COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2016/CLE/gen/FP 00196

BETWEEN

THE GRAND BAHAMA AIRPORT COMPANY LIMITED

Plaintiff

AND

WESTERN AIR LIMITED

Defendant

BEFORE: The Honourable Mrs Senior Justice Estelle G Gray Evans

APPEARANCES: Mr Dwayne Fernander for the plaintiff
Mr Harvey O. Tynes, Q.C. and
Ms Tanisha Tynes for the defendant

HEARING DATES: 2018: October 22 and 23

Closing submissions:
Defendant 2018: 12 November and 11 December
Plaintiff 2018: 26 November

JUDGMENT

Gray Evans Sr. J.

1. The plaintiff is a registered company incorporated under the laws of the Commonwealth of The Bahamas, engaged in the business of managing and operating the Grand Bahama International Airport in the City of Freeport on the Island of Grand Bahama, one of the Islands of the said Commonwealth of The Bahamas.

2. The defendant is and was at all material times a registered company incorporated under the laws of the said Commonwealth of The Bahamas engaged in the business of providing passenger and freight charter air services in the said City of Freeport in general. The defendant also provides Civil Aviation approved, commercially scheduled flights into the said City of Freeport, and other destinations throughout The Bahamas.

3. By a license agreement dated 1 April 2005, the defendant was licensed by The Grand Bahama Port Authority Limited to carry on the business of providing passenger and freight charter air services from approved premises being office space "K" located in the domestic terminal of the Grand Bahama International Airport.

4. By an Indenture of Lease dated 1 October 2009 made between the plaintiff and the defendant ("the Lease") the plaintiff granted to the defendant a lease of approximately three (3) acres of real property situate adjacent to the Grand Bahama Airport Domestic Terminal parking for a term of **20 years** commencing 1 March 2009, at the rent described in the second schedule to the lease, with the option to renew for a further period of 20 years.

5. The parties also entered into an Operating Agreement also dated 1 October 2009.

6. For ease of reference, relevant provisions of the Operating Agreement are set out hereunder:

> **"Entire Agreement**
>
> 1. This agreement supersedes and replaces any previous Operating Agreements heretofore made between WAL and the Airport Company.
>
> **WAL's Covenants**
>
> 2. In consideration of the covenants on the part of the Airport Company hereinafter contained WAL hereby covenants and agrees as follows:-
>
> > **Facilities**
> >
> > (1) WAL will commence construction of a maintenance hanger and passenger terminal within six (6) months of the date hereof on the premises more particularly described in the lease agreement. The construction shall be in accordance with the Business Plan including schedule for completion

which shall have received prior written approval of the Airport Company and the Technical Department of the Port Authority.

(2) …

Airport Rules and Regulations

(3) WAL shall observe and obey all rules and regulations as promulgated by the Airport Company from time to time.

Monthly Reporting

(4) WAL shall furnish to the Airport Company on a monthly basis beginning 30 days from the commencement of operations, accurate records of operations including but not limited to fleet size, number of employees, number of passengers enplaned and deplaned, cargo tons enplaned and fuel requirements.

Subletting

(5) …

Utilities

(6) …

Airport Fees

(7) WAL shall pay all Airport charges promulgated by the Airport Company in its Tariff or otherwise including but not limited [to] security fees and landing fees as may be required of it from time to time for services rendered by the Airport Company. WAL shall establish a line of credit with the Airport Company and shall pay a deposit in the amount required by the Airport Company in respect of the said charges on signing of the lease agreement. Should the deposit be applied to outstanding airport charges it shall be replenished by WAL. Such deposit shall be required to be maintained for the duration of the Lease.

Security

(8) WAL shall take directives from the Airport Company regarding the maintenance of levels of security as dictated by the Airport Company as well as existing and future international, governmental and non-governmental civil aviation standards. Should domestic passenger security screening be mandated by law, WAL [shall] provide such screening at its own cost or shall pay the Airport Company to provide the same. WAL shall increase security levels on written notice from the Airport Company to do so.

(9) …

3. PROVIDED ALWAYS AND IT IS HEREBY EXPRESSLY AGREED AND DECLARED as follows:

Term

(1) This Agreement shall remain in force for a term equal to the term of the lease agreement unless otherwise terminated as herein specified PROVIDED HOWEVER that this Agreement shall automatically terminate in the event that WAL ceases to be a Licensee of the Port Authority and/or its lease of the premises is terminated by the Airport Company.

Amendment

(2) Subject to agreement between the parties hereto this Agreement may be amended from time to time by a subsequent writing signed by each of the parties hereto

Breach of Covenant

(3) In the event of any breach of covenant on the part of either of the parties hereto except for the covenant of WAL to pay the Airport charges as required under the Provisions of Clause 2 (7) hereof the non-breaching party shall give to the other notice in writing to remedy the breach within thirty (30) days. Should the breach not be remedied within the notice period then this Agreement may be terminated by the non-breaching party but without prejudice to any right of action which the non-breaching party may have against the other for any antecedent breach of covenant on the part of the other herein contained.

Non payment of fees

(4) In the event that WAL shall default in the payment of the Airport charges as required under the provisions of Clause 2(7) hereof and if the same shall remain unpaid for a period of thirty (30) days after becoming due whether formally demanded or not then after giving to WAL notice in writing affording a further fourteen (14) days for the payment of such concession fees and WAL failing within such period of fourteen (14) days to pay the same then the Airport Company at any time thereafter shall be entitled without any further notice to WAL to terminate this Agreement without any liability whatsoever to the Airport Company but without prejudice to any right of action against WAL for any antecedent breach of covenant by WAL herein contained."

7. At the date of the execution of the Lease and Operating Agreement, the defendant operated its flights from the plaintiff's domestic terminal in which the defendant also leased office space.

8. The defendant commenced operations at its new facility on 5 September 2015, on which date the defendant also discontinued its use of the plaintiff's domestic terminal.

9. Subsequent to the defendant's relocation to its leased premises, the plaintiff tendered seven invoices for security, facility and departure fees, totaling $371,352.85 and by letter dated 27 April 2016 with the reference line: "Revised Demand for outstanding Airport Fees", the plaintiff demanded payment of "passenger fees" due for the period October 2015 to April 2016, in that sum.

10. The defendant has failed, and or refused, to pay the said sum of $371,352.85 to the plaintiff.

11. The plaintiff commenced this action against the defendant on 15 June 2016 by a specially indorsed writ of summons in which the plaintiff pleads, inter alia, as follows:

> "4. By an operating agreement also dated 1st October 2009 and entered into by the company and the defendant and marked as Exhibit B to the Lease, the defendant covenanted and agreed, inter alia, to:
>
> i) Observe and obey all rules and regulations as promulgated by the airport company from time to time;

ii) Furnish to the airport company on a monthly basis beginning 30 days from the commencement of operation, accurate records of operations including but not limited to fleet size, number of employees, number of passengers enplaned and deplaned, cargo tons enplaned and fuel requirements.

iii) Pay all airport charges promulgated by the airport company in its tariff or otherwise including but not limited [to] security fees and landing fees as may be required of it from time to time for services rendered by the airport company.

"5) Additionally, by the operating agreement, the defendant was and still is obligated to provide the plaintiff with passenger numbers with respect to the number of passengers enplaned and deplaned monthly. The passenger numbers would then be applied against the tariff to calculate the amount of Airport fees due to the plaintiff. The defendant thereafter is obligated to pay the airport fees due thirty (30) days after the issuance of the invoice for each month. The operating agreement and its terms and provisions will be more specifically relied upon at the trial for their full meaning and effect.

"12) Under cover of its letter dated 17th February 2016, the plaintiff provided the defendant with an invoice for the period 5th September to 5th October 2015 based on the actual passenger count that was finally provided by the defendant under its obligations in the operating agreement.

13) By way of a letter dated 1st March 2016, the defendant responded acknowledging receipt of the revised invoice and stated, inter alia, "Western Air will continue to pay its leased payments per the lease agreement and accurate invoices for services rendered such as landing fee invoices per the operating agreement."

