



[2020] JMCC COMM 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2019CD00083

BETWEEN	PAYMASTER (JAMAICA) LIMITED	CLAIMANT/RESPONDENT
	GRACE KENNEDY REMITTANCE SERVICES LIMITED	1ST DEFENDANT
AND	PAUL LOWE	2ND DEFENDANT/APPLICANT

IN OPEN COURT

Mr. Vincent Chen and Mr. Makene Brown instructed by Chen Green & Co. for the Applicant

Mr. Maurice Manning and Mr. Mark Paul Cowan instructed by Nunes, Scholefield, DeLeon & Co. for the Respondent

Heard: February 3, 4 and 5, June 11, 2020

Damages - Assessment of damages based on undertaking given on obtaining an interlocutory injunction

PALMER HAMILTON, J

BACKGROUND

- [1] The Court is called upon to make an enquiry into damages in relation to the Claimant's (hereinafter "the Respondent") undertaking given to the Court on the grant of an interim injunction in this matter. The history of litigation between the parties herein has been long. Therefore, I will attempt to summarize only the facts that are relevant to the determination of the issues in the instant application.
- [2] The 2nd Defendant, Mr. Paul Lowe (hereinafter "the Applicant") was in the business of developing software programmes for bill payments. In the 1980's, he developed a computer programme known as the CCSREMIT which he marketed to companies in Jamaica including agencies of the Government of Jamaica, the Cayman Islands and Tortola British Virgin Islands. The Applicant's business practice entailed modifying his basic CSSREMIT programme to meet the specific needs of each client and, retaining his copyright, to grant the client a non-exclusive licence to use the programme as so modified. This meant that he earned not only by charging a licensing fee but also by charging for the maintenance of the software and its adjustment from time to time.
- [3] The Applicant granted the Respondent a non-exclusive licence to use CSSREMIT for the multi-payment programme which he developed at the Respondent's request and expense. The Respondent used the modified programme to operate its business.
- [4] In 1999, after negotiations, the Respondent gave the 1st Defendant a nonexclusive licence to use the programme and by virtue of this licence, the 1st Defendant entered the market for the provision of a multi-payment agency system in Jamaica in competition with the Respondent. The Respondent contended that both the 1st Defendant and the Applicant had infringed its copyright in the software which the Applicant had prepared for it and initiated proceedings asserting same.
- [5] In 2000, the Respondent obtained an interlocutory injunction preventing the 1st Defendant and the Applicant from using the software. The *ex parte* Order is coined as follows: -

“(1) The Defendants be restrained whether by themselves, their officers, servants or agents or any of them otherwise howsoever from doing any of the following acts-

- a. Reproducing or authorising the reproduction without the Plaintiff’s consent of the Paymaster multi-payment collection software system of its computer software programme.*
- b. Possessing in the course of business or selling or offering for sale or using without the Plaintiff’s licence any copies or materials of the said programme.*
- c. Converting for their own use infringing copies of the Plaintiff’s said computer software.*

(2) The Plaintiff gives the usual undertaking in damages...”

[6] The Applicant has not used that software since being forbidden not to do so. The matter proceeded to trial and judgment was given in favour of the 1st Defendant and the Applicant and it was also ordered that there be an enquiry into damages consequent on the Respondent’s undertaking given to the Court on the granting of the interim injunction. The Respondent appealed to both the Court of Appeal and to the Judicial Committee of the Privy Council and both pronounced in favour of the Applicant.

[7] Pursuant to the ruling of the Supreme Court and the Court of Appeal that also made a further Order for the enquiry as to damages pursuant to the undertaking given by the Respondent, the Applicant now wishes to enforce the Respondent’s cross-undertaking. It is that assessment that is now before me.

[8] Both parties made detailed written and oral submissions supported by authorities for which I am grateful. I do not propose to repeat all the evidence of the parties or the submissions but I will only discuss so much of it as impacts my determination. The parties and their Counsel however, can rest assured that I have carefully reviewed and considered the evidence and submissions as well as the authorities cited.

