

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2020CV00048

BETWEEN PAYMASTER (JAMAICA) LIMITED APPELLANT

AND PAUL LOWE RESPONDENT

Maurice Manning KC, Mark-Paul Cowan and Ms Allyandra Thompson
instructed by Nunes, Scholefield, Deleon & Co for the appellant

Vincent Chen and Mrs Vanessa Reid Pringle instructed by Chen, Green & Co for
the respondent

17, 18 April 2023 and 15 July 2024

Civil procedure - Injunction — Interlocutory — Undertaking as to damages —
Cross-undertaking as to damages — Enforcement of undertaking —
Quantification of damages — Loss of a chance — Claimant obtaining interim
injunction in copyright infringement proceedings — Court subsequently
finding copyright claim invalid — Quantification of damage occasioned to
defendant for purpose of enforcing cross-undertaking given by claimant —
Obligations on the defendant to prove loss under the counter-factual scenario
— Whether compensation can be granted for loss of reputation

Aspects of a computer program not subject to copyright protection

Copyright Act, 1993 – ss 2, 5 and 6

BROOKS P

[1] I have read in draft the judgment of my brother D Fraser JA. I agree with his
reasoning and conclusion and have nothing to add.

D FRASER JA

Introduction

[2] This is an appeal from an assessment of damages regarding loss flowing from an interlocutory injunction granted on 25 August 2000, restraining the conduct of the respondent Paul Lowe ('the respondent' or 'Mr Lowe') in relation to a software program referred to as "The Paymaster Multiple Collection Program". The assessment was conducted by Palmer Hamilton J whose judgment with neutral citation **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Services Limited and Paul Lowe** [2020] JMCC COMM 11 delivered on 11 June 2020, culminated in the following order:

"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."

[3] The interlocutory injunction granted in 2000 regarding the software stated:

"(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..."

[4] The detailed history of this matter was traversed by Lord Hodge in the judgment of the Judicial Committee of the Privy Council ('JCPC') intituled **Paymaster (Jamaica)**

Limited and another (Respondents) v Grace Kennedy Remittance Services Limited (Appellant) (Jamaica) Paymaster (Jamaica) Limited (Appellant) v Grace Kennedy Remittance Services Limited and another (Respondents) (Jamaica) [2017] UKPC 40 ('the JCPC judgment'). In setting out the necessary background, I will, in parts, quote significant portions of that history.

[5] The appellant, Paymaster (Jamaica) Limited ('Paymaster'), is a company that was incorporated by Ms Audrey Marks to develop in Jamaica a multi-payment agency system, whereby it would facilitate payments to its many client companies by collecting such payments on their behalves. These clients would pay it a fee for that service. The way development of that business idea proceeded was outlined at paras. 3 and 4 of the JCPC judgment as follows:

"3. In 1994 Paymaster employed a consultant, Dr Maurice McNaughton of Jamaica Online Information Services Ltd ('JOL'), to assist it in developing its multi-payment agency concept by identifying the tasks for which software would be designed. This involved (a) a network linking all of the collection outlets to a head office, (b) multi-client cashiering software at the collection outlets and (c) head office software to collect and consolidate payment information from the outlets at the end of each operating shift. In about April 1995 JOL commissioned Mr Paul Lowe ('Mr Lowe'), a computer programmer, to prepare a suitable program. Mr Lowe's business was the development of software for monetary transfers. He had developed a cashiering program which collected payments for a single company directly, called CSSREMIT, which he marketed to companies in Jamaica, the Cayman Islands and Tortola BVI and to agencies of the Government of Jamaica. Mr Lowe's business practice was to modify his basic CSSREMIT program to meet the specific needs of each client and, retaining his copyright, to grant the client a non-exclusive licence to use the program as so modified. Mr Lowe granted Paymaster a non-exclusive licence to use CSSREMIT for the multi-payment program which he developed at Paymaster's request and expense. Paymaster used the modified program to operate its business.

4. The software for the multi-payment agency concept involved (a) a branch function which enabled a customer to settle bills from different companies from one location or branch and (b) a head office function by which data from that branch were transmitted to an intermediary which collated the data and transmitted the correct data and payments to each of the client payee companies.”