14) As a consequence, and without derogating from its right to charge airport fees pursuant to the operating agreement, by letter dated 30th March 2016 the plaintiff advised the defendant that it had reviewed its tariff and would reduce the defendant's airport fees to $12.50 per passenger in an effort to arrive at an amicable resolution of the dispute with retrospective effect from September 2015.

15) The defendant responded by its letters dated 4th and 6th April 2016 and advised, inter alia, that the airport fees being levied were not justified and indicated that it would only pay $4.00 per passenger.

16) The plaintiff by its letter dated 2nd April 2016 demanded payment from the defendant and the defendant has failed and or refused to pay to the plaintiff the sums due and owing to the plaintiff despite the plaintiff's numerous requests demanding payment of the said airport fees.

17) **In breach of its obligations under the lease and Operating Agreement to pay airport fees, the defendant has failed and or refused to pay to the plaintiff the sums due and owing to the plaintiff; despite the plaintiff's numerous requests demanding payment of the said Airport Fees.**

18) As at 15th May 2016, the defendant is indebted to the plaintiff in the amount of $371,352.85 being airport fees collected by the defendant and due and owing to the plaintiff.

19) In the premises, the plaintiff has suffered loss and damages, **such loss and damages as set out in the schedule of particulars below and continuing.**

SCHEDULE OF PARTICULARS

Date	Invoice	Amount
16-Feb-16	16022016	$42,542.05
23-Mar-16	23032016	46,520.09
23-Mar-16	24032016	40,249.08
6-Apr-16	4062016	55,689.30
6-Apr-16	4072016	50,967.36
6-Apr-16	4082016	75,573.04
15-Apr-16	4152016	59,811.93
TOTAL		**$371,352.85**

12. In its defence filed 8 July 2016, the defendant pleads, inter alia, as follows:

"5) The defendant denies that it "… still is obligated to provide the plaintiff with passenger numbers with respect to the number of passengers enplaned and deplaned monthly," although the defendant has done so previously. The defendant also denies that the aforementioned passenger numbers should be applied against the tariff to calculate the amount of airport fees due to the plaintiff, or that the defendant is thereafter obligated to pay the airport fees as calculated and alleged in paragraph 4 of the statement of claim.

"12) The defendant admits that the plaintiff demanded payment of outstanding airport fees in a letter dated 10th February 2016. The defendant also says that the plaintiff asserted in its 10th February letter that it did not have the defendant's account, if necessary. Thus, the invoice was inaccurate. The defendant denied owing the demanded airport fees to the plaintiff in a letter dated 11 February 2016, as alleged in paragraph 11 of the statement of claim.

13) The defendant admits that the plaintiff provided a revised invoice for the period 5th September to 5th October 2015 based on actual passenger count, under cover of its letter dated 17th February 2016, as alleged in paragraph 12 of the statement of claim. The defendant denies the accuracy of the revised invoice. **The defendant also denies a continued obligation to provide a passenger count, as alleged in paragraph 12 of the statement of claim, or that the defendant is obligated to pay the revised and inaccurate invoice mentioned herein.** The defendant says that in February 2016, the defendant's up-to-date account statements, sent by the plaintiff's accounting department, reflected all outstanding balances as paid in full.

14) The defendant admits that it sent a letter to the plaintiff dated 1st March 2016 in which it acknowledged receipt of the revised invoice, and in which the defendant agreed to continue to make its lease payments per the lease agreement and **accurate** (emphasis added) invoices for services rendered, "such as landing fee invoice" per the operating agreement, as alleged in paragraph 13 of the statement of claim. The defendant will refer to the operating agreement at the trial of this action for its full terms and effect.

15) The defendant admits that the plaintiff indicated it would propose a reduction in the defendant's airport fees from $18.50 to $12.50 per passenger with retrospective effect from September 2015, via letter dated 30th March 2016, as alleged in paragraph 14 of the statement of claim.

16) The defendant admits that it responded via letters dated 4th and 6th April 2016 as alleged in paragraph 15 of the statement of claim. The defendant further says that its 4th

April 2016 letter declined the plaintiff's proposed reduction of the airport fees **because the plaintiff refused to fully express what services the plaintiff alleges were and are being rendered.** The plaintiff's identified legal counsel at the time, called the defendant's Vice President of Operations and expressed disdain for the defendant's 4th April 2016 letter declining the plaintiff's offer, and the plaintiff's counsel suggested that the defendant offer "something" in return to resolve this dispute.

17) **The defendant further admits that the airport fees being demanded by the plaintiff were not justified, after the defendant refused to supply a complete list of services which the plaintiff was claiming to have been rendered.** The defendant admits that in an effort to resolve matters amicably, without waiving its rights under the operating agreement, the defendant counter-offered to pay $4.00 per passenger - $2.00 for security fee and $2.00 for the facility fee per passenger – as alleged in paragraph 15 of the statement of claim. The defendant also says that the defendant's account statement dated 11th April 2016 from the plaintiff's accounting department, was the first official accounting statement to reflect the alleged outstanding balance of airport fees.

18) The defendant admits that the plaintiff by its letter dated 26th April 2016 demanded payment from the defendant as alleged in paragraph 16 of the statement of claim. The defendant further admits that in a return letter of the same day, it refused to pay the alleged fees demanded by the plaintiff, as alleged in paragraph 16 of the statement of claim. The defendant denies that the airport fees demanded by the plaintiff were "duly levied" **and the defendant also denies that said fees are owing because the defendant no longer uses those services upon which the alleged airport fees are based, as alleged in paragraph 16 of the statement of claim.**

19**) The defendant denies that it is in breach of its obligations to the plaintiff under the lease and operating agreement by refusing to pay the inaccurate fees levied by the plaintiff, as alleged in paragraph 17 of the statement of claim**. The defendant also says that no airport fees in specific reference to the leased property, upon which the operating agreement is based, were charged or billed for 4 years after the execution date of 1st October 2009.

20) The defendant denies that as of 15th May 2016 it owed the plaintiff airport fees in the amount of $371,352.85 as alleged in paragraph 18 of the statement of claim, or at all.

21) The defendant denies that the plaintiff has suffered loss and damage as alleged in paragraph 18 of the statement of claim, or at all. The defendant does not admit that it is liable to pay the plaintiff damages, interest, costs or such further or other relief as alleged and demanded in paragraph 18 of the statement of claim.

13. At trial, each side called one witness, each of whom filed a witness statement which she adopted as her evidence in chief.

14. Evidence on behalf of the plaintiff came from Ms Chanan Jones, who, in her witness statement filed 11 October 2018, states the following:

1) I am presently employed with the Grand Bahama Airport Company Limited ("the Company") as the Airport Director. I began my employment with the company in July of 2013 and have been in the position of airport director since January 2014. My responsibilities include but are not limited to the strategic leadership of the Grand Bahama International Airport inclusive of operation and financial matters. I have direct knowledge of all the matters I address in this witness statement unless I have stated otherwise. I make this witness statement on behalf of the company and in

support of the action against Western Air Limited. The contents of this witness statement are true and correct.

2) The company is a registered company incorporated under the laws of The Commonwealth of The Bahamas engaged in the business of managing and operating the Grand Bahama International Airport in the City of Freeport on the Island of Grand Bahama ("the Airport") one of the Islands within the said Commonwealth of the Bahamas.

3) The defendant is a registered company incorporated under the laws of The Commonwealth of The Bahamas engaged in the business of providing passenger and freight charter air services in the City of Freeport in the Island of Grand Bahama and The Commonwealth of The Bahamas in general.

4) By an Indenture of Lease dated 1st October 2009 made between the company and the defendant ("the Lease"), the company granted to the defendant a lease of approximately three (3) acres of real property situate adjacent to the Grand Bahama Airport Domestic Terminal parking for a term of 20 years at a rent more particularly described in the Second Schedule of the Lease.