The Applicant’s Claim and Submissions

- [9] By Notice of Application the Applicant sought, inter alia, an Order that there be an enquiry into damages consequent on the Respondent's undertaking. In his Witness Statement, the Applicant detailed the harm caused to him by the interlocutory injunction obtained by the Respondent. He described the harm as irreparable and indicated that it caused him to lose his position in the market as frontrunner in the creation and development of bill collection software.
- [10] The Applicant indicated that subsequent to the injunction the collection of bills on behalf of others has developed into a flourishing industry and was undertaken by numerous organisations other than the Respondent and the 1st Defendant. He was regularly approached by other local and international companies. However, during and after the trial and subsequent appeals there was little or no contact, citing that the assertions of the Respondent followed him everywhere.
- [11] The Applicant also averred that although the CSSREMIT was well known and accepted in the market place, because of the existence of the injunction he could not make it available to new customers as it would have included the functions required by the Respondent. The result has been that his reputation as the owner of an advanced collection software programme has suffered and he now has difficulty attracting clients.
- [12] It was further proffered by the Applicant that had he been allowed to continue to develop and maintain his position in the market any number of these organisations could have retained him for the purpose of developing the programme to cater to the specific requirements of each individual company and its subsequent maintenance for the foreseeable future.
- [13] In order to quantify his financial losses suffered over the eighteen (18) year injunction period, the Applicant undertook the following calculations: -

"a. Using the evidence filed at this Honourable Court and ventilated in the trial of this matter formulated a scenario that accounts for the sale of licences and maintenance of the program that I anticipated over the life of the injunction.

- b. *From this interest, based on the average BOJ Commercial Lending Rate is placed on the maintenance Cost from year to year to maintain the value of the maintenance cost from year to year.*
- c. *Then Interest Lost is calculated on the value of the sale and the interest that would have been accumulated in that sale for the year.*
- d. *Then as the market expands over time the estimated value of that sale is accounted for as I would have had software I would adjust as needed and it was the only one available on the market that was proven and in production. This would have given me an advantage in the market which I have used to arrive at the financial loss I suffered.”*

[14] The Applicant produced his estimate based on the above scenario and this revealed that he suffered loss of approximately Four Hundred and Seventy Million Four Hundred and Thirty-Two Thousand Three Hundred and Eleven Dollars and Thirty-Two Cents (\$470,432,311.32).

[15] Learned Counsel Mr. Chen submitted that the Court having ordered that an enquiry ought to be held into the damages, the matter now to be determined is quantum. He stated that the traditional approach to the assessment was stated obiter by Lord Diplock in **F. Hoffman-La Roche & Co. A.G. and Others v Secretary of State for Trade and Industry** [1975] A.C. 295 at 361E as follows: -

“The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction...”

[16] In assessing the relevant principles to be applied, Learned Counsel cited and explored the following cases: -

1. **Graham v Campbell** (1878) 7 Ch.D. 490;
2. **Ansett Transport Industries (Operations) Pty Ltd v Halton** [1979] 25 A.L.R. 639;
3. **Les Laboratoires Servier and another v Apotex Inc and others (No 2)** [2008] EWHC 2347 (Ch);

4. **Abbey Forwarding Limited (In Liquidation) and HM Revenue & Customs v Richard John Hone, Patrick Daniel Owen and William James Owen** [2012] EWHC 3525 (Ch);
5. **Fiona Trust & Holding Corporation v Yuri Privalov & Others** [2016] EWHC 2163 (Comm); and
6. **AstraZeneca AB and another v Krka dd Novo Mesto and another** [2015] EWCA Civ 64.

[17] In summary, Mr. Chen submitted that the remedy under a cross-undertaking in damages is by way of equitable compensation rather than common law damages, so the defendant, in this case the Applicant, has to show that the damage would not have been sustained but for the injunction and not that the injunction was the sole cause. He further submitted that the court is compensating for loss caused by the injunction which was wrongly granted.

[18] It was also averred by Learned Counsel for the Applicant that the present position of the law is that the Court's hands are not tied by strict rules as to remoteness in contract cases but it is a requirement to look at all the circumstances when deciding whether what is being claimed is as a result of the injunction and is assessable.

[19] Mr. Chen urged that the Court should approach the determination of the loss in two stages. He submitted the following: -

"First, it should select a scenario which, on a balance of probabilities, is the most probably way things might have happened in a counterfactual and secondly, it should then look at the assumptions made and make a determination as to the likelihood of those assumptions playing out. To the extent that the Court finds that they were likely or not, to apply an appropriate discount to the particular assumption as the Court determines.

