outstanding on invoices for internet or telephone services at the time those were disconnected. Mr Spencer agreed in evidence, that of the twelve invoices, none were for internet or for telephone. He however, claimed they were paid after services were disconnected.
- [66] The evidence of Mr Spencer that payments were to be applied to the oldest invoices first was not supported by any other evidence and was contradicted in fact by the documentary evidence. The email from Kerry Lawrence that it was done on advice of their attorneys, after disconnection, the accounting system used by ADS itself and the statements sent to Fly Jamaica all contradict this assertion by Mr Spencer. Even the evidence provided in exhibit H done by Mr Spencer himself, only served to contradict Mr Spencer's assertion in this regard as well. Because in order to do a running total of the balances owed by Fly Jamaica on the entire account rather than on specific invoices, Mr Spencer had to pull the data from their accounting system Quick Books and do a simple calculation in excel. The ADS Global Aging Quick Zoom also did not correspond to exhibit H neither did the Quick Book statements sent to Fly Jamaica listing outstanding statements. Mr Spencer in his evidence, claimed to be unaware that every payment sent to ADS by Fly Jamaica, corresponded to a specific invoice. After being shown, through a laborious process by counsel for Fly Jamaica, that payments corresponded to specific invoices, Mr Spencer finally agreed that statements from Quick Books, which was their accounting system, did lists specific invoices outstanding and the amounts.
- [67] I find also that this application of sums to the oldest invoices was a procedure adopted by ADS after the disconnection of services and had no legitimate basis in contract or in the parties' course of dealing.

Issue 4 – Whether the call centre invoices were disputed by the defendant in accordance with clause 4.3 of the Provision of Services Agreement

Claimant's submissions

[68] Counsel for ADS argued that for there to be a dispute over an invoice, by virtue of the agreement, that dispute had to be in writing pursuant to clause 4.3 which states:

"...In the event that The Client shall dispute any sum referred to in the invoice The Client shall be required to give written notice to ADS Global Ltd and to give the reasons for the dispute within five (5) working days at the request of ADS Global Ltd and to substantiate such sum with such documents and records as are reasonable in the circumstances."

[69] Counsel pointed out that no written notice of any disputed invoice was sent to ADS. Counsel noted that the first the term "dispute" was used was after the services were suspended. Counsel argued that although Fly Jamaica claims, in its pleadings in the counterclaim filed 23 July 2018, that written notice of a dispute was given in relation to invoices numbered 14327, 14333, 14334, 14336 and 14346, this is unsubstantiated by the evidence. Counsel pointed out that the evidence of Ms Ramtallie was that she disputed the invoices orally and by telephone and on two (2) occasions by e-mailing a question about wait time.

[70] Counsel pointed out further that, even if the court were to accept that there was a dispute by phone, this was not consistent with the requirements under the agreement. Counsel also submitted that in the case of the e-mails, these were queries made and did not constitute a dispute. He pointed to Ms Ramtallie's email of 16 May 2014 in response to ADS' threat to suspend service which, he said, mentioned no dispute. It reads:

"Dear Ms. Lawrence

*In regards to your letter dated 15 May 2014, please note that invoices for the internet and telephone services are **not** outstanding, therefore please refrain from disconnecting these services.*

I hereby request a breakdown of all the hours for which we have been billed from February 2013 to 19 April 2014 and 4-10 May 2014.

Kind Regards."

[71] ADS, he said, responded by letter dated 17 May 2014:

"Attention Ms. Andrea Ramtallie

We are unable to grant you the request in your letter day 16 May 2014. Your account is in major default, therefore we cannot continue to offer our services. All services provided by ADS Global Ltd will be affected. We are concerned about your inability to keep your account current.

We also want to remind you that all payments should be made in accordance with our service agreement any deviation from this stipulates a breach of agreement.

We appreciate the opportunity to serve you. Thank you in advance for your anticipated cooperation in this matter.

Best Regards."

[72] Counsel noted that on 21 May 2014, Ms Ramtallie wrote to Kerry Lawrence at ADS to inform her that a payment was made. At that time there were no services. Ms Ramtallie wrote:

"Dear Kerry

The sum of \$3,473.88 was transferred to your account this morning. This represents payment for the following invoices:-

14341 – monthly charge for 10 MB Fibre Direct Internet

14342 – ½ Sip Trunk numbers

14347 – Inbound & Outbound long distance services

14348 – Toll free charges

Please reconnect these services today. On a point of note, our phones were disconnected yesterday. I assume this is for non-payment. However, payment for the phone lines become due today. Please check your records.

Thanks for your services."

- [73] Counsel argued that at no time did Fly Jamaica indicate it was disputing the invoices. He also pointed out that it was only after Kerry Lawrence wrote that ADS had applied all payments to the oldest invoices that Ms Ramtallie responded saying:

"Kerry

The invoices for the call centre are in dispute, therefore the payments should not be applied to these."

There was in fact, he submitted, no dispute.

Defendant's submissions

- [74] Counsel for Fly Jamaica pointed to the fact that ADS, in its further amended particulars of claim, claimed for (12) invoices but that in the witness statement of Mr Spencer, there were 13 invoices listed there. Counsel also pointed to the fact that during his examination-in-chief, Mr Spencer amplified his evidence by adding three (3) invoices and removing four (4), thus bringing the total number of invoices claimed in his evidence in line with ADS, further amended particulars of claim.