[6] At para. 5 it was noted that:

“Paymaster set up various outlets and incurred expense to Mr Lowe for improving and rectifying the software. Over time Paymaster won contracts with several utility companies and sought to increase the number of its branches in order to expand the availability of its services to the public and win new client companies.”

[7] During the development process, discussions were held between Ms Marks and Mr Brian Goldson, the managing director of Grace Kennedy Remittance Services Ltd (‘GKRS’), concerning the possibility of GKRS investing in Paymaster. GKRS was a Jamaica-based agent of a Jamaican subsidiary of Western Union Corporation, a United States corporation which provided electronic bill-payment and money transfer services in the United States and several other countries. Two versions of Paymaster’s business plan were shared confidentially with GKRS, but ultimately the investment was not pursued.

[8] The genesis of the long-running dispute between the parties was summarised at paras. 6 and 7 of the JCPC judgment as follows:

“6. In 1999 Mr Lowe approached GKRS with a proposal to grant a non-exclusive licence of the CSSREMIT software which he had developed for Paymaster and to customise it to meet GKRS’s needs. After negotiations, Mr Lowe gave GKRS a non-exclusive licence to use the program. Using this software GKRS entered the market for the provision of a multi-payment agency system in Jamaica in competition with Paymaster in about April 2000.

7. Paymaster contended that both GKRS and Mr Lowe had infringed its copyright in the software which [the respondent] had prepared for it. In August 2000 Paymaster obtained an

interlocutory injunction restraining GKRS and Mr Lowe from using the software. GKRS has not used that software since being enjoined against so doing. The software, which was a DOS-based program, has long since become obsolete and both Paymaster and GKRS have operated their businesses using different software...”

[9] In the substantive claim, Paymaster alleged breach of copyright and breach of confidence against both Mr Lowe and GKRS. On judgment being entered in favour of Mr Lowe and GKRS on 30 April 2010, the interim injunction was discharged. An enquiry into damages consequent on the undertaking given by Paymaster on the granting of the interim injunction was ordered.

[10] On 27 March 2015 this court dismissed Paymaster’s appeal on breach of copyright and its claim for breach of confidence against Mr Lowe. It allowed the appeal against GKRS in respect of the claim for breach confidence, while also allowing Mr Lowe’s cross appeal. The court agreed that Mr Lowe had suffered loss by Paymaster having obtained the interim injunction which compelled him to terminate his contract with GKRS and forfeit the benefit of a service contract with it. An order for the enquiry into damages pursuant to the undertaking was again made.

[11] When the matter was further appealed to the JCPC, it was settled that: a) Mr Lowe retained the copyright to his software and had granted Paymaster a non-exclusive licence to use the program as modified to its specific needs; b) GKRS had not breached the confidence of Paymaster when setting up its business in competition to the appellant; and c) Mr Lowe had not breached the confidence of Paymaster by providing to GKRS limited information concerning Paymaster along with the software he delivered to them.

[12] Those matters of liability having been settled, the enquiry into damages which had been ordered by the Supreme Court and this court proceeded. It resulted in the order for damages to be paid to Mr Lowe, which is the subject of this appeal.

The evidence at the assessment

[13] The evidence before the assessment judge consisted of: i) the affidavits and witness statements of Mr Lowe, Mr (now Dr) Maurice McNaughten (initially as an Information Technology Executive and then as Assistant Vice-President of Product Development of GKRS), Mr Jason Cooke (as Information Technology Manager at GKRS and then as Information Technology Specialist); ii) the affidavit of Ms Audrey Marks, Managing Director and principal shareholder of Paymaster, and iii) the witness statements of Ms Joan-Marie Powell, Managing Director of GKRS and Mr Patrick Dallas, ICT Consultant. The court also received the oral evidence of Mr Lowe on his case and Mr Dallas on Paymaster's case.

The decision of the learned assessment judge

[14] The learned assessment judge placed her focus on whether Mr Lowe suffered any loss as a result of the injunction being granted. She obtained significant guidance on the methodology informing her assessment, from the principles outlined by Harris J (as she then was) 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, ('**Pfizer v Medimpex, NMF and Lasco**') supplemented by other authorities.