The second is not so simple. The Court has a great responsibility to exercise a discretion as to how likely a particular assumption might have happened as projected and then to apply or not to apply a discount and if it is applicable, the degree of that discount."

- [20] Learned Counsel indicated that this approach should be liberal. He invited the Court to follow the methodology set out in **AstraZeneca AB and another v Krka dd Novo Mesto and another** (supra) as well as the guidelines suggested by Lord Diplock in **F. Hoffman-La Roche & Co. A.G. and Others v Secretary of State for Trade and Industry** (supra).
- [21] In relation to the issue of interest, the appropriate rate submitted was an average between the highest and lowest rates prevailing at the time of the injunction which is 16.61 % per annum. An agreed extract from the publication of the statistical digest published by the Bank of Jamaica was submitted for the Court's consideration along with the cases of **Goblin Hill Hotels Limited v John Thompson and Janet Thompson** (unreported), Jamaica, Court of Appeal, Supreme Court Civil Appeal No.57/2007, judgment delivered on the 19th day of December, 2008 and **British Caribbean Insurance Company Limited v Delbert Perrier** (1996) 33 J.L.R. 119.

The Respondent's Claim and Submissions

- [22] The Respondent's position is contained in the redacted Witness Statement of Mr. Patrick Dallas. He revealed that the injunction would not have prevented the Applicant from making updates to his base CSSREMIT programme and that he would have had the source code for this programme available to him at the time of the injunction.
- [23] Mr. Dallas also detailed ways in which the software could have been deployed so as not to breach the injunction made against the Applicant, one of which being rewriting source codes. He revealed that CSSREMIT was designed to run on the operating system called Disk Operating System (DOS) and due to the growing obsolescence of DOS, it would have been prudent for the Applicant to change to a windows based programme or completely lose his relevance as an application software developer/provider in a year or two after the injunction. CSSREMIT could be converted to run on a different operating system to yield an application which

could execute similar functions. Mr. Dallas disclosed that the fact that it could execute similar functions is not what was prohibited by the injunction.

- [24] Mr. Dallas further stated that after 2001, there would not have been any viable market for the Applicant's DOS based programme since any incoming player in the bill payment system would have insisted on software specifically designed to run in a multi-processing environment such as the Windows OS.
- [25] Learned Counsel Mr. Maurice Manning adumbrated his submissions by indicating that the burden of proof is on the Applicant to prove his losses, if any, in the ordinary way and to the requisite civil standard on a balance of probabilities.
- [26] On the issue of causation, Mr. Manning cited the cases of **Air Express Limited v Anset Transport Industries (Operations) Proprietary Limited** (1981) 146 CLR 24 and **Uzor v China & others** EWCH 827 (Ch) in support of his submission that the Applicant must prove that he suffered loss or damage and that the damage was caused by the grant of the injunction. Learned Counsel indicated that it is not a proper conclusion to say that the Order prevented the Applicant from developing his CSSREMIT software and it did not prevent him from rewriting codes in a different language to perform the same tasks.
- [27] Also, Learned Counsel submitted that any stigma that was allegedly attached to the Applicant's name would have come about as a result of the ongoing litigation and not the injunction itself. There is therefore no causal link between the injunction and any loss of potential business.
- [28] On the issue of evidence and proof of the counterfactual, Learned Counsel submitted the case of **Allied Maples Group Ltd v Simmons & Simmons** [1995] 1 WLR 1602 and stated that the burden of proving the counterfactual rests on the Applicant. Mr. Manning indicated that the appropriate counterfactual scenario that the Court should consider is as follows: -

1. Had the injunction not been granted the Applicant would have still lost his contract with the Respondent as the relationship had broken down and the parties were going to embark on a bitter legal battle. At best damages should be confined to damages for breach of contract and not damages flowing from the injunction.
2. Had the injunction not been granted, the Applicant would have likely continued his maintenance contract with the 1st Defendant for a few months until the alternative software, that is the CEMSUP could become fully operational. It is submitted that a period of four (4) months is more than reasonable to facilitate the transition either to a new programmer or to a new software developed by the Applicant.
3. Had the injunction not been granted, the market for the Applicant's software on the DOS-based platform would have been extinct. Any new entrants in the bill collections market would have required a windows-based programme. The Applicant was free to create a new software programme to keep up with changes in technology as the injunction did not prevent him from doing so.
4. In the counterfactual scenario, there is no scope to accommodate potential licensees for software that was obsolete.