[75] Counsel asked the court to note that the invoices Mr Spencer added to his witness statement were as follows:

Invoice Number	Amount Due
1. 14352	\$7,461.01
2. 14356	\$2,090.01
3. 14357	\$9,751.05

[76] Counsel for the defendant pointed to the fact that Mr Spencer removed invoices 14321, 14322, 14323 and 14324, which were all paid 2 May 2014, when Ms Ramtallie transferred US\$3150.65 to ADS' bank account. Counsel also pointed to the fact that Mr Spencer's evidence was that when he added the sums due under the various invoices the total was \$309,386.01, which is the total of the invoices shown below. The invoices claimed during the trial, she said were therefore, the following:

Invoice Number	Amount Due
1. 14319	\$8,414.13
2. 14327	\$7,878.95
3. 14333	\$8,794.35
4. 14334	\$8,730.74

5. 14336	\$9,310.37
6. 14346	\$7,648.57
7. 14349	\$6,533.18
8. 14351	\$1,192.01
9. 14352	\$7,461.01
10.14354	\$231,581.64
11.14356	\$2090.01
12.14357	\$ 9751.05

- [77] Counsel argued that all the invoices, except for the last two (2), were for call centre services and were invoiced under the Provision of Services Agreement. Counsel argued that they were all disputed.
- [78] Counsel noted that the last two (2) invoices numbered 14356 and 14357 were for ½ Sip Trunk and 10MB internet respectively. Counsel submitted that these were null and void, invalid and of no effect. Those two invoices, counsel pointed out, were being claimed as monthly charges, from the date of termination, up to what, ADS claimed, was the end of contract period. Both invoices, counsel pointed out, are dated 29 May 2014, which are dates after the termination of the contracts and for services which were never rendered. Counsel argued that there is no justification under any contract for claiming those sums.
- [79] Counsel contended that Fly Jamaica disputed all the call centre invoices, whether by phone or by e-mail. Counsel pointed to the evidence of Ms Ramtallie where she said that in January ADS started changing the dates on the invoices, so she started asking questions. Counsel pointed also to the fact that Ms Ramtallie's

evidence was that she was concerned that she was receiving invoices in emails on dates which did not match the dates on the invoices. Her evidence, counsel submitted, was that she called Ms Kerry Lawrence at ADS, to discuss the issue, and counsel submitted that these calls were evidence of a dispute of an invoice (for example invoice dated January 6, 2014 but received January 14, 2014) by telephone. Counsel argued that this was not the first time Fly Jamaica had disputed an invoice, the previous dispute of June 2013 being resolved before payment.

- [80] Counsel pointed out further that the dispute as to the dating of the invoices was not resolved, as the practice continued until termination in May 2014. Counsel also pointed to invoices numbered 14333 and 14334 which were sent with email saying "details attached" but to which there were no details attached. Counsel noted that the invoices were disputed by email because they showed Fly Jamaica was being charged for wait time, amongst other things. Counsel submitted that the email thread commencing 23 April 2014 is evidence of a dispute involving Invoices numbered 14333 and 14334 over the charge for wait time.
- [81] Counsel also pointed to the fact that the same issue about wait time arose again in a later email from Ms Ramtallie on 29 April 2014 when shortly after receiving invoice numbered 14336, Ms Ramtallie asked "why are we being charged for wait time". There was a response 30 April 2014. Counsel argued that the dispute as to whether Fly Jamaica could legitimately be charged for wait time is ongoing since it is not grounded in the contract and no explanation or justification for doing so has been proved by ADS. Counsel argued that ADS' explanation that the agents do "back office tasks" was unacceptable and Fly Jamaica still disputes the call centre invoices which include charges for wait time.
- [82] Counsel pointed also to Fly Jamaica's claim to be entitled to set off the sum of \$267.20 against any invoice from ADS, as a result of ADS causing Fly Jamaica to lose that amount on a booking, after ADS refunded a customer for the purchase of

an airline ticket and failed to notify Fly Jamaica. As a result the passenger still travelled but travelled for free, as the tickets were not cancelled, although the credit card charge back was processed by the bank.

[83] Counsel for Fly Jamaica submitted that the following invoices were disputed as indicated below:

Invoice Number	Date Received by Fly Jamaica	Date and Manner Disputed	Reason(s) disputed
14319	April 1, 2014	April 1, 2014 by phone	Invoice pre-dated billable period
14327	April 8, 2014	April 8, 2014 by phone	Invoice pre-dated billable period
14333	April 23, 2014	April 23, 2014 by email	No justification for wait time & invoice pre-dates end of billable period
14334	April 23, 2014	April 23, 2014 by e-mail	No justification for wait time & invoice pre-dates end of billable period
14336	April 29, 2014	April 29, 2014 by email	No justification for wait time & invoice pre-dates end of billable period
14346	May 6, 2014	May 6, 2014 by phone	No justification for wait time & invoice pre-dates end of billable period
14349	May 13, 2014	May 13, 2014 by phone	No justification for wait time & invoice pre-dates end of billable period
14351	Not received	July 31, 2014 – Disputed in Defence to Claim Form	Fly Jamaica disputes every invoice from ADS

14352	May 21, 2014	May 21, 2014 by email	No justification for wait time & invoice pre-dates end of billable period Fly Jamaica disputes every invoice from ADS
14354	May 21, 2014	May 21, 2014 by email	Invoice after termination not justified & Fly Jamaica disputes every invoice from ADS

[84] Counsel maintained therefore, that every invoice for call centre services listed as past due was disputed.