[15] She indicated that Mr Lowe had to establish by relevant evidence that the injunction had caused him to lose his chance of making a profit from selling licences of his program and obtaining payment for its maintenance, which chance was real and not fanciful. Then, as the learned assessment judge, she would evaluate that chance and reflect it in the amount of damages awarded.

[16] She noted that the approach to the quantification should be compensatory and not punitive. Also that damages in a case like this, while analogous to those awarded for breach of contract, should be assessed liberally but with logical and sensible adjustments, which did not entitle Mr Lowe to damages with little or no supporting evidence.

[17] The learned assessment judge also took judicial notice that the battle between the parties was public and had tainted Mr Lowe's reputation on the market, causing him difficulty attracting new clients and maintaining existing ones resulting in loss. This loss was found by the learned assessment judge to have been caused by Mr Lowe's compliance with the injunction which loss could have been foreseen when the injunction was granted.

[18] The learned assessment judge found that it was highly probable that Mr Lowe would have continued to make profits from being the frontrunner in the market as the creator and developer of bill collection software, but for the injunction. The learned assessment judge found that compliance with the injunction denied Mr Lowe, "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 such licences and the possible maintenance of such licences". Hence it essentially "embargoed his trade" causing "[Mr Lowe] to lose the reputation and advantage he had on the market prior to the imposition of the injunction".

[19] The learned assessment judge, while noting evidential weaknesses in the support put forward by Mr Lowe for his claim, largely accepted his evidence including his method of calculating his losses, subject to adjustments which she deemed necessary. Accordingly, she determined that Mr Lowe's counterfactual had a probability of about 60% and utilised a 40% discount for all the possible "vicissitudes, contingencies and uncertainties", which led to the award handed down.

Grounds of appeal

[20] Paymaster relied on the following grounds of appeal:

"a. The Learned Judge's finding that the Applicant was the 'front runner' in the market ignores the fact that this was a self-described label. There was no evidence that he was 'highly probable' or likely to 'continue' to be the 'front runner' given the evidence of the shortcomings of the software which was based on older technology.

b. The learned Judge erred in failing to have any or adequate regard to the evidence from the Applicant in cross-examination that there were other competing software sourced locally and from overseas that were being used or introduced.

c. The learned Judge had no evidence from the Applicant that he in fact made 'a profit' and contradicts her own findings that the Applicant did not assist the court by way of supplying any underlying documents that existed when the injunction was granted for such a determination to be made. Similarly, no evidence was led by the Applicant for the court to conclude that the chance of continuing 'to make a real profit was real and... not fanciful'

d. The learned Judge had no or no sufficient evidence on which to conclude that the Applicant's software 'was the only one available on the market that was proven and in production'. The weight of the evidence should have inclined the court to the contrary view.

e. The learned Judge's finding that the Applicant would not have lost pre-existing and new clientele but for the injunction is not supported by the evidence. The Applicant was already on his way to losing contracts with the Appellant and with Grace Kennedy, the latter having signed a contract with an American supplier 6 months before the injunction was granted.

f. The learned Judge erred in her assessment of damages by accepting, contrary to all evidence, that the calculation of loss could reasonably include loss of income from the Appellant and from Grace Kennedy Remittance Services for the period August 2000 to the date of judgment.

g. The learned Judge erred in her interpretation of the order granting the interlocutory injunction and/or misunderstood the scope of the order in applying it to the facts before her when she concluded that the Applicant could not make adjustments and improvements to his software for his pre-existing and new clients because of the injunction.

h. The learned judge failed to properly consider and apply the relevant principles of causation in determining the scope of

what the Applicant was in fact prevented from doing as a result of the injunction

i. The learned Judge failed to appreciate that the Applicant was not precluded from continuing to earn income from his CSS REMIT system in respect of any existing or new clients.

j. Alternatively, the learned Judge had no or no adequate regard to the fact that the Applicant could have sought the consent of the Appellant or the direction of the court relating to any adjustments or improvements to his CSS REMIT programme outside of the disputed litigation between the parties.