[29] The Respondent submitted that the Applicant had a duty to mitigate potential losses resulting from the injunction and cited the cases of **Pearl Smith v Conrad Graham and Lois Graham** (1996) 33 JLR 189, **Abbey Forwarding Limited (In Liquidation)** and **HM Revenue & Customs v Richard John Hone, Patrick Daniel Owen and William James Owen** (supra) and **Saffron Limited v Angel Estates Limited** [2012] ECSCJ No. 359.

[30] On the issue of interest, Mr. Manning submitted that the application for interest is a discretionary one and that even though the genesis of the relationship between the parties is essentially a commercial one, it does not follow that a commercial rate of interest should be applied in the instant case in an application for equitable compensation. Learned Counsel submitted that interest should be awarded on a simple interest basis at 6% per annum since the objective is to compensate the Applicant and not to punish the Respondent. The cases of **The London, Chatham Railway Company and Dover Railway Company v The South Eastern Railway Company** [1893] AC 429, **Goblin Hill Hotels Limited v John Thompson and Janet Thompson** (supra) and **British Caribbean Insurance Company Ltd v Delbert Perrier** (1996) 33 JLR 119.

ISSUES

[31] The issue that falls to be determined by the Court is whether the Applicant has suffered any loss and if so, what loss did the making of the injunction cause to the Applicant.

LAW AND ANALYSIS

[32] In determining whether the Applicant herein sustained any loss from the grant of the injunction, I must analyse the circumstances under which the injunction was granted and the purpose of the undertaking. It was already ordered by the Supreme Court and the Court of Appeal that there be an inquiry into damages and as such I will only consider this issue succinctly. I adopt the words of the Honourable Ms. Justice Nicole Simmons at paragraph 12 of the case of **University Hospital Board of Management v Dr. Sandra Williams Phillips** [2014] JMSC Civ. 47. Simmonds, J stated the following: -

“The usual practice where the court is granting an interlocutory injunction is to require the claimant to give an undertaking as to damages. It is to be noted that this undertaking is given to the court and is intended to provide a method of compensating the other party if at some later date it appears that the injunction was wrongly granted. It has therefore been described as “the price which the person asking for an interlocutory injunction has to pay for its grant”. The effect of

the undertaking is that the party who obtains the injunction undertakes to pay any damages sustained by the other party as assessed by the court.”

[33] Simmons, J went further at paragraphs 16 and 17 to state: -

“In order to enforce the undertaking there must be an assessment by way of an inquiry as to damages. There are two issues which arise on an application for such an inquiry to be conducted. The first is whether the undertaking ought to be enforced. If the answer is in the affirmative, it must then be considered whether the defendant has suffered any damage at all.

*The resolution of the first issue according to Lloyd, L.J. in **Financiera Avenida S A v. Shiblaq**, The Times January 14, 1991, is dependent on “...the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff at trial, the subsequent conduct of the defendant and all other circumstances of the case”. The learned Judge also said that the decision as to whether the order ought to be made is a question of discretion...”*

[34] In the case of **Ushers Brewery Ltd v King & Co. (Finance) Ltd** [1972] Ch 148, the court held that an inquiry was not to be ordered unless the plaintiff had failed on the merits at the trial or it was established before the trial that the injunction ought not to have been granted.

[35] Having considered these authorities and the fact that the Applicant was vindicated at all levels of the justice system, it is appropriate in the circumstances that the undertaking of the Respondent be enforced and an inquiry as to damages be conducted.

[36] I now turn my focus on to whether the Applicant suffered any loss as a result of the injunction being granted. I note that the submissions and legal principles advanced by the Applicant are analogous to those proclaimed by the Honourable Mrs. Justice

Vivene Harris in the case of **Pfizer Limited v Medimpex Jamaica Limited, NMF Pharmaceuticals Limited (t/a as Mac’s Pharmaceuticals) and Lasco Distributors Limited** [2017] JMSC Civ. 162 and I place substantial reliance on this case.