5) By an operating agreement also dated 1st October 2009 and entered into by the company and the defendant and marked as Exhibit B to the Lease, the defendant covenanted and agreed, inter alia, to:

   a) Observe and obey all rules and regulations as promulgated by the airport company from time to time;

   b) Furnish to the airport company on a monthly basis beginning 30 days from the commencement of operation, accurate records of operations including but not limited to fleet size, number of employees, number of passengers enplaned and deplaned, cargo tons enplaned and fuel requirements.

   c) Pay all airport charges promulgated by the airport company in its tariff or otherwise including but not limited [to] security fees and landing fees as may be required of it from time to time for services rendered by the airport company.

6) By the Operating Agreement, the defendant was and still is obligated to provide the company with passenger numbers with respect to the number of passengers enplaned and deplaned monthly to ascertain the amount of airport fees due. The process entailed the Company applying the passenger numbers provided by the defendant against the tariff to calculate the amount of airport fees due to the company. The defendant thereafter was obligated to pay the airport fees which would be due thirty (30) days after the issuance of the invoice for each month.

7) After agreement was reached and the Operating Agreement accepted and executed by the defendant on 1st October 2009, the defendant continued to pay the airport fees pursuant to its obligations under the Operating Agreement.

8) The defendant commenced operations of its new terminal facility on 5th September 2015. By a letter dated 4th September 2015, the company advised the defendant, inter alia, of its obligation to pay airport fees. The defendant responded by letter the same day advising: "We fully comprehend Clause 7 of the Operating Agreement and reiterate to GBAC that we will continue to pay all airport fees for services rendered, as per the Operating Agreement. We are open and willing to continue our discussion on this matter."

9) Since, moving into its facility on 5 September 2015, the defendant has refused to pay the airport fees required pursuant to the Operating Agreement. It is to be noted that the Operating Agreement was not varied or notated at the time the defendant moved into its facility and the defendant is still obligated to pay those airport fees levied by the company.

10) The defendant continues to assert that it will only pay for services rendered and bases, erroneously, its refusal to pay airport fees on the rationale that the company does not provide (i) security screening services anymore and (ii) that it (the defendant) has its own operating facility and no longer uses the company's terminal. The airport fees, however, comprise more than the two mentioned items that the defendant asserts as the reasons why they ought not to pay the airport fees levied by the company.

11) The fact is that the airport provides many services that are subsumed in the airport fees and apportioned to all users of the airport. For example the company provides inter alia, the following airport services:

    a) Standby fire and crash services;

    b) Maintenance and upkeep of the control tower;

    c) Assistance with maintenance and upkeep of the navigation instruction;

    d) General security of the airport facility;

    e) Upkeep of runway and taxiways;

    f) General administration of airport including but not limited to property insurance and other regulatory mandates such as the periodic provision of location charts and site inspections; and

    g) Housing and maintenance of all government agencies including but not limited to Air Traffic Control and The Bahamas Meteorological Department.

12) I must point out that the defendant does in fact receive services other than security and terminal use. On 7th February 2017, at approximately 5:00 pm, the defendant's Saab 340 aircraft experienced a problem with its landing gear shortly after take-off from the airport, As a result, the aircraft returned for a landing and shortly after landing, the aircraft landing gear collapsed resulting in the aircraft leaving the runway and ending up in bushes. <u>The company's standby fire and crash unit had to respond to the incident. The defendant was not independently invoiced for this service as it is a part of the services subsumed into the airport fees.</u>

13) On or about 5th October 2015, the company issued pro forma Invoice #5102015 for the billing period of 5th September – 25th September 2015 for airport fees relating to security, facility and departure fees for 477 passengers.

14) By an email dated 6th October 2015, the defendant (i) indicated that the pro forma Invoice #5102015 was inaccurate, (ii) denied that it owed any fees for security, facility and departure and (iii) requested that the plaintiff "….dismiss this inaccurate billing."

15) Notwithstanding the company's use of the terminology "security and facility", this was not a reference in any way shape or form to security screening or use of the company's terminal facilities. At all times prior to and post the defendant's relocation to its new terminal building on leased property, the references to "security and

facilities" always included but were not limited to the services indicated at paragraph 11 in this witness statement.

16) The company and the defendant through their respective representatives thereafter communicated through various letters in the month of January 2016, in order to resolve the dispute as to payment. I was in constant communication with the company's internal counsel regarding the outstanding receivables from the defendant and the options available to the company to collect. I ultimately advised that demands be made for the payment of the outstanding amount.

17) Demands were thereafter made by letters dated 18th, 22nd, and 27th January 2016 for the defendant to pay the outstanding airport fees.

18) In responding to a query raised by the defendant regarding the reason why the company issued a pro-forma invoice rather than an actual invoice, the simple reason was that up to that point in time, the defendant had failed to discharge its obligations pursuant to the Operating Agreement to provide a passenger count to the company as required. In a letter dated 2nd February 2016 sent on behalf of the company, the defendant was advised that a pro forma invoice was issued based upon estimated passenger numbers since up to the time of the invoice date, actual passenger numbers were not provided by the defendant.

19) A further demand for payment of the outstanding airport fees was issued on behalf of the company and dated 10th February 2016. However, the defendant by its letter dated 11th February 2016 continued to deny that it owed any **airport fees** to the company.

20) Under cover of its letter dated 17th February 2016, the company provided the defendant with an invoice for the period 5th September to 5th October 2015 based on the actual passenger count that was finally provided by the defendant pursuant to its obligations under the Operating Agreement.

21) By way of a letter dated 1st March 2016, the defendant responded acknowledging receipt of the revised invoice and stated, inter alia, "Western Air will continue to pay its lease payments per the lease agreement and accurate invoices for services rendered such as landing fee invoices per the Operating Agreement."

22) As a consequence, and without derogating from its right to charge airport fees pursuant to the tariff and Operating Agreement, by a letter dated 3rd March 2016 the company advised the defendant that it had reviewed its tariff, as it relates to this unique tenant arrangement and offered to reduce the airport fees apportioned to the defendant from $18.00 to $12.50 per passenger in an effort to arrive at an amicable resolution of the dispute with retrospective effect from September 2015.

23) The defendant responded by its letters dated 4th and 6th April 2016 and rejected the offer made by the company and advised, inter alia, that the airport fees being levied were not justified and indicated that it would only pay $4.00 per passenger.

24) Due to the defendant's refusal to pay the required airport fees duly levied, the company issued, by its letter dated 26th April 2016, a further demand for payment from the defendant of the outstanding airport fees.

25) I also wish to point out that the defendant is being rather misleading by its assertion that it was not receiving services and therefore was not obligated to pay any airport fees pursuant to its obligation under the Operating Agreement. Quite the contrary is true. The truth is, the defendant, in furtherance of its obligation under the Operating

Agreement, collected airport fees from each of its passengers but instead of turning those fees over to the company pursuant to its obligation then and presently, it instead collected and pocketed the airport fees that were rightfully due to the company.

26) By way of illustration, I refer to a boarding pass from one of the defendant's passengers on flight 709 which departed the airport on 30th July 2016 at 12:00 pm and arrived in Nassau at 12:35pm. The boarding pass reflects among other charges the following:

    a. "Taxes $5.23" (presumably VAT)

    b. "Grand Bahama International Airport Security Fees $6.50"

    c. "Grand Bahama International Airport Departure Fees $6.50

    d. "Nassau Terminal Fees $0.88".

27) Despite collecting and increasing these fees, which are still being charged and collected by the defendant, it refuses to pay that which it has an obligation to pay, in breach of the Operating Agreement and the lease.

28) Further, notwithstanding its obligation to collect and pay the airport fees, and despite the demand made by the company for payment, the defendant by return letter dated 26th April 2016 refused to pay the airport fees duly levied by the company that had been collected by it. It instead offered to pay $4.00 out of the $18.00 it had collected on behalf of the company. The airport fees remain due, owing and accruing.

29) Notably, after proceedings were commenced against the defendant, the defendant's boarding pass was modified to remove any reference to "Grand Bahama International Airport Fees" and which has been replaced with "Western Air Terminal Fees." It is also noteworthy to state that in addition to the fees description change, the defendant's fees have increased by $3.00 round trip since last July 2018. This is quite curious given that the company has only since increased its fees by $4.00 round trip effective 1st January 2018. The defendant was given notice of the company's fee increase by letter dated 12th July 2017.