Discussion and findings on issue 4

[85] Clause 4.3 of the Provision of Services Agreement made provision for the treatment of disputed invoices. It set out how those disputes were to be handled. Firstly, disputes were to be in writing. Therefore, any reliance by Fly Jamaica on an oral dispute must fail. It also requires the writing to be a notice of a dispute. This written notice of a dispute would then trigger a request for reasons from ADS which must be provided within five days of that request. None of the emails relied on by Fly Jamaica amount to a notice of dispute. The writing relied on by Fly Jamaica as evidence of a dispute are the emails from Ms Ramtallie to Kerry Lawrence questioning wait time. These I have found to be mere queries which were never elevated to the level of and do not constitute a notice of dispute of the invoices, as contemplated by clause 4.3 of the agreement.

Issue 5 – Whether the claimant had the right to suspend all services due to non-payment of invoices under the Provision of Services Agreement

Claimant's submissions

[86] Counsel for ADS submitted that Fly Jamaica was always aware and understood that it was the policy of ADS that services would be suspended for non-payment

of invoices. Counsel pointed to the evidence that notice was given to Fly Jamaica that services would be suspended from as early as May 2013. Counsel pointed to the fact that Kerry Lawrence wrote to Fly Jamaica 20 May 2013 in the following terms:

"Andrea

Please see updated statement attached. All past due invoices should be paid immediately. Your phone and internet services are also liable for disconnection."

- [87]** Counsel also pointed to the second notice from ADS dated 11 October 2013 written by Kerry Lawrence to Ms Ramtallie at Fly Jamaica in the following terms:

"Dear Andrea

Pursuant to Fly Jamaica Ltd provision of services agreement with ADS Global Ltd, this communication shall constitute formal notice that Fly Jamaica Ltd is in default of its payment obligations. Please understand your service will be interrupted if ADS Global does not receive the full payment of \$36,719.62 by 12 October 2013. In addition, please be advised that all late payment charges have been added to your account and are due on receipt."

- [88]** Counsel again pointed to the third notice on 22 October 2013 in these terms:

"Dear Andrea

Pursuant to Fly Jamaica Ltd provision of services agreement with ADS Global Ltd, this communication shall constitute formal notice that Fly Jamaica Ltd is in default of its payment obligations. Please understand your service will be interrupted if ADS Global does not receive the full payment of \$36,844.20 by 25 October 2013. In addition, please be advised that all late payment charges have been added to your account and are due on receipt."

Please see files attached for account detail. You may contact ADS Global Finance Department at klawrence@ads-g.com or 620-4263 x 5 if you have any questions regarding the outstanding charges.

ADS Global Ltd looks forward to receiving payment and ensuring the service (s) continue uninterrupted."

- [89] Counsel argued that whilst the "telecom services agreements" make no provision for the suspension of services, such a term is implied on the basis of business reality to give efficacy to the contract. Counsel cited the case of **Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another** [2015] UKSC 72; [2016] EGLR 8.
- [90] Counsel argued that a term giving the right to suspend for non-payment is necessary to be implied in the contract to ensure compliance with material terms of the contract, such as payment of invoices on time. Counsel argued that suspension of services for non-payment is common practices by the telecom and internet service providers. Counsel also argued that it was necessary to imply such a right, as ADS had its own payment obligations which it had to meet.
- [91] Counsel submitted that the implied right to suspend was invoked because Fly Jamaica was in breach of all the contracts and did not pay within the 15 day when invoices were presented and also failed to express any dispute regarding those invoices, as required by the Provision of Services Agreement clause 4.3.
- [92] Counsel asked the court to note that on three (3) occasions when threatened within disconnection Fly Jamaica had paid up. This, counsel submitted was before it had set up its Guyanese call centre. Counsel pointed out that the call centre service was the first to be disconnected, it having been suspended 18 May 2014.
- [93] Counsel also argued that the payment of older invoices is standard business practice. Counsel pointed to the evidence of Mr Spencer that the sums were

inserted into Quick Book and applied to the invoices. Fly Jamaica's account was not up to date and subsequent payments made 20 May 2014 and 21 May 2014, when applied to its account, covered the oldest outstanding invoices, that is, a balance on invoice numbered 14316 and some of invoice numbered 14319.

- [94] Counsel argued that, in any event, based on Ms Ramtallie's evidence, the invoices due prior to the suspension of services, would still be overdue the 15 days.

Defendant's submissions

- [95] Counsel for Fly Jamaica argued that when ADS sent written notice to Fly Jamaica that its services were liable for disconnection, it had no valid right or reason to issue such a notice. Neither, counsel maintained, was the notice period contained therein, valid. Counsel submitted to the court that termination had to be done according to the provisions of the various contracts. Counsel pointed the court to the termination clauses under the three contracts.

Termination provided for under the Provision of Services Agreement

- [96] Counsel pointed the court to the "Provision of Service Agreement" where the contractual terms there provide for termination in Clause 7 as follows:

7 Termination

7.1 *The following obligations are conditions of this Agreement and any breach of these terms shall be deemed reasons for termination of this agreement. The party in breach of the terms of the agreement shall receive 14 days written notice with the right to cure.*

7.1.1 *Failure on the part of either party to observe any obligation under this Agreement following the receipt of any notice issued by the other party indicating any breaches hereof;*

7.2 *Without limitation, either party may by notice in writing immediately terminate this Agreement if either party has:*

7.2.1 *Committed any gross misconduct and/or any serious or persistent negligence in respect of his obligation hereunder;*

7.2.2 *Failed or refused after written warning to carry out the duties reasonably and properly required of themselves hereunder.*

7.3 *Failure on the part of the Client to meet the "Payment Terms" as agreed will be considered cause for termination of the agreement.*

7.4 *Upon the termination of this Agreement for any reason:*

7.4.1 ***Each Party*** *shall immediately deliver up to the other all correspondence, documents or other papers in the possession of each one pursuant to this Agreement;*

7.4.2 ***Each party*** *shall within seven (7) working days of termination present invoices for all work done prior to termination in respect of which no invoices were previously submitted. Such invoices shall be paid by the other within ten (10) working days of receipt of invoice by the other;*

[97] Counsel argued that even if the letter from ADS to Fly Jamaica dated 15 May 2014 was a warning, closure of the call centre could only have been lawfully carried out after 14 days and there would have to be written notice. Counsel noted that Fly Jamaica received no written notice that the agreement had been terminated.