[37] As indicated by Learned Counsel Mr. Chen, the case of **Les Laboratoires Servier and another v Apotex Inc and others (No 2)** (supra) summarises the modern principles in relation to damages payable in cases where an undertaking is given

pursuant to an injunction. At paragraph 12 of the case of **AstraZeneca AB and another v Krka dd Novo Mesto and another** (supra), Kitchin LJ referred to the dicta of Norris J from **Les Laboratoires Servier and another v Apotex Inc and others (No 2)** (supra) as follows: -

*“The parties were agreed before the judge and before this court that the general principles to be applied in assessing the damages payable under a cross-undertaking given in respect of the grant of an interim injunction are those explained by Norris J in **Les Laboratoires Servier v Apotex Inc** [2008] EWHC 2347 (Ch), [2009] FSR 220, [2009] IP & T 600, [2009] FSR 220. In that case Norris J said this:*

[5] The principles of law sufficient to enable me to quantify compensation in this case may be shortly stated:

- (a) The undertaking is to be enforced according to its terms. In the instant case (as in many others) it is that Servier will comply with any order the court may make “if the court ... finds that this order has caused loss to the Defendants”. The question for me is therefore: what loss did the making of the order and its continuation until discharge cause to Apotex?*
- (b) The approach is therefore essentially compensatory and not punitive;*
- (c) The approach to assessment is generally regarded as that set out in the obiter observation of Lord Diplock in **Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry** [1974] 2 All ER 1128 at 1150, [1975] AC 295 at 361 namely:*

*“The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the Plaintiff and the Defendant that the Plaintiff would not prevent the Defendant from doing that which he was restrained from doing by the terms of the injunction: see **Smith v Day** ((1882) 21 Ch D 421 at 427) per Brett LJ”*

- (d) What Apotex was trying to do (and what the order restrained it from doing) was to enter a new market for the sale of generic perindopril. It was denied exploitation of this opportunity. The outcome of such exploitation is attended by many contingencies but **Chaplin v Hicks** [1911] 2 KB 786 establishes (at 791 per Vaughan Williams LJ) that whilst “the presence of all the contingencies on which the gaining of the prize might depend makes the calculation not only difficult but incapable of being*

carried out with certainty or precision” damages for the lost opportunity are assessable.

- (e) The fact that certainty or precision is not possible does not mean that a principled approach cannot be attempted. The profits that*

*Apotex would have made from its exploitation of the opportunity to sell generic perindopril depend in part upon the hypothetical actions of third parties (other potential market participants) and in part upon Servier's response to them. A principled approach in such circumstances requires Apotex first to establish on the balance of probabilities that the chance of making a profit was real and not fanciful: if that threshold is crossed then the second stage of the inquiry is to evaluate that substantial chance (see **Allied Maples v Simmons & Simmons** [1995] 4 All ER 907, [1995] 1 WLR 1602). As Lord Diplock explained in **Mallett v McMonagle** [1970] AC 166 at 176:*

“... in assessing damages which depend on its view as to what ...would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing ... would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards...”

*(f) **The conventional method of undertaking this exercise is to assess damages on a particular hypothesis and then to adjust the award by reference to the percentage chance of the hypothesis occurring. In many cases it is sufficient to postulate one hypothesis and make one discount: but there is no reason in principle why one should not say that either Scenario 1 or Scenario 2 would have occurred and to discount them by different percentages. That is the course which Mr Watson QC urged in the present case: and I note that it has some support in **Earl of Malmesbury v Strutt & Parker** [2007] PNLR 570.”** [my emphasis]*

[38] The Respondent also agreed with this position and indicated in the written submissions that: -

“It is not in dispute that a case of this nature, the court is permitted to make an assessment based on a counterfactual scenario- a set of facts detailing what would have happened or what would have likely happened had the Defendant not been restrained by the injunction. The burden of proving the counterfactual also rests upon the constructor of the counterfactual or the injunctee as the case may be.”