30) In breach of its obligations under the lease and Operating Agreement to pay airport fees, the defendant has failed and refused to pay to the company the sums accruing and owing to the company - despite the company's numerous requests demanding payment of the said airport fees and despite the company in good faith offering to reduce the tariff as it related to the defendant. Further, the defendant, in breach of its obligations pursuant to the lease and Operating Agreement has failed since May 2016 to provide the company with any passenger numbers.

31) As at 15th May 2016, the defendant was indebted to the company in the amount of $371,352.85 being airport fees collected by the defendant and due and owing to the plaintiff, such airport fees continuing to accrue. As at the end of September 2018, the defendant's debt to the company is estimated to be in the region of $1,893,278.50 based on average passenger throughput from previous data provided by the defendant.

32) The company continues to suffer loss and damage as a result of the defendant's refusal to pay airport fees. The company has, as an option, the right to determine the lease consequent on the defendant's failure to perform in accordance with the terms of the lease and Operating Agreement, but is reluctant to do so given the state of the economy on the Island of Grand Bahama.

33) The above statements are true and correct to the best of my knowledge and belief.

15. Included in the agreed bundle of documents are the documentary evidence referred to by Ms Jones in her said witness statement. Those documents include invoices totaling $371,352.85, purporting to represent charges for the periods between 5 September 2015 and April 2016 billed by the plaintiff to the defendant.

16. Evidence on behalf of the defendant came from Ms Sherrexcia Rolle, who in her witness statement filed 19 October 2018, states the following:

1) I am currently the Vice President of Operations and General Counsel at Western Air Limited (interchangeably "WAL"). I am also the daughter of the founders, Rex Rolle and Shandrice Woodside and have been involved in and aware of the affairs and decision-making of Western Air since its inception in 2001. My role as both VP of Operations and General Counsel officially began in 2015.

2) I moved to Grand Bahama in early 2015 to spearhead the opening of WAL's private passenger terminal and to offer additional administration presence at our Freeport ticket station.

3) My responsibilities in the company include overseeing the day to day operations of the airline, executive decision making, major purchasing, oversight of management, hiring negotiations (foreign and domestic), drafting and review of contracts including aircraft leasing and acquisitions, communicating with vendors and government agencies such as The Bahamas Civil Aviation Authority ("BCAA"), working with external attorneys to articulate WAL's positions on legal matters, and reporting to the President & CEO, Mr Rex Rolle and Vice President & COO, Mrs. Shandrice Woodside.

4) I have direct knowledge of the matters I will discuss in this witness statement the contents of which are true and correct.

5) WAL is a registered company incorporated under the laws of the Commonwealth of The Bahamas.

6) WAL is a licensed commercial airline operating daily scheduled and on demand charter flights throughout The Bahamas, the Caribbean and Latin America. WAL holds an Airline Operating Certificate ("AOC"), which was issued by The Bahamas Civil Aviation Authority by which WAL and all Bahamian airlines are governed.

7) WAL was founded in the year 2001 and began flights between Andros and Nassau. WAL expanded its services into Grand Bahama approximately one year after it was established and operated multiple daily flights into Grand Bahama, increasing the number of flights as the demand grew.

8) The plaintiff is a registered company incorporated under the laws of The Commonwealth of The Bahamas and manages the Grand Bahama International Airport ("the Airport").

9) At the San Andros International Airport, WAL has a private passenger terminal, fixed based operations, corporate offices and maintenance facility, which serve as WAL's headquarters.

10) From about the 2003 and beyond, Mr Rolle always briefed me regarding his conversations with Mr Edward St George and I am aware that a formal proposal and negotiations with the plaintiff only began after Mr St George passed away.

11) I am aware that the negotiations, meetings and discussions involving Mr Rolle, Mr Paul Darville (family friend and airline consultant) and the plaintiff's representatives took years. I am also aware that economic savings were a critical factor at the time particularly after the downturn in the economy that threatened the livelihood of many businesses, particularly the airline industry.

12) In the year 2009, WAL finally agreed to execute an Indenture of Lease ("Lease Agreement") with the plaintiff, and I am familiar with the terms of the Lease and an Operating Agreement which were signed by the plaintiff and WAL.

13) I was always briefed by Mr Rolle, Mr Darville and our legal counsel on the various meetings with the plaintiff and WAL as it pertained to the plaintiff's proposal to renegotiate the Lease Agreement and/or Operating Agreement.

14) Under the Operating Agreement WAL is licensed to carry on the business of providing passenger and freight, charter air services on the premises leased. The agreement also provides for WAL to construct a terminal on premises which were leased by the plaintiff to WAL.

15) The Operating Agreement was signed in 2009 prior to the construction of WAL's private terminal.

16) At that time, WAL was still operating in the plaintiff's domestic terminal and incurring fees for the services that the plaintiff was providing. In exchange for the use of the plaintiff's facility and services, WAL paid the following fees:

- Departure fee (per passenger)
- Facility fee – Arrival (per passenger)
- Landings fees – per every aircraft landing
- Fees for delayed flights
- Fees for cancelled flights
- Fees to use the power supply generator
- Holiday Premiums
- Any other fee for a service which the plaintiff provided at WAL's request.

17) In the days leading up to WAL's relocation to its private terminal the plaintiff sought to require WAL to continue to use its services in order to ensure that the plaintiff continued to receive fees for such services.

18) WAL refused to agree to use the services of the plaintiff after moving into its own facility. The Operating Agreement provided that WAL would pay the plaintiff "for services rendered" only.

19) By early 2015, WAL had conducted a lot of major purchasing in anticipation of the opening of its private passenger terminal later that year.

20) WAL's overall investment in its new terminal was in excess of Six Million Dollars ($6,000,000.00).

21) WAL worked with the BACC who were in communication with the plaintiff, the Royal Bahamas Police Force ("RBPF") and an experienced Transport Security

Administration ("TSA") instructor from the US, to create and get an approved security screening program to conduct its own security screening at its private terminal.

22) WAL invested in ground handling equipment, vehicles, and power supply units for its aircraft, generators, water tank systems, advanced security technology, surveillance and camera systems, access and network control systems.

23) WAL hired personnel for its ground support department, security screening, operations, janitorial staff, etc.

24) WAL also contracted and still contracts with numerous Grand Bahamian based vendors to provide various services to operate WAL's passenger terminal efficiently and independently.

25) Prior to WAL operating from its private terminal, on August 31st 2015 WAL communicated to the plaintiff that while it would be operating from the new WAL private passenger terminal starting September 5th 2015, WAL would continue to use the ticket counter space from which it was operating in the plaintiff's terminal until January 31st 2016 per a ticket counter Lease which had been executed on the 28th February 2014.

26) WAL was thereby seeking to assure the plaintiff that it would fulfill its obligations for the duration of the ticket counter lease as executed. We further sought to communicate to the plaintiff that WAL would continue to fulfill its fiscal obligations to the plaintiff.

27) WAL's accounts department and the plaintiff's accounts department had an ongoing payment arrangement, whereby WAL continued to pay down on its outstanding account balances relating to fees which had been incurred while WAL operated in the plaintiff's domestic terminal.

28) The plaintiff responded by requesting items such as proof of insurance standard operating procedures, copy of certification, certificate of occupancy, and for the parties to conclude a Ground Handling Agreement, discuss format for monthly reporting and credit arrangement with respect to airport fees.

29) WAL provided the requested items and reiterated its position on the issues of ground handling and the airport fees. WAL's position was that WAL would continue to pay any outstanding balances for the airport fees "for the services previously rendered" and would pay fees for any services which the plaintiff provided to WAL in the future.

30) The items requested were presented to the plaintiff and the plaintiff congratulated me and our team on our new facility and stated that we should discuss the airport fees. Ms Chanan Jones wrote "While it will not hinder the relocation process, it is a critical item for moving forward."

31) At that point, I felt obliged to set up a further discussion on the matter to explain WAL's position.