Termination under the 10MB Internet Agreement

[98] Counsel stated that notice of termination of services under the 10MB Fibre Direct Dedicated Internet Service Business Agreement is 30 days. Counsel argued that as at May 15, 2014 there were no invoices for telephone or internet services outstanding or overdue. Counsel pointed to the fact that the only invoice for internet services that appeared on the statement attached to the notice as at May 15, 2014

was invoice numbered 14341 issued on the 1 May and was not yet due when the notice was issued on the 15 May. Counsel noted that, even applying a 15 days' period, 15 days would not have passed after the issue of invoice numbered 14341. Counsel also pointed out that invoice numbered 13341 is not listed as past due on the statement, so that on May 15, 2014 when ADS issued its notice to Fly Jamaica no 10 MB Internet invoice was due or past due.

Termination under the ½ Sip Trunk (telephone agreement)

- [99] Counsel argued that the notice of the 15 May, 2014 did not list any invoice for telephone service as being past due. That agreement does not indicate payment terms, however, it is governed by Columbus Standard Master Service Agreement. Counsel pointed out that when the ½ Sip Trunk was executed the reseller agreement between Columbus and ADS made 16 August 2012 was in effect. Clause 8.1 of the reseller agreement, she said, gave ADS 30 days to pay invoices.
- [100] Counsel submitted that at 15 May 2014 no telephone invoices or internet invoices were overdue or outstanding. Counsel pointed out that the statements attached to the notice confirms this. Counsel pointed out also that the only invoices for telephone services that appear on the statement as at 15 May 2014 were invoices numbered 14342, 14347 and 14348. These counsel said, were issued 1 and 6 May 2014, so that even if the terms of payment were net 15 days, they were not listed as past due.
- [101] Counsel argued that the reseller agreement allowed ADS to cancel a service order, with written notice, subject to cancellation fees being paid to Columbus Communications. The reseller agreement refers to cancellation as early termination. Counsel pointed to the fact that termination for breach under the reseller agreement was limited to material breaches not cured within 30 days of the notice of default. So that, according to counsel, ADS could only be terminated

by Columbus after 60 days, that is 30 days after the invoice and 30 days after notice of default. Counsel argued that at no time was Fly Jamaica in default for 60 days and on 15 May 2014, was not in default at all.

- [102] Counsel pointed out that the three (3) telephone invoices which were outstanding at 15 May 2014 were number 14342 dated 1 May 2014, number 14347 dated 6 May 2014 and number 14348 dated 6 May 2014 and were not overdue as at 15 May 2014. Therefore, counsel argued, on 15 May 2014 there was no reason to issue notice with regard to the ½ Sip Telephone Agreement.

Discussions and findings

- [103] I agree with the submissions of counsel for Fly Jamaica. Having established that all the agreements were separate independent contracts and that there were no overdue payments for telephone and internet services at the time those services were disconnected, I find that ADS had no right to suspend all services because of the non-payment of invoices under the Provision of Services Agreement.
- [104] I find that the previous three emails in 2013 from ADS to Fly Jamaica which threatened disconnection for non-payment cannot be relied on as notice of the disconnection in May 2014. I find that the notice sent on 15 May 2014 was in essence two days' notice of the termination which took place on 18 May 2014 and was a clear breach of the Provision of Services Agreement which called for 14 days' notice, with a right to cure.
- [105] I must refer to counsel's submissions regarding the resellers agreement between ADS and Columbus Communication and say that though it is persuasive, it is not conclusive as to the actions of ADS in relation to suspension of telephone or internet services. As such my assessment of this issue will be based on an assessment of the agreements.

- [106] I find that the 10 MB Fibre Direct Dedicated Internet Service Agreement and the ½ Sip Trunk and Direct Inbound Dial Business Agreement makes no provisions as to the grounds on which services may be suspended. The internet service agreement, however, states that thirty (30) days' notice is required for termination of service. There is no such provision in the telephone agreement.
- [107] The case of **Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another** [2016] EGLR 8 cited by counsel for ADS is authority for the definitive statement that a term will only be implied into a contract if it satisfies the test of business efficacy or is so obvious that it goes without saying.
- [108] I agree that a right to suspend services is a clause that may be implied into contract to provide business efficacy to it, however, a contract of this nature in which the survival of one entity depends on the fulfilment of an agreement by the other contracting entity, would require a specific clause outlining the grounds on which the services are to be suspended and a specific period in which the notice should be given. These specific provisions are what would give an agreement of this nature "business efficacy."
- [109] In the absence, however, of any such specific clause, the right to suspend could only arise by implication after a reasonable period of notice. I find that with the two contracts, that is, the internet and telephone, sharing a similar contractual foundation the thirty days' notice applicable to the internet agreement, should, by implication, be applicable to the telephone services agreement to give it business efficacy. In any event the period of notice under the Columbus Master Service Agreement would be applicable to the service order for the telephone services provided by ADS to Fly Jamaica.
- [110] I find furthermore, that even if, as counsel for the ADS submitted, the right to suspend the contract for non-payment is to be implied in the contract for telephone

services, on the facts of this case, there was no ground on which to suspend the services as there were no overdue payments on the invoices for telephone or internet as at 15 May 2014. In addition, even if there was a right to suspend or terminate those services had arisen, thirty days' notice would have been required to be given to Fly Jamaica.