[39] I have also adopted the principles outlined in the case of **Richard John Hone and others v Abbey Forwarding Ltd. (In Liquidation) and another** [2014] EWCA Civ 711. McCombe LJ stated at paragraphs 63 to 64 and 66 to 68: -

*“In the result, therefore, and perhaps not surprisingly, I reach the conclusion that the law as to the recoverability of loss suffered by reason of a cross-undertaking is as stated by Lord Diplock in his dictum in **Hoffmann-La Roche**, but with this caveat. **Logical and sensible adjustments may well be required, simply because the court is not awarding damages for breach of contract. It is compensating for loss for which the defendant “should be compensated” (to apply the words of the undertaking).** Labels such as “common law damages”*

and “equitable compensation” are not, to my mind, useful. **The court is compensating for loss caused by the injunction which was wrongly granted. It will usually do so applying the useful rules as to remoteness derived from the law of contract, but because there is in truth no contract there has to be room for exceptions.**

In my judgment, the law also meets the justice of the matter. A defendant wrongly enjoined should be compensated for losses that he should not have suffered, but a claimant should not be saddled with losses that no reasonable person would have foreseen at the time when the order was made, unless the claimant knew or ought to have known of other circumstances that was likely to give rise to the particular type of loss that occurred in the case at hand. A claimant may, however, find himself liable for losses which would not usually be foreseen in particular cases. One such case may be if a loss, not usually foreseeable, arises before a defendant has had any real opportunity to notify the claimant of the likely loss or sensibly to apply to the court for a variation.

In the context of the present case, and before turning to factual issues, I would add that I accept Mr Coppel’s submission that, for a loss to be recoverable, the remoteness rules only require that the claimant giving the undertaking should have reasonably foreseen loss of the type that was actually suffered by the defendant and not the particular loss within that type: see (again by analogy) Chitty on Contracts, 21st Edn. Vol. 1 paragraph 26-113, p.1828.

I do not consider that the judge misstated the principles applicable, as the Appellants contend, when he said (at paragraph 27 of the judgment) that the rules rendered, “...recoverable either loss suffered by the Injunctee that falls within the first or second rule in Hadley v Baxendale and arises from circumstances that were either actually known to the injunctor or deemed to have been known to the injunctor at the time when the injunction is granted...” Nor do I think the judge was in error (in paragraph 29) when he said that, “...the cardinal point remains this: absent express notice of special circumstances [my emphasis] arising after the date when the injunction is granted, the conventional approach is that compensation will not be recoverable for events occurring after the grant of the injunction that could not be foreseen at the time when the injunction was granted...”

In my judgment, these passages were not indicating that the judge required proof of “actual notice of the actual circumstance” creating the loss before compensation for it was recoverable (c.f. paragraph 66 of the Appellants’ skeleton argument). If a claimant has knowledge of special circumstances, giving rise to potential type of loss, or other actual knowledge of a particular loss it will be recoverable, but what amounts to such knowledge will be intensely fact-sensitive. However, as will appear below, I do think that in respect of one of the claims, the judge did wrongly require proof of “actual notice of the actual circumstance” creating the loss. [my emphasis]

- [40] Having outlined the guiding principles in conducting an inquiry as to damages, I garner from the authorities that the Applicant must show that the injunction caused him loss and that his chances of making a profit from the sale of licences to his programme and its maintenance was real and not fanciful. I also gather that the

Applicant must establish his loss by adducing relevant evidence. When this threshold has been passed, the Court must then evaluate that chance and reflect it in the amount of damages it awards.

[41] I also note that the approach to the quantification shall be compensatory and not punitive. I will therefore make the assessment based on the method urged by the Applicant, that is, on the same principles as those applicable to breach of contract.

[42] My sister Harris, J in **Pfizer Limited v Medimpex Jamaica Limited, NMF Pharmaceuticals Limited (t/a as Mac's Pharmaceuticals) and Lasco Distributors Limited** (supra) made it clear that I should bear in mind that since realistically there was no breach of contract, the damages can be assessed liberally but with logical and sensible adjustments. Harris, J stated at paragraph 291: -

"I will adopt the words and approach of McCombe J that, "In my judgment, I would not adopt an approach of awarding either "modest" damages on the one hand or "generous" damages on the other. I think that the correct approach should be to award realistic compensation for what has occurred";

[43] I also accept the submission of Learned Counsel Mr. Manning that the liberal assessment principle does not entitle the Applicant to damages with little or no supporting evidence. I am further guided by Harris, J the case of **Pfizer Limited v Medimpex Jamaica Limited, NMF Pharmaceuticals Limited (t/a as Mac's Pharmaceuticals) and Lasco Distributors Limited** (supra) where at paragraph 29 she stated: -