32) Approximately one month after WAL had been operating at its terminal facility, with passengers departing and arriving at the WAL terminal, WAL conducting its own security screening, ground handling, etc, the plaintiff sent an invoice to WAL for the month of September 2015, containing charges for services which the plaintiff was no longer providing to WAL. These fees included a "departure fee" a "security fee" and a "facility fee".

33) WAL immediately responded to the plaintiff stating that the invoice was inaccurate because it billed WAL for services which the plaintiff was no longer providing.

34) The plaintiff responded on October 6th 2015 stating that my comments were noted and indicated that the plaintiff would seek to enforce the terms of the agreement between the parties.

35) For the next three (3) months the plaintiff did not communicate any further on the invoice and did not assert a claim that WAL owed the plaintiff any airport fees for services rendered for any period after WAL had begun to operate from its terminal.

36) WAL continued to pay down the balance owed to the plaintiff for fees relating to the period prior to 5th September 2015 when WAL operated from the plaintiff's terminal facility.

37) Between August 2015 and December 2015, WAL paid to the plaintiff more than $2,000,000.00 relating to fees which were previously owed.

38) WAL remitted a payment in respect of all outstanding balances owed to the plaintiff on January 5th 2016. The plaintiff's statements and receipts show that WAL did not owe anything further.

39) Each statement of account provided by the plaintiff in December 2015, January 2016, February 2016 and March 2016 showed WAL paying its monthly fees inclusive of land lease and landing fees which brought WAL's balance owed to $0 for each month.

40) After months of silence from the plaintiff, and after WAL's payment was made for all fees relating to the period when WAL operated from the plaintiff's terminal, on January 31st 2018 [sic] the plaintiff began asserting a demand for airport fees owed to the plaintiff covering the period after WAL had moved into its private terminal.

41) Numerous correspondences went back and forth between representatives of the plaintiff and me relating to a disputed invoice No. 5102015.

42) Also, several meetings and telephone conversations took place involving Mrs Berlice Lightbourne, Ms Chanan Jones and me.

43) On several occasions, I pointed out that the Operating Agreement did not create an obligation for WAL to pay a facility fee when WAL and its passengers were no longer making use of the plaintiff's facility, that WAL was not obligated to pay the plaintiff for security screening when WAL no longer makes use of the plaintiff's security screening, that WAL was not obligated to pay a departure or arrival fee when WAL and its passengers departed from and arrived at WAL's private terminal. The plaintiff's representative disagreed.

44) I requested that the plaintiff indicate which services the plaintiff was providing to WAL which WAL was not paying for. The plaintiff's representatives replied that they were not obliged to provide a breakdown of what charges were allocated for what services.

45) I am aware that when a non-Western Air private aircraft lands at the airport the plaintiff charges a landing fee for the aircraft, a ramp fee and a fee for any other service requested by the airport user. The plaintiff does not charge the user a "passenger based fee".

46) Nor does the plaintiff charge the user of a private aircraft using the airport a facility fee or a security fee per passenger.

47) Nor does the plaintiff charge a “departure” or “arrival fee” per passenger on a private aircraft which makes use of the airport.

48) Further, I am not aware of a case in which the plaintiff has charged a non-ticket counter on land lease tenant, a security, facility, departure or arrival fee per passenger as a contribution to the cost of operating the airport.

49) It was for these reasons that I asked the plaintiff’s representative on several occasions why WAL was being asked to pay for services which the plaintiff was not providing.

50) In one of my many discussions with Ms Berlice Lightbourne and Ms Chanan Jones, I specifically discussed three matters relating to: “ICAO”, “WAL terminal fees” and “proposal to reduce fees”.

ICAO

51) International Civil Aviation Organization (“ICAO”) is a specialized agency of the United Nations which provides standards and recommended practices. It seeks to promote uniform civil aviation standards and practices in all member states. The Bahamas is a Member State of ICAO and thus The Bahamas Civil Aviation Authority and its international airports have a responsibility to maintain a certain standard of operational functionality regardless of whether the airport is privately owned or government owned.

52) I raised with the plaintiff’s representatives the matter of ICAO compliance and whether the plaintiff had a responsibility, regardless of the amount of WAL’s “contribution”, to maintain certain levels of safety including but not limited to the upkeep of runways, control tower, perimeter surveillance, insurance, etc.

53) While ICAO allows for the airport to seek contributions from aircraft operators and users to offset costs, they also strongly recommend that certain policies should not be ignored, for example, “aircraft operators and airport users including end-users should not be charged for facilities and services they do not use.” See TAB 8.

54) Another ICAO policy states that civil aviation (not the Authority, general phrase of civil aviation) should not be charged for any costs that would be incurred for general security functions performed by the State such as general policing, intelligence gathering and national security. See TAB 8.

55) In the case of WAL we operate an independent, private terminal inclusive of our own security screening and the only visible additional security that is provided on the non-ramp side is by the Royal Bahamas Police Force. By making its lease payments and paying landing fees for use of the runway, WAL contributes to the cost for the upkeep of the airport.

56) The plaintiff’s representatives responded that in accordance with ICAO’s policy they were entitled to charge a private airport operator.

WAL’s Terminal Fees

57) I also discussed with the plaintiff’s representatives the issue of WAL charging its passengers a “terminal fee”.

58) The representatives complained that WAL was collecting a terminal fee which belonged to the plaintiff and was keeping it.

59) In this case, the plaintiff is basing its claim on the “name” of the fee as set out on the boarding pass, which once said “Grand Bahama International Airport Security Fee.” In this case, the plaintiff’s claim is completely without foundation.

60) The words “Grand Bahama International Airport” is a reference to the location of the airport and is not a reference to the plaintiff, whose name is “Grand Bahama Airport Company”. Similarly a reference to “Nassau Terminal Fee” is a reference to the location of the airport in Nassau.

61) Because WAL operates a privately owned terminal facility at the Grand Bahama International Airport, WAL has the ability to charge a departure fee and security fee for the upkeep and use of its private facility and the security machines and the personnel it employs to perform such services.

62) WAL has since decided to have its IT personnel update the titles in the reservations and ticketing system to avoid confusion with the plaintiff.

63) We contend that WAL as a licensed airline business, has the right to increase or decrease the costs of the services it renders to the general public.

Proposal to Reduce Fees

64) Following a discussion with Mrs Berlice Lightbourne, the plaintiff produced a proposal to reduce the airport fees which it was seeking to collect from WAL from $18.00 to $12.50 as a form of apportionment for the services they were no longer providing.

65) I relayed this proposal to my superiors at WAL and they immediately rejected it. I then sent a letter to the plaintiff declining the plaintiff’s offer to reduce the fees from $18.00 to $12.50 and requested details of the items which warranted a fee of $12.50 per passenger.

66) Shortly afterwards, I receive a telephone call from Mrs Lightbourne stating that at the very least WAL should make a counter offer to show that we were willing to resolve this matter.

67) Mrs Lightbourne went on to say that she would have “egg” on her “face” if we do not provide a counter offer.

68) In good faith, and solely in an attempt to bring this matter to an amicable resolution WAL sent a counter proposal of $4.00 per passenger.

69) Mrs Lightbourne, then responded to my counter offer by stating that WAL does not have the right to fix the plaintiff’s tariff.

70) At that point I realized that her request for me to make a counter offer had not been made in good faith.

71) I note that the plaintiff has used the monthly reporting figures which WAL presented to them to unlawfully bill WAL for passenger fees and services which they no longer provide.

72) Finally, I wish to indicate that WAL’s passenger numbers are accessible to the plaintiff because WAL is required to file a flight plan with the control tower for every flight out of Grand Bahama.

73) The above statements are true and correct to the best of my knowledge and belief.

17. Under cross examination, Ms Rolle agreed that while the defendant operated in the plaintiff's terminal facility the defendant collected airport charges on behalf of the plaintiff. However, she said, that was because the defendant's passengers used the plaintiff's terminal facility.

18. Ms Rolle said that since moving to its leased premises, the defendant pays for services rendered by the plaintiff, such as landing fees and ground handling charges.

19. Ms Rolle admitted that since its relocation, the defendant has not furnished records of its passengers to the plaintiff as required by clause 2(4) of the Operating Agreement.