k. The learned Judge ignored or gave no adequate weight or consideration to the evidence that the Applicant was not precluded from developing software on other platforms that could achieve the same or similar functionality and not constitute use of the Paymaster multi-payment collection system that was the subject of the injunction.

l. The learned Judge gave no weight and failed to make a proper assessment of the unchallenged evidence that the subject of the injunction had become obsolete before the injunction was discharged and that the Applicant failed or refused to apply newer technologies to the idea of a multiple collections system.

m. The Learned Judge erred in giving no adequate or any regard to the principles she cited when she accepted that the question for her was: *'what loss did the making of the order and its continuation until discharge cause the Applicant'*, when she awarded damages based on a calculation of loss of income from pre-existing and prospective clients up to December 2018 when the injunction had been discharged in April 2010.

n. The learned Judge erred when she concluded that compliance with the injunction had caused [sic] Applicant to suffer loss of contracts and loss of reputation without any reliable evidence to this effect being led by the Applicant.

o. The learned Judge misdirected herself on the law on the question of causation in distinguishing the case **Uzor v Chinye & Others** [2004] EWHC 827.

p. The learned Judge erred in failing to find that in seeking to prove his alleged losses, the Applicant was not entitled to construct a methodology that was not consistent with his business model to maximise his computation of damages.

q. The learned Judge failed to make any objective assessment of the Applicant's alleged losses and instead adopted a wholly erroneous calculation of loss submitted by the Applicant.

r. The learned Judge erred in failing to hold the Applicant to proving his claim according to the requisite standard for proof of pecuniary losses.

s. The learned Judge had no reliable or any evidence before her in relation to the size of the market for the Applicant's software that was the subject of the injunction, whether at the time of the injunction, during the injunction or after the injunction was discharged.

t. The learned judge failed to properly consider and apply the relevant principles relating to the Applicant's duty to mitigate.

u. The learned judge erred in failing to make any deductions for expenses or taxes in respect of her award.

v. To the extent that she had any discretion to do so, the learned Judge erred in her application of a 40% discount to the Applicant's assessment of his loss, to cover the contingencies, vicissitudes and uncertainties of business, without first making a calculated analysis of how the several deficiencies and other factors affected the computation of the Applicant's claim.

[21] Paymaster seeks the following orders:

"i The appeal be allowed;

ii. The award of damages of with interest thereon calculated at the rate of 6% per annum from the 25th August 2000 to the 11th day of June 2020 be set aside;

iii. Damages to be assessed by this Honourable Court of Appeal;

iv. Costs of the Appeal to the Appellant to be taxed if not agreed."

Submissions

Overview

Counsel for Paymaster

[22] Counsel submitted that the respondent failed to prove his losses before the learned assessment judge as claimed and failed to establish a credible counterfactual scenario from which such losses could be derived.

[23] Counsel further advanced that the learned assessment judge erred in her approach to the evidence and her interpretation of the injunction which resulted in an award which was erroneous, excessive and unsubstantiated. She also failed to consider and apply principles of causation and mitigation which would have had a significant impact on questions of recoverability and the overall quantum of damages.

[24] Counsel further submitted that the arbitrary 40% discount applied by the learned assessment judge to account for all the possible “vicissitudes, contingencies and uncertainties” cannot counterbalance the errors in her assessment as the starting point adopted by her (that is, the counterfactual presented in Mr Lowe’s Excel spreadsheet) was grossly unrealistic.

[25] In the circumstances, counsel maintained that this court should allow the appeal, set aside the judgment and award of the learned assessment judge, and make an appropriate substitution thereof, with costs to Paymaster.

Counsel for Mr Lowe

[26] Counsel, in his general overview, submitted that at the heart of this matter is the question of judicial discretion. Therefore, the sole issue for this court was whether the learned assessment judge had erred either in law or on the facts, justifying interference by this court. He relied on the well-known authority of **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042.