*"...Counsel for Pfizer submitted that a 'liberal assessment' is a means of assessment which may be utilised by a judge, who when faced with a hypothetical scenario, must estimate a realistic award based on the relevant indications available and admitted into evidence. **The principle does not serve as a substitute for the fundamental principles of the law of evidence. Although Lord Wilberforce was speaking in relation to an assessment of damages***

*where a patent had been infringed, in **General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd** [1975] 2 All ER 173,179, I find the following statement apt: 'The ultimate process is one of judicial estimation of the available indications.' It is also clear from the authorities that the court must embark upon a balancing exercise, consequently regard must be had to all the relevant evidence in order to determine the appropriate weight to be given in arriving at the final judicial estimate. [my emphasis]*

- [44]** After a careful analysis, I find that it was highly probable that the Applicant would have continued to be the frontrunner in the market as the creator and developer of bill collection software and that he would have continued to make a profit from doing so but for the injunction. I do accept that the chance of the Applicant making or continuing to make a profit was real and that same was not fanciful. I will now outline my reasons for this decision.
- [45]** The Applicant indicated that prior to the granting of the injunction, his software was the only one available on the market that was proven and in production. This was not denied by the Respondent and I find the Applicant as a credible witness in this regard. What was challenged by the Respondent is the issue of causation, in that, the losses did not flow from the grant of the injunction, but instead from the litigation.
- [46]** While I agree with Mr. Manning that had the injunction not been granted the Applicant would have still lost his contract with the Respondent, I find that it would not have led to the loss of other pre-existing and new clientele. Prior to the granting of the injunction, the Applicant would build on his software, make amendments to the base and license it to clients. I find that he was denied the exploitation of this opportunity by the operation of the injunction. The adjustments and improvements incorporated into the software for his pre-existing and new clientele are similar to those incorporated into the software that was licenced to the Respondent and the injunction precluded this, resulting in the loss of new and pre-existing clientele.
- [47]** The Applicant stated that he would regularly be approached by companies like Fujitsu-ICL with locations in Jamaica and Trinidad and Tobago with respect to new installations to make bids for bill payment applications before the granting of the injunction. The Applicant detailed that after the granting of the injunction, when he contacted the general manager of Capital Financial Group as well as Victoria Mutual Building Society he was denied having meetings with them.
- [48]** I take judicial notice that the battle between the parties herein was public and as such it would have tainted his reputation on the market, resulting in him being

slapped with the difficulty of attracting new clients and maintaining existing ones. I do find that there is an element of commonality between the effect of the injunction and the loss of the Applicant's reputation. The loss of these contracts, in my view and his reputation was a result from the compliance with the injunction. I also find that this loss could have been foreseen when the injunction was granted.

[49] I also find that the case of **Uzor v Chinye** (supra) is clearly distinguishable from the instant case as the cross-undertaking in that case was not the basis upon which the claimant failed to obtain the paid chairmanship but rather, it was from the publication of the order. While in the case at Bar, it is not an unreasonable stretch that as a software developer, the flagrancy of the alleged infringement which the injunction sought to prevent, would cause him to lose his reputation as the frontrunner in the market and this is, in my judgment, a substantive effect of the injunction. The Applicant was denied the ability to continue to build upon the base of the software that existed, which meant that he was unable to continue the sale of licences and potential maintenance of said licenses.

[50] In my judgment, even if the litigation herein was not publicized, the effective course of complying with the injunction, would have embargoed his trade and cause the Applicant to lose the reputation and advantage he had on the market prior to the imposition of the injunction. In examining the scenario presented by the Applicant, it is my view that the chance of this occurring during the counterfactual situation presented, would have been highly probable based on the nature of the circumstances.

[51] In any event, the relationship broke down because of the Respondent's contention of breach of copyright and the injunction, in my view, further compounded the issues as it prevented him from utilizing the software. It was submitted by the Respondent that the injunction prevented the Applicant from using the software granted to the Respondent and as such he was free to develop his CSSREMIT software or re-writing same. This, in my view, was the very act that led to the

Respondent's contention of copyright violation, resulting in the injunction being granted. It is the Applicant's development and tweaking of the software to meet the specifications of the 1st Defendant that led to the Respondent's allegation of breach of copyright. It would therefore not be reasonable to expect the Applicant to continue the very essence or act of what led to the institution of the proceedings.