20. The issues identified by the parties in their written closing submissions are as follows:

a) By the plaintiff:

i. Whether the defendant breached any of its obligations under the Operating Agreement?

ii. Whether the defendant is obligated to pay Airport charges pursuant to the Operating Agreement?

b) By the defendant:

i. Whether the defendant is obligated, pursuant to the provisions of clause 2(7) of the Operating Agreement, to pay to the plaintiff the said sum of $371,352.85 claimed by the plaintiff, particulars of which are set out in the aforesaid seven invoices?

21. Counsel for the plaintiff in his closing submissions asserts that the defendant is in breach of two provisions of the Operating Agreement, namely: clause 2(4) and clause 2(7) respectively.

22. By clause 2(4) of the Operating Agreement the defendant agreed to "furnish to the Airport Company on a monthly basis, beginning 30 days from the commencement of operations, accurate records of operations including but not limited to fleet size, number of employees, number of passengers enplaned and deplaned, cargo tons enplaned, and fuel requirements."

23. The plaintiff pleads at paragraph 5 of its statement of claim that "by the operating agreement, the defendant was and still is obligated to provide the plaintiff with passenger numbers with respect to the number of passengers enplaned and deplaned monthly".

24. The defendant denies that it is still obligated to provide the aforesaid information to the plaintiff, although it admits it had done previously.

25. It is common ground that whereas the defendant provided the aforesaid information to the plaintiff while it operated from the plaintiff's domestic terminal, since relocating to its leased premises the defendant has only provided the plaintiff with reports for the period October 2015 to April 2016. Ms Rolle also admitted that the defendant no longer provides the plaintiff with the aforesaid monthly reports.

26. Clause 2(4) of the Operating Agreement has not been amended, so clearly the defendant is still obligated to provide the information to the plaintiff and its failure to provide the same amounts to a breach of the provision.

27. However, not only does the plaintiff not plead a breach of clause 2(4) of the Operating Agreement but it also does not seek any relief with respect thereto.

28. So, assuming, without deciding that the defendant is in breach of cause 2(4) of the Operating Agreement, it seems to me that the plaintiff would be left to its remedy under clause 3(3) of the Operating Agreement.

29. The plaintiff also alleges, which the defendant denies, that the defendant is in breach of its obligations to pay the airport fees pursuant to clause 2(7) of the Operating Agreement, in that the defendant has failed and refuses to pay the plaintiff the sums due and owing to the plaintiff despite the plaintiff's numerous requests demanding payment of the said airport fees.

30. Whether or not the defendant is in breach of clause 2(7) aforesaid, will depend on:

a) Whether or not the defendant is obligated to pay "airport fees" pursuant to clause 2(7) of the Operating Agreement? And if so,

b) Whether the charges for which the aforesaid seven invoices have been issued constitute "airport fees"/"airport charges" and are payable by the defendant pursuant to clause 2(7) of the Operating Agreement?

31. The plaintiff alleges at paragraph 19 of its statement of claim, which the defendant denies, that as at 15 May 2016 the defendant is indebted to the plaintiff in the sum of $371,352.85, being "airport fees" collected by the defendant and due and owing to the plaintiff.

32. Counsel for the defendant points out that the term **"**airport fees" does not appear in clause 2(7) of the Operating Agreement and, therefore, he argues, there is no obligation on the defendant to pay "airport fees" as pleaded to the plaintiff.

33. I note, however, that while the reference in the body of clause 2(7) aforesaid is to "airport charges", the heading to that clause is "Airport fees" and it is, in my view, clear from the correspondence passing between the parties, as well as the evidence of the witnesses, that the parties used those terms interchangeably.

34. I, therefore, find that references to "airport fees" in the statement of claim as well as in the context of the defendant's obligation under clause 2(7) aforesaid are references to the "airport charges" provided for in clause 2(7) aforesaid.

35. It is also clear from clause 2(7) of the Operating Agreement, indeed, it is not disputed, that the defendant is obligated by that clause to pay "airport charges" to the plaintiff.

36. I, therefore, find that the defendant is obligated to pay to the plaintiff "airport fees"/"airport charges" pursuant to clause 2(7) of the Operating Agreement.

Is the defendant obligated by clause 2(7) of the Operating Agreement to pay the aforesaid invoices?

37. However, the real issue between the parties is whether the defendant is obligated pursuant to the provisions of clause 2(7) of the Operating Agreement to pay the said sum of $371,235.85 claimed by the plaintiff, particulars of which are set out in the aforesaid seven invoices?

38. Clause 2(7) of the Operating Agreement provides, inter alia, that:

"[the defendant] shall pay all airport charges promulgated by the Airport Company in its Tariff or otherwise including but not limited [to] security fees and landing fees as may be required of it from time to time for services rendered by the [plaintiff]."

39. Counsel for the plaintiff makes the following observations and or submissions:

a) The provisions of clause 2(7) of the Operating Agreement are clear and unambiguous; that the words in that clause should be given their natural meaning; that the word "shall" has always been judicially interpreted as having a mandatory effect and there is no reason to depart therefrom.

b) The plaintiff having promulgated airport charges pursuant to clause 2(7) aforesaid, the defendant is obligated to pay.

c) "Promulgated" should be given its natural meaning in the context of the sentence in which it appears. In that regard, the court should accept Ms Jones' evidence that "to promulgate" means "to levy, to issue, to make known", which is consistent with how the term was viewed by the parties in practice.

d) Prior to relocating to its leased premises, the defendant duly charged and collected airport fees from its passengers, and remitted the same to the plaintiff. Logically, the only way the defendant could have known what to charge and collect is if the airport fees had been "promulgated", "a fortiori", he submits, "it is".

e) The defendant cannot "sensibly challenge or dispute the fact that it paid over to the plaintiff, on a monthly basis, a sum of money that represented the airport charges promulgated by the plaintiff in its tariff".

f) Equally, the defendant cannot reasonably maintain or assert that as a result of its relocation to its own terminal it was somehow exempted from charging, collecting and remitting to the plaintiff those airport charges promulgated which it collected and remitted to the plaintiff prior to its location. It would amount to a nonsense for the defendant to assert that no airport charges were promulgated after it relocated to its own building.

g) There is no provision in the Operating Agreement which the defendant could identify that expressly or otherwise states that on its relocation from the plaintiff's domestic terminal to its own terminal, the defendant would no longer be obligated to charge its passengers the airport charges, collect and remit the same to the plaintiff.

h) Consequently, Ms Rolle having admitted that the defendant has not paid to the plaintiff any airport charges, other than landing fees, since its relocation, the court ought to find that the defendant is in breach of clause 2(7) aforesaid for having failed to pay to the plaintiff, "a fortiori, those airport charges promulgated, which it collected prior to relocating to its own terminal building and which it ought to have continued collecting given it was and still is under an obligation to do so".

i) The court is invited to find, as a matter of fact and law, that the defendant has breached the Operating Agreement and is liable to the plaintiff in damages for the amount of $1,893,278.50; or alternatively, such other relief as the court may deem appropriate for such that a proper passenger count be provided to the plaintiff for the purpose of assessing the proper amounts due and owing.