- [111] Therefore, on 20 May 2018 when ADS disconnected telephone and internet services to Fly Jamaica without giving the requisite notice, it acted in breach of and contrary to the terms of its agreements with Fly Jamaica.

The application of payment on specific invoices to old invoices

- [112] As found previously, this action carried out by ADS was unjustifiable. It is clear from the practice of sending individual invoices for each payment, that payment was due on each specific invoice sent to Fly Jamaica.

- [113] The general contractual arrangement between ADS and Fly Jamaica, is that it would provide Fly Jamaica with the contracted services at a specified sum. Therefore, the apportionment of the payment for telephone and internet services to the invoices for call centre services, which was provided under a separate contract, was, in essence, a breach of contract on the part of ADS and the suspension of the telephone and internet services, as a result, would constitute the same.

Issue 6 – Whether all three agreements were repudiated by Fly Jamaica when it refused to pay outstanding and future invoices

Claimant's submissions

- [114] Counsel for ADS cited the case of **Mersey Steel and Iron Company v Naylor Benson and Company** [1884] 9 App Case 434 and argued that Fly Jamaica had implicitly and explicitly repudiated the telecom services agreement. Counsel

pointed to the fact that Mr Spencer received an e-mail on 26 May 2014, from Fly Jamaica, which stated that Fly Jamaica rejected all invoices from ADS. Counsel submitted that this was clear evidence that Fly Jamaica had no intention of paying the invoices presented to them by ADS. Counsel also cited *Halsbury's Laws of England 4th Edition Volume 9 (1)* paragraph 989 which states that:

"Where one party (A) to a contract has committed a breach of contract by a defective performance or by repudiating his obligation under the contract, the innocent party will have the right to rescind the contract de futuro, that is treat himself as discharge from the obligation to tender further performances and to sue for damages for any loss he may have suffered as a result of the breach such a breach by A does not usually itself automatically terminate the contract B has the right to elect to treat the contract as continuing or to terminate by rescission."

Defendant's submissions

[115] Counsel submitted that Fly Jamaica did not repudiate any contract nor did it at any time before termination indicate it no longer intended to be bound by the contracts. Counsel submitted further that Fly Jamaica fully intended to pay whatever invoices were not disputed.

[116] Counsel argued that, in any event, the only contract ADS could claim had been repudiated by breach was the Call Centre Agreement. If that were so, counsel argued, damages would be as stated under that contract. Counsel pointed to Clause 7.4 of the call centre agreement which states as follows:

7.4 *Upon the termination of this Agreement for any reason:*

7.4.1 *Each party shall immediately deliver up to the other all correspondence, documents, or other papers in the possession of each one pursuant to this Agreement;*

7.4.2 *Each party shall within seven (7) working days of termination present invoices for all work done prior to termination in respect of which no invoices were previously submitted. Such invoices shall be paid by the other party within ten (10) working days of receipt of invoice by the other;*

[117] Counsel argued that if the court were to find that Fly Jamaica was in breach of the call centre agreement, then ADS was only entitled, by virtue of that agreement, to be paid on invoices for work done prior to the termination.

Discussion and findings on issue 6

[118] Firstly, the internet and telephone agreement cannot have been said to be repudiated by Fly Jamaica as the requisite payments were made on these invoices, evidencing an intention on the part of Fly Jamaica to continue with the performance of the contract between the parties.

[119] The alleged repudiation of the call centre agreement, by Fly Jamaica, was not explicit, therefore, I will consider its conduct in assessing whether the call centre agreement, by implication, had been repudiated. It is my view, that notwithstanding the finding that there had been no disputed invoices, on a literal interpretation of the contract, it was clear, by the conduct of Fly Jamaica that they were querying the invoices sent by ADS with no intention of repudiating that contract. I find that they had a legitimate right to make the queries they did make, without being held to have repudiated the contract. There were invoices with incorrect dates, invoices sent without the requisite details and invoices with dates which predated the actual billable hours. The charges for wait time was a legitimate concern which gave rise to queries which ought to have been responded to other than in a "pay up and shut up" manner.

[120] The case of **Sweet v Maxwell Ltd v Universal News Services [1964] 3 All ER 30** it was opined that:

"if a person's refusal is based upon a misconstruction of the agreement, it does not represent an absolute refusal to fulfil his obligations, provided that he shows his readiness to perform the contract according to its true tenor."

[121] On this ground I find that the response of Fly Jamaica on 26 May 2014, rejecting ADS' invoices cannot be taken as an absolute refusal on the part of Fly Jamaica to perform their obligation under the agreement. There was, obviously, an issue surrounding the way in which Fly Jamaica was being billed by ADS, which was contrary to the contract and the usual course of dealings between the parties up to April 2014, when Ms Ramtallie first became aware of wait time. Pre-dated invoicing began in January 2014.

[122] Further to that, Fly Jamaica had requested to see all the past invoices of ADS Global from February 2013 to 19 April 2014 and 4- 10 May 2014, in the email of Ms Ramtallie dated 16 May 2014, access to which was denied by Ms Kerry Lawrence, in her email dated 16 May 2014.