[52] While I accept that the injunction obtained by the Respondent stifled the Applicant's ability to earn income from the programme he developed, I have no evidence about the Applicant's strategies and his ability to dominate and gain more market for his CSSREMIT programme in the counterfactual scenario. Prior to the granting of the injunction, the CSSREMIT application was nearing obsolescence. I note at this juncture that the programme is presently obsolete and both the Respondent and the 1st Defendant are using new programmes. However, there is no evidence to suggest that the Applicant would not have been able to satisfy the demand of a more modern software thereby retaining his position in the market.

[53] On the other hand, there is evidence that he would continuously make modifications to his programme to suit the needs of each client and that said programme was improved over the years. Is this sufficient to conclude that these organizations would retain him to cater to these specific requirements and its subsequent maintenance for the then foreseeable future? Would it result in his unrelenting capture and domination of the potential market?

[54] Further, the Applicant provided no evidence as to the existence of any employment contract he had with any pre-existing clients. However, I do not find his viva voce evidence in that regard incredible or unreasonable in the circumstances.

[55] In my assessment of the counterfactual scenario presented by the Applicant, whilst same would have been strengthened with the availability of more evidence, I do find that on a balance of probabilities, the Applicant suffered loss as a result of the injunction obtained by the Respondent and as indicated earlier, he was prevented from making a profit in the future as a result of the injunction. While, having regard to the changes in technology and the fact that the software would have become

obsolete by trial date, there is nothing to suggest that the Applicant would not have been able to meet these changes and ensure the continuance of a viable market for his software had the injunction not been granted.

[56] Furthermore, Learned Counsel Mr. Manning maintained that the Applicant failed to mitigate his loss as the injunction did not prevent the Applicant from making updates to the CSSREMIT programme. The Applicant detailed that he tried to reach out to a few companies who declined his services during the existence of injunction. I find, in essence that this was migratory in nature. The Applicant also stated that he created a new software but he had to sell it at a discounted price due to his loss of reputation. I am however of the view that even if the Applicant had presented other software, his reputation on the market was tarnished and this flowed from the grant of the injunction.

[57] In the circumstances, I have accepted that the Applicant's evidence was deficient but I do find that he suffered loss as a result of the imposition of the injunction. I also accept the methodology he has used to arrive at his calculations, however, there are aspects of his calculations that I believe ought to be discounted. With the necessary adjustments and discount, it would result in the fairest assessment of what would have occurred in the counterfactual scenario presented by the Applicant.

[58] In the circumstances, I conclude that the Applicant's counterfactual has a probability of about 60%. I am of the view that the counterfactual scenario required, and it would have certainly been helpful to the Court, more detailed and cogent evidence being elicited by the Applicant. Also, no explanation was provided by the Applicant for the lack of such evidence when he was pressed by Learned Counsel for the Respondent as to why he did not provide same. A 40% discount for all the possible "vicissitudes, contingencies and uncertainties" as indicated by Harris J in **Pfizer Limited v Medimpex Jamaica Limited, NMF Pharmaceuticals Limited (t/a as Mac's Pharmaceuticals) and Lasco Distributors Limited** (supra) is appropriate.

[59] On the issue of interest, the Court was provided with a statistical digest published by the Bank of Jamaica to assist the Court in making an assessment at an appropriate rate. I am guided by the case of **Tate & Lyle Food Distribution Ltd. v Greater London Council & Anor** [1981] 3 All ER 716. Forbes J indicated the basis for awarding interest at page 722 as follows: -

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

[60] From the authority cited above, I gather that the aim of interest is not to punish the Respondent. I agree with the submission of the Respondent that the Court ought to exercise its discretion to award interest in order to do justice between the parties and not as a means of overcompensating the Applicant. I am prepared to award interest at 6% per annum and I believe same is reasonable in the circumstances.

ORDERS AND DISPOSITION

1. The Applicant is awarded damages of J\$282,259,386.80 plus interest thereon calculated at the rate of 6% per annum from the 25th day of August, 2000 to the 11th day of June, 2020.
2. Costs to the Applicant to be taxed if not agreed.

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3. This Order is stayed for six (6) weeks from the date of this judgment.