40. On the other hand, counsel for the defendant makes the following observations and or submissions:

a) The meaning and effect of clause 2(7) of the Operating Agreement are clear and unambiguous and the provisions of the Agreement are intended to apply while the defendant operated from the plaintiff's domestic terminal facility as well after the defendant moved to its own private terminal.

b) However, the "airport charges" which the defendant is under an obligation to pay are clearly limited to charges only which have been "promulgated by the Airport Company" and are in respect of "services rendered by the Airport Company".

c) The intention of the parties to limit the charges payable by the defendant is placed beyond a shadow of a doubt by clause 2(8) of the Operating Agreement which provides, inter alia, as follows:

> "WAL shall take directives from the Airport Company regarding the maintenance of levels of security as dictated by the Airport Company as well as existing and future international, governmental and non-governmental civil aviation standards. Should domestic passenger security screening be mandated by law, WAL shall provide such screening at its own cost or shall pay the Airport Company to provide the same…"

d) It is obvious from that clause that the parties intended that while the defendant was operating from the plaintiff's domestic terminal, the defendant would have been required to pay the plaintiff a charge for "security screening" of the defendant's passengers who were making use of the plaintiff's security screening services at the time; that once the defendant moved into its own facility on 5 September 2015 and the plaintiff was no longer providing security screening services to the defendant's passengers, the plaintiff could no longer require the defendant to pay "airport charges" for "security screening", which is precisely what the plaintiff is now seeking to do.

e) In that regard, each of the aforesaid invoices adduced in evidence in support of the plaintiff's claim includes charges for "Security Domestic", "Departure Fee Domestic" and "Facility Fee Domestic" in respect of a period after the defendant had relocated and was operating from its own private terminal. Therefore, there is no obligation on the defendant to pay those charges.

f) Moreover, before the plaintiff can charge, and the defendant be expected to pay, "airport charges" pursuant to clause 2(7) of the Operating Agreement, the plaintiff must satisfy the court by evidence adduced at the trial that the item (i) is in the nature of an "airport charge"; (ii) has been "promulgated" or "published" by the Airport Company [the plaintiff] as an "airport charge"; and (iii) the charge is in respect of a "service rendered by the Airport Company" to the defendant.

g) Where the plaintiff fails to show that the aforesaid three circumstances co-exist, there is no obligation on the defendant to make payment to the plaintiff under the provisions of clause 2(7) aforesaid. And, if there is no such obligation, there could be no breach by the defendant of the provisions of that clause.

h) The plaintiff led no evidence that it ever promulgated or published a list of airport charges; and the court is not permitted to make a finding to that effect where there is no evidence before the court to support the same.

i) Further, Ms Jones' suggestion that to "promulgate" and to "levy" meant one and the same thing was "irrational" as the former means to "publish" while the latter means to "impose" as in a tax or fine.

j) Furthermore, Ms Jones' evidence at paragraph 11 of her witness statement that certain airport services are "subsumed in the airport fees" would mean that those charges are "concealed" and not "promulgated" as required by clause 2(7) aforesaid, since, "subsume" ordinarily means "include as part of something else."

k) Accordingly, in the example provided by Ms Jones at paragraph 11 of her said witness statement, the effect of her evidence would be that all of the items she listed are "included" as part of a charge which bears a different name, which would mean that the charges relating to all of the items in paragraph 11 of her witness statement are "concealed" and not "promulgated" or "made well known" or "published" as required by clause 2(7) of the Operating Agreement.

l) Consequently, if the aforesaid invoices for which the plaintiff now seeks payment contain "concealed" charges, as suggested by Ms Jones, then the defendant would have no obligation to pay them.

m) Further, in light of Ms Jones' admissions at paragraph 15 of her witness statement that the use of the words "security" and "facility" in the aforesaid invoices was not a reference to "security screening" or "use of the plaintiff's terminal facilities", there is no evidential basis upon which the Court can conclude that the items in the aforesaid invoices are in the nature of "airport charges" or are "services rendered by the Airport Company".

n) Further, if, as Ms Jones asserts, the charges for security and facility have "always included" the items listed in paragraph 11 of her witness statement, they would represent charges which are "subsumed" and not "promulgated" or "published" by the Airport Company. In which case, the aforesaid invoices adduced by the plaintiff in support of its claim would be invoices which the defendant would not be obligated to pay.

o) In any event, each of the aforesaid invoices includes charges in respect of services which are no longer being "rendered by the Airport Company" to the defendant, and, therefore, the defendant is under no obligation to pay those charges.

41. In its statement of claim, the plaintiff pleads, at paragraph 19 that as "at 15th May 2016, the defendant is indebted to the plaintiff in the sum of $371,352.85 being airport fees collected by the defendant and due and owing to the plaintiff; and at paragraph 29 of her witness statement/evidence-in-chief Ms Jones states, inter alia, that: "notwithstanding its obligation to collect and pay the airport fees and despite the demand made by the company for payment, the defendant…refused to pay the airport fees duly levied by the company that had been collected by it. It instead offered to pay $4.00 out of the $18.00 it had collected on behalf of the company.

42. Under cross examination, Ms Rolle admitted that while the defendant operated from the plaintiff's domestic terminal facility, the defendant collected airport charges on behalf of the plaintiff. However, she said, that was because the defendant's passengers used the plaintiff's terminal facility; that since moving the defendant no longer collects such charges on behalf of the plaintiff as the plaintiff no longer renders the services therefor.

43. However, nowhere in the Operating Agreement is there a provision which imposes an obligation on the defendant to collect airport charges/airport fees on behalf of the plaintiff.

44. I, therefore, find that the defendant is not indebted to the plaintiff in the sum of $371,352.85 on the basis that that sum represents airport fees collected by the defendant and due and owing to the plaintiff.

45. However, it is common ground that the only provision in the Operating Agreement that imposes an obligation on the defendant to make any payments to the plaintiff is clause 2(7) which provides as follows:

> "WAL [defendant] shall pay all Airport charges promulgated by the Airport Company [plaintiff] in its Tariff or otherwise including but not limited [to] security fees and landing fees as may be required of it from time to time for services rendered by the Airport Company…"

46. In that regard, I accept that on a plain reading of that clause, in order for the court to determine that the defendant is obligated to pay the sum of $371,352.85 charged in the aforesaid invoices, the plaintiff must prove by the evidence led at trial that the items for which the plaintiff has charged the defendant are (i) in the nature of "airport charges"; (ii) which have been promulgated by the defendant as an airport charge in its tariff or otherwise; and are (iii) in respect of a service or services rendered by the plaintiff to the defendant.

47. The aforesaid seven invoices include charges for "flight activity" for the periods specified therein. They include the following items:

a) Departure fee domestic;
b) Facility fee domestic; and
c) Security domestic.

48. The amounts on each invoice were calculated on the basis of the number of passengers enplaned and deplaned, as provided by the defendant to the plaintiff in the "monthly report charts" included amongst the documentary evidence, for the period of seven months between 5 September 2015 and 6 April 2016.

49. For example, invoice #16022016, dated 16 February 2016, for the period 5 September 2015 to 6 October 2015 in the sum of $42,542.05 shows the following information:

Description	**Quantity**	**Unit price**	**Vat amount**	**Amount**
Departure fee domestic	2174	$6.50	$1,059.83	$14,131.00
Security domestic	2174	$5.00	$ 815.25	$10,870.00
Facility fee domestic	2242	$6.50	$1,092.98	$14,573.00
Total		**$18.00**	**$2,968.05**	**$42,542.05**

50. Additionally, included amongst the defendant's documentary evidence are copies of invoices issued in 2014 by the plaintiff to, and paid by, the defendant while the defendant operated from the plaintiff's domestic terminal, reflecting charges for the same items at the same per-passenger rate as those shown on the aforesaid seven invoices.

51. In that regard, Ms Rolle at paragraph 16 of her witness statement/evidence-in-chief, states that when the defendant operated in the plaintiff's domestic terminal, in exchange for its use of the plaintiff's facility and services, the defendant paid, inter alia, the following fees:

a) Departure fee (per passenger)
b) Facility fee – Arrival (per passenger)
c) Landings fees – per every aircraft landing

52. It is common ground that “airport charges”/”airport fees” are not defined or particularized in the Operating Agreement. And while Ms Jones under cross examination said she could have provided the same, the plaintiff produced no evidence of its tariff; nor was any evidence adduced by the plaintiff to show that “departure fee domestic”, “facility fee domestic”, and “security domestic” had been promulgated by the defendant as airport charges in its tariff or otherwise prior the issuance of the aforesaid invoices.

53. Instead, Ms Jones referred the court to a letter dated 12 July 2017, addressed to Ms Rolle, in which Ms Jones notified Ms Rolle of the plaintiff’s proposal to increase its facility and security fees with effect from 1 January 2018, as an example of the plaintiff’s promulgation of its airport charges,

54. In my judgment, however, that letter does not assist the plaintiff because not only was the notice dated and issued after the defendant vacated the plaintiff’s domestic terminal, but it was also dated after the plaintiff issued the aforesaid seven invoices.