[123] I agree with counsel for Fly Jamaica that the terms of the call centre agreement provide for the manner in which the parties were to conduct themselves in the event of a termination of the contract in clause 7.4.1 and 7.4.2. Fly Jamaica maintains that since it took none of the steps outlined in those clauses, there was no evidence on which this court could find that it had repudiated the call centre agreement. I agree. It states:

"7.4.1 Each party shall immediately deliver up to the other all correspondence, documents or other papers in the possession of each one pursuant to this agreement;

7.4.2 Each party shall within seven (7) working days of termination present invoices for all work done prior to termination in respect of which no invoices were previously submitted. Such invoices shall be paid by the other within ten (10) days of receipt of invoice by the other;"

[124] I find that Fly Jamaica's actions did not amount to a repudiation of the call centre agreement or any other agreement with ADS. In fact, it is clear that when ADS terminated all services, it chose to bring the contract to an end and sue for payment. There is no clause in the contract for suspension but there is a clause for termination for non-payment. Even though no telephone bill or internet bill was outstanding, those services were terminated and remained terminated despite payment. This was because, according to Mr Spencer, ADS was still out of pocket on the call centre invoices. There can be no other conclusion therefore, other than that ADS chose to terminate those contracts. Therefore, when ADS terminated the contracts there was nothing left for Fly Jamaica to repudiate by its letter of 26 May 2014. It also had the right to dispute the invoices sent by ADS for the remaining contract period, which were for services which were never provided after ADS terminated the contract.

Issue 7 – Whether ADS acted in breach of the agreements entitling Fly Jamaica to damages on its counterclaim

ADS' submissions on the counterclaim

[125] Counsel Mr Gammon submitted that ADS did not terminate the contracts but only suspended them and that the right to suspend for non-payment was an implied right. Counsel also submitted that in any event, Fly Jamaica was not entitled to damages, since they were not able to prove any losses, with any degree of reliability. Counsel argued that the expert report of Ms Hall on the supposed losses by Fly Jamaica as a result of the termination of the contract had concluded that the data was insufficient for an accurate estimate of the lost sales by Fly Jamaica, resulting from the termination. As such, he maintained that the data was unreliable, particularly as the data source had no comparable data to accurately assess the losses. Counsel also pointed to the fact that the expert was unable to say, with any certainty, that the losses estimated in her report were caused by ADS. Counsel submitted further that if the data was inaccurate, the results would also be

inaccurate. Therefore, he said, the estimated losses attributed to ADS were inaccurate and the court could place no reliance on it, as it was merely guesswork.

Fly Jamaica's submissions on the counterclaim

- [126] Counsel for Fly Jamaica maintained that all invoices under the telephone and internet services agreement were paid up at the time of disconnection and in any event the notice to terminate was insufficient. Counsel further maintained that the unpaid invoices under the call centre agreement were in dispute and until that dispute was resolved, the invoices were not due and owing. It maintained that at the date of the notice to terminate, it did not owe any sums under the internet and telephone agreement and any default in the call centre agreement did not give ADS Global the right to suspend the telephone and internet agreement. ADS, she said, was therefore, in breach.
- [127] Counsel also argued that Fly Jamaica was given less than five (5) days' notice prior to termination. Written notice was given 15 May 2014 and by Tuesday 20 May 2014, telephone, internet and call centre services had all been disconnected. The call centre ceased operation after 17 May 2014. The phone and Internet were disconnected Tuesday 20 May 2014.
- [128] Counsel pointed out that under the Provision of Services Agreement clause 7.1 fourteen (14) days' notice to cure should be given. She said Fly Jamaica was instead, given one (1) day before the call centre ceased operating and four (4) days was given for the remaining two (2) contracts.
- [129] Counsel argued that this was a clear breach of contract. In respect of the call centre agreement, she said there was no adequate notice and with respect to the other two agreements, not only was it a clear breach of contract, there was no justification for such action.

[130] Counsel argued that a breach of contract gives right to damages. The aim of the award of damages, she said, is to compensate the party claiming damages for loss suffered as a result of the breach. Counsel argued that Fly Jamaica was a fledgling operational airline and would have suffered losses as a result of the discontinuation of the services.

[131] Counsel argued that Fly Jamaica's loss is the financial loss consequent on the breach by ADS. The losses, she maintained, would be from sales and revenue. Counsel argued that the contract between ADS and Fly Jamaica were entered into with a view to Fly Jamaica achieving sales and collecting revenue from airline ticket sales.

[132] Counsel cited **Hadley v Baxendale [1854] a Exch 341** where it was said that:

"where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

[133] Counsel argued that in commercial contracts loss of revenue and loss of profit is foreseeable. Counsel argued further that Fly Jamaica was aware of its duty to mitigate and had attempted to do so. Counsel pointed to the evidence of Mrs Reece who gave evidence that Fly Jamaica tried to obtain telephone and internet services directly from Columbus Communication, after the disconnection, but Columbus Communications refused said service, citing the poor relationship between Fly Jamaica and its associate ADS.

[134] Counsel conceded that it was difficult to measure the level of losses suffered by Fly Jamaica for the breach of the telephone and internet contracts. This was due,

counsel noted, to the lack of historical data for comparison. Counsel submitted, however that costs associated with printing of new material to advertise new lines were easier to quantify and ask the court to accept proof of these provided by Fly Jamaica.

[135] Counsel pointed to the evidence of the expert Mrs Hall on the losses sustained by Fly Jamaica from the time of breach to the end of the contract period (May 2014 – March 2015). Counsel noted that, according to the actuarial forecasts, the losses in revenue during the period from May 2014 until March 2015 (which should have been the end of the call centre contract) ranged from a minimum of Four Million Two Hundred and Eighty-Three Thousand Nine Hundred and Sixty United States Dollars (US\$4,283,960.00) to a maximum of Six Million Three Hundred and Seventeen Thousand One Hundred and Sixty-Six United States Dollars (US\$6,317,166.00). The mean average of the six models is calculated at Five Million Four Hundred and Sixty-Eight Thousand and Sixty-Three United States Dollars (US\$5,468,063.00).