55. Counsel for the plaintiff pointed out that prior to relocating to its leased premises, the defendant, pursuant to clause 2(7) aforesaid, remitted to the plaintiff, airport fees which it had charged and collected from its passengers. In his submission, logically, the only way the defendant would have known what to charge and collect is if the airport fees had been “promulgated” or communicated to the defendant by the plaintiff.

56. That may be so. However, it seems to me that if, as Ms Jones indicated, airport charges are promulgated by means of a letter in the form of the 12 July 2017 letter, then the plaintiff ought to have been able to produce such evidence. It did not.

57. So, while I agree with counsel for the plaintiff that at some point prior to or after the execution of the Operating Agreement, the plaintiff must have promulgated, in the sense of having made known and or communicated to the defendant those airport charges billed as “departure fee domestic”, “facility fee domestic”, and “security domestic”, in my judgment the plaintiff has failed to adduce evidence of such promulgation.

58. As indicated, clause 2(7) of the Operating Agreement creates an obligation on the defendant to pay only those airport charges which have been promulgated by the plaintiff in its tariff or otherwise for services rendered to the defendant by the plaintiff.

59. So, in the event I am incorrect in my finding that the plaintiff has failed to adduce evidence of promulgation of its airport charges, I go on to consider whether the charges on the aforesaid seven invoices are for services rendered by the plaintiff to the defendant.

60. Nowhere in its statement of claim does the plaintiff plead a specific, or any, services that it provided to the defendant in respect of which it charged the “departure domestic”, “facility domestic”, and “security domestic” fees in the aforesaid seven invoices.

61. Indeed, the plaintiff’s pleaded case is that the sum of $371,352.85 represents “airport fees collected by the defendant and due and owing to the plaintiff” and Ms Jones at paragraphs 25 through 28 of her witness statement confirms this when she states, inter alia,

that “the defendant, in furtherance of its obligation under the operating agreement collected airport fees from its passengers but instead of turning those fees over the company pursuant to its obligation…it instead collected and pocketed the airport fees that were rightfully due to the company…Further, notwithstanding its obligation to collect and pay the airport fees and despite the demand made by the company for payment, the defendant…refused to pay the airport fees duly levied by the company that had been collected by it.”

62. Nevertheless, Ms Jones in her witness statement/evidence-in-chief says that prior to the defendant’s relocation to its private terminal, the information regarding passenger numbers enplaned and deplaned provided by the defendant to the plaintiff under the Operating Agreement were applied by the plaintiff against the tariff to calculate the amount of airport fees due to the plaintiff; that since moving to its private terminal, the defendant continues to assert that it will only pay for services rendered and “bases, erroneously”, she says, “its refusal to pay airport fees on the rationale that the plaintiff does not provide security screening services anymore and that the defendant has its own operating facility and no longer uses the plaintiff’s terminal.” However, Ms Jones says, “the airport fees comprise more than the two mentioned items that the defendant asserts as the reasons why it ought not to pay the airport fees levied by the plaintiff.”

63. According to Ms Jones, the airport provides many services that are subsumed in the “airport fees” and apportioned to all users of the airport, including:

a) Standby fire and crash services;

b) Maintenance and upkeep of the control tower;

c) Assistance with maintenance and upkeep of the navigation instruments;

d) General security of the airport facility;

e) Upkeep of runway and taxiways;

f) General administration of airport, including but not limited to, property insurance and other regulatory mandates such as the periodic provision of location charts and site inspections; and

g) Housing and maintenance of all government agencies including but not limited to Air Traffic Control and The Bahamas Meteorological Department.

64. From that evidence, I understand Ms Jones to be saying that while the plaintiff charges a per-passenger rate for the aforesaid “flight activity” charges, by way of “departure fee domestic”; “facility fee domestic”; “landing and security domestic”, the funds derived therefrom are used to defray or subsidize [my words] the plaintiff’s costs of providing, the services listed in her witness statement.

65. However, nowhere in the statement of claim does the plaintiff plead that the services listed by Ms Jones were provided to the defendant after 5 September 2015 and are the services for which the plaintiff charged as “departure fee domestic”; “facility fee domestic”; “landing and security domestic”, in the aforesaid seven invoices.

66. On the other hand, Ms Rolle’s evidence is that while the defendant operated in the plaintiff’s domestic terminal, the defendant, in exchange for the use of the plaintiff’s facility and services, paid fees for the following:

a) Departure fee (per passenger)

b) Facility fee – Arrival (per passenger)
c) Landings fees – per every aircraft landing
d) Fees for delayed flights
e) Fees for cancelled flights
f) Fees to use the power supply generator
g) Holiday Premiums
h) Any other fee for a service which the plaintiff provided at WAL's request.

67. According to Ms Rolle, in the days leading up to the defendant's relocation to its private terminal the plaintiff sought to require the defendant to continue to use its services in order to ensure that the plaintiff continued to receive fees for such services; that the defendant refused to agree to use the services of the plaintiff after moving into its own facility; and indicated that it would, pursuant to the Operating Agreement only pay the plaintiff "for services rendered".

68. In that regard, Ms Rolle says that since moving to its private terminal on 5 September 2015, the defendant conducts its own security screening; has invested in ground handling and other equipment, including advanced security technology, surveillance and camera systems; has hired personnel for its ground support, security screening and, inter alia, operations; and has contracted vendors to provide various services to enable it to operate its passenger terminal efficiently and independently; that except for the defendant's use of the plaintiff's runway for landing, for which the defendant pays a landing fee and ground handling charges, the defendant is no longer receiving those services from the plaintiff.

69. Consequently, the defendant contends, it is not obligated to pay the aforesaid seven invoices.

70. It is accepted that the burden is on the plaintiff to prove by evidence led at trial that it is entitled to the sum claimed in its statement of claim.

71. It is therefore incumbent on the plaintiff to adduce evidence to show pursuant to clause 2(7) of the Operating Agreement that the charges to which the aforesaid seven invoices relate are all in respect of services rendered by the defendant to the plaintiff, which the plaintiff, in my judgment, has failed to do.

72. In that regard, Ms Jones, asserts that: "the airport fees comprise more than the two mentioned items that the defendant asserts as the reasons why it ought not to pay the airport fees levied by the plaintiff." Those two mentioned items are: (i) the defendant no longer uses the plaintiff's terminal and (ii) the plaintiff no longer provides security screening services for the defendant.

73. It seems to me that that assertion by Ms Jones is an acknowledgement by the plaintiff that the airport fees claimed in the aforesaid seven invoices relate to, or include, security screening and the defendant's use of the plaintiff's domestic terminal – neither of which service was provided to the defendant by the plaintiff during the period covered by the aforesaid seven invoices. That, of course, would mean that the plaintiff is charging the defendant for a service or services which the plaintiff no longer provides to the defendant.

74. It is, in my view, unclear from the evidence exactly what services are covered by the charges in the aforesaid seven invoices.

75. Furthermore, I accept the submission of counsel for the defendant, that if, as Ms Jones asserts, the charges for security and facility in the aforesaid invoices are in no way related to “security screening” or “the use of the plaintiff’s terminal facility”, there is no evidential bases upon which this court can conclude that those charges are in the nature of airport charges which have been promulgated or are in respect of services rendered by the plaintiff.

76. So, in the absence of evidence as to the specific services provided by the plaintiff to the defendant during the period post September 2015 for which the aforesaid seven invoices have been issued, I am unable to find that the defendant is obligated to pay the sum of $371,352.85 as claimed by the plaintiff pursuant to clause 2(7) of the Operation Agreement.

77. In the circumstances, I find that the plaintiff has failed to prove that the charges for “departure fee domestic”, “facility fee domestic”, and “security domestic” on the aforesaid seven invoices are airport charges, which, on a balance of probabilities, have been promulgated by the plaintiff “in its tariff or otherwise” for services rendered by the plaintiff to the defendant.

78. The plaintiff’s claim for payment of the sum of $371,235.85 is, therefore, dismissed with costs to the defendant to be taxed if not agreed.

DELIVERED this……of……A.D. 2019

Estelle G. Gray Evans

Senior Justice