[136] Counsel submitted that, in reality, the actual losses during that period could have been anywhere in the range. The mean is a reasonable estimate of what the actual losses in revenue could have been calculated to be, if actuarial science were able to provide an accurate estimate.

[137] Counsel submitted that Fly Jamaica should be awarded the sum of US\$5,468,063.00 for damages for losses in revenue sustained as a result of breach of contract by ADS from May 2014 to March 2015, which was the end of the call centre agreement contract period.

Discussion and findings on the counterclaim for damages

[138] When ADS disconnected the telephone and internet services there were no overdue invoices. The required period of notices before termination was also not

given. I find that for those reasons ADS was in breach of the 10 MB Fibre Direct Dedicated Internet Agreement and the ½ SIP Trunk and Direct Inbound Dial Business Agreement with Fly Jamaica. I also find that when it terminated the Provision of Services Agreement and disconnected the call centre services, it did so without giving the proper 14 days' notice with a right to cure as provided for under the contract. As a result, ADS was also in breach of the Provision of Services Agreement with Fly Jamaica. Fly Jamaica is, therefore, entitled to damages.

[139] I find however, that Fly Jamaica (a position they conceded to) failed to prove to the court the losses suffered directly resulting from the termination of services in relation to the 10 MB Fibre Direct Dedicated Agreement and the ½ Sip Trunk and Direct Inbound Dial Business Agreement (internet and telephone respectively), as such I award no damages in respect of the breach of those two agreements, on this counterclaim.

[140] As it relates to the Provision of Services Agreement (call centre agreement), Fly Jamaica relied on the evidence of Mrs Constance Hall, an actuary, who was certified as an expert by and provided a report to the court. She is a Fellow of the Society of Actuaries, Fellow of the Conference of Consulting Actuaries, Enrolled Actuary, member of the Caribbean Actuarial Association and a member of the American Academy of Actuaries. Mrs Hall has over thirty-five years' professional experience throughout the Caribbean, Latin America and the United States of America. She was asked by Fly Jamaica to estimate the loss in revenue resulting from the breach of its contract with ADS. Her role, as she understood it, was to use the numerical data provided by Fly Jamaica, to see what sales would have been during a particular period. She, therefore, attempted to identify loss sales resulting from the breach. In her report and in evidence, she identified the weaknesses in her analysis, which was basically the fact that the period of data provided was too short for an accurate comparison and the fact that Fly Jamaica was a new company, and a small operation with no other airline of comparable size operating

in the region. Her evidence, however, was that actuarial projections are not expected to be accurate but that as an actuary, she is allowed to make assumptions and best estimates within a range of values. The estimation of loss of sales is a "purely mathematical exercise for which an actuary is well qualified". In the estimation of numbers, she would often employ models and did so in this particular case.

- [141]** In the instant case the expert used Fly Jamaica's sales in the Guyana market for comparison with its sales revenues in the Jamaican market. She looked at what happened in Guyana and in Jamaica with respect to sales in one market as opposed to the other. In doing so she employed 6 models and to overcome the inadequacies in the data, bearing in mind that Fly Jamaica was only in operation for a short period of time, the estimated loss was taken as the average of the amounts forecasted using all the models. The data showed significant growth in Guyana and the contention was that Jamaica would have grown at a similar or greater rate if the breach had not occurred.
- [142]** In considering the experts report and evidence, I identified particular obscurities in the scientific and non-scientific methods she employed which influenced my final quantification and award of damages. The expert herself in her report stated that Fly Jamaica had only operated for fifteen (15) months prior to the period of the breach of contract and that this did not provide sufficient historical data for accurate forecasting using any of the methods.
- [143]** The scientific method considered forecasting methods. The expert stated in her report that these methods were chosen as they were the ones that would best use the available data. The expert used six different models and applied them to two different periods. The first application, as reproduced in the table below, used the data from May 2014- March 2015, immediately post breach, to predict what the sales would have been for the period of breach. The application of the models to

the second period April 2015 to April 2016, used the data on actual sales to predict what sales would have been for that period, if there had not been a breach. In my assessment, however, I focused on the first period immediately after the breach, for the simple reason that, the effect of the breach would have been felt more dramatically during this period, and thereafter, the mitigating plans would have been effectively in placed, thus affecting the forecasted sales and diluting the effect of the breach.

[144] The expert also applied non-scientific methodology to arrive at an estimate. In this regard she compared the sales generated in Guyana with the sales generated by the call centre in Jamaica before the breach. In this way she found that the channels affected by the breach were generating sales at twice the level of the Guyana call centre before the breach. Whilst both call centres were operational in the period 2013-2014, the channels affected by the breach were generating sales at more than twice the level of the Guyana call centre. Subsequent to the breach, the comparative sales data showed that the Jamaican sales figures began to fall, showing a complete reversal, with the Guyana call centre having more sales than Jamaica. The expert concluded, that although the data was insufficient for an accurate estimate of the sales lost by Fly Jamaica, it was sufficient to show that the loss was material. The estimated losses for the period immediately after the breach using the non-scientific comparative method ranged from US\$2.3 million to US\$5.9 million which estimates bracketed those from the models.

[145] The data highlighted in the table below using the scientific models included actual sales during the period of breach of the contract and were estimated as the amount for the month preceding the breach, adjusted by the growth rate, experienced in Guyana.

[146] The findings for the period of the breach were in table 3 paragraph 4.1 as follows:

Actual Sales for Period 2014 May to March 2015		5,039,025
Forecasting Model	Forecasted Sales	Lost Sales
T- Period Simple Moving Average	11, 365,191	6,317,166
Weight Moving Average	11,029,265	5,990,240
Simple Exponential Smoothing	10, 876, 236	5, 837, 211
Classical Time Series Model	9,492,053	4,453,028
Simple Linear Regression	10,965,800	5,926,775
Monte Carlo Random Simulation	9,322,985	4,283,960
Maximum	11,356,191	6,317,166
Minimum	9,322,985	4,283,960
Average	10,507,088	5,468,063

[147] The expert in her evidence stated that she had to use several models in her analysis because there was not sufficient historical data and as such the results were based on averages. She also stated that the limited historical data could result in an overestimation or underestimation of results.

[148] In her evidence she stated that "If we had several years of data we could see what to expect. The more data the greater expectation would be. With a year of data it is impossible to tell with any reasonable certainty..." Additionally, the expert in her report gave a summary of data in which she identified and highlighted channels affected by the contract breach. These channels included:

- i. Airport Ticketing Office – Kingston
- ii. Corporate Headquarters
- iii. Customer Service – Kingston
- iv. Travel Agent – Jamaica
- v. Reservation Call Centre – Montego Bay

[149] In her evidence the expert also stated that she was told which channels were affected by the breach, however, she had no way of verifying it. The evidence of Mr Spencer is that the call centre could not operate without the internet and telephone services, so that when the internet and telephone was disconnected, the call centre could not operate. It is my view therefore, that when all the services were disconnected, it would have affected all the channels considered by the expert.

[150] The sub-total figure of actual sales of Five Million and Thirty-Nine Thousand and Twenty-Five Dollars (\$5,039,025.00) was used by the expert to calculate the lost

sales of Fly Jamaica and it therefore had major implications on the expert's final analysis. The evidence of the expert was as follows:

"Expert: ... "That's the 5,039,095 is actual sales for the same 11 months period.

Counsel: "What is lost sales?

Expert: Lost sales is the 11,356,191 minus 5,039,025 gives us lost sales of \$6, 317,166."

[151] As the business was small it is understandable why the sales were not comparable to any other business of its kind. The evidence of Mrs Reece was that Jamaica was a small market, therefore, it is not surprising that the analysis heavily relied on a comparison of the performance of Fly Jamaica in the Guyana market which was also small.

[152] This reasoning would apply to the analysis conducted in the non- scientific method, in which forecasts were based solely on a comparison with the performance in Guyana during the period of the breach. The expert presented comparisons of the estimated lost sales in three different scenarios:

1. Estimate of Lost Sales Assuming that Sales of affected Channels would have been Twice Guyana's Sales.
2. Estimate of Lost Sales Assuming that Sales of affected Channels would have been 125% of Guyana's Sales (USD).
3. Estimate of Lost Sales Assuming that sales of affected channels grew at Guyana's Growth.

[153] I will reproduce only the data given by the expert for the period immediately after the breach, in table 5 and 7, as I find that they are the most comparable to the data analysis of the actuarial model in which the rates were adjusted by the growth rate experienced in Guyana.

[154] Paragraph 4.7 table 5 of the report:

1. Estimate of Lost Sales Assuming the Sales of affected Channels would have been Twice Guyana's Sales (USD)			
Period	Estimated Sales	Actual Sales	Lost Sales
2014 May to 2015 March	11,672,504	5,039,025	6,663,479

[155] Paragraph 4.9 table 7 of the report:

Estimate of Lost Sales Assuming the Sales of affected Channels grew at Guyana's Growth Sales (USD)			
Period	Estimated Sales	Actual Sales	Lost Sales
2014 May to 2015 March	10,946,348	5,039,025	5,907,323

[156] The estimate of lost sales assuming that sales of the affected channels would have been 125% of Guyana's sales was also produced. In that table, (table 6 at paragraph 4.8 of the report) the estimated sales for the period was 7,295, 315,

actual sales were 5,039,025 and lost sales was 2,256,290. The tables above demonstrate that the data analysis in the scientific and non- scientific method, are in close range and therefore the non-scientific methodology acted as a validation of the results from the models. To my mind, this amplifies the data analysis done in the scientific method, as the figures are not much different in range, despite the observed obscurities and inaccuracies. I accept the expert's statement that the assumption that growth in the Jamaican market is similar to growth in Guyana is supported by the data. For the period prior to the breach revenues for Jamaica were almost double that of Guyana. By June of 2014 the trend had reversed. Jamaica only recovered in November of 2014 trending higher into 2015.

[157] It is clear to me that Fly Jamaica must have and did suffer considerable losses as a result of the disconnection of the call centre services. It could have been worse had Fly Jamaica not initiated mitigating actions and had they not have an alternate plan B, has Mrs Reece put it. In the circumstances, I find they are entitled to damages. I have no reason to reject the expert's opinion on the matter. Her report was a result of doing the best she could in the circumstances of the limited time period and data that she was given. However, given the admitted deficiencies in the comparative data, on my own analysis of what was just and reasonable considering the circumstances, I have determined that the lower end of the range of losses presented in the models, was a fair award for damages.

[158] I, therefore, award the sum of Four Million Two Hundred and Eighty-Three Thousand Nine Hundred and Sixty United States Dollars (US\$4,283,960.00) based on an assessment of the expert's evidence and being the lower end of the range recommended by the expert.

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