[27] Counsel argued that the learned assessment judge correctly adopted the principles outlined by Harris J in **Pfizer v Medimpex, NMF and Lasco**, which were affirmed by this court on appeal. Counsel advanced that the learned assessment judge, who had the benefit of seeing the witnesses and observing their demeanour, rejected the evidence of Mr McNaughton and preferred the evidence of the respondent. Counsel argued that based on that evidence, the only reasonable counterfactual scenario or hypothesis placed before the court was in the spreadsheet prepared by the respondent. The learned assessment judge correctly, it was argued, found that Mr Lowe would have continued to adjust his program to keep it current and relevant and not simply accept that it was obsolete as suggested by Paymaster. Further, counsel highlighted that the learned assessment judge carefully identified the weaknesses in the respondent's evidence and based on her findings of fact, formulated her own scenario and at her discretion applied a discount she saw fit, to arrive at the quantification of the loss.

[28] It was submitted that there was no material error of law or fact justifying interference by this court with the learned assessment judge's findings and conclusions. Accordingly, the appeal should be dismissed with costs to Mr Lowe.

The basis on which this court may intervene

[29] Contrary to the submissions of counsel for Mr Lowe, this is not a case susceptible to analysis under the principles outlined in **Hadmor Productions Ltd and others v Hamilton and others**. In her assessment of damages, the learned assessment judge was not exercising a discretion in the sense outlined in that case, and correctly did not frame her task under that rubric.

[30] In **Lasco Distributors Limited v Pfizer Limited; Medimpex Jamaica Limited v Pfizer Limited** [2022] JMCA Civ 35 (**Lasco v Pfizer**) this court at para. [123] outlined the approach to be followed in assessing damages payable on the enforcement of an undertaking as follows:

“Although the assessment of damages is often regarded as not being an exact science, there are clear principles upon

which an assessment is conducted and, as stated by Lord Diplock and duly followed by the learned judge, “if the undertaking is enforced the measure of damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear” (see F Hoffmann-La Roche at page 361 D-F and para. [13] of the learned judge’s judgment).”

[31] The learned assessment judge correctly recognised that her task was to distil and apply the principles outlined in cases dealing with the determination of what a reasonable counterfactual was. A hypothetical construct of the state of affairs that would have existed but for the wrongfully imposed injunction. These principles are outlined in cases such as **Les Laboratoires Servier (a company incorporated in France) and another v Apotex Inc and others** [2008] EWHC 2347 (Ch) (**‘Les Laboratoires Servier’**) and **Astrazeneca AB and another v Krka dd Novo Mesto and another** [2015] EWCA Civ 64 (**‘Astrazeneca AB’**) and **Lasco v Pfizer**.

[32] The task of this court is therefore to determine if the learned assessment judge applied the correct law and made findings which were properly founded upon the evidence before her: **Astrazeneca AB**. It is only if there was some error in either regard, that this court may and is required to intervene.

Summary of detailed submissions

[33] In the detailed submissions of Paymaster and Mr Lowe the grounds of appeal were grouped and advanced under the following headings:

I. Lack of Evidentiary Support, Profitability and Market Conditions [Grounds (a) - (e); (p) - (s) & (v)].

II. Relevant Period for Calculating Losses Claimed [Grounds (f) & (m)].

III. Causation and Interpretation of the Injunction [Grounds (g) (i); (k) & (l)].

IV. Approach to Claim of Loss of Reputation [Grounds (n) & (o)].

V. Failure to Mitigate [Grounds (j) & (t)].

VI. Failure to make Deductions for Taxes/Business Expenses [Ground (u)].”

Causation and interpretation of the injunction – Grounds (g) - (i); (k) & (l)

[34] Though it comes third in the issues outlined by the parties, it is useful to first address the scope of the injunction, as that determination will have a significant impact on the outcome of this appeal.

Counsel for Paymaster

[35] Counsel submitted that in seeking to enforce the undertaking it was incumbent on the respondent to show that he would not have sustained the damage he alleges but for the injunction. See **Air Express Limited v Ansett Transport Industries (Operations) Proprietary Limited** [1981] 146 CLR 24. Counsel also maintained that the principles of causation and remoteness had to be applied to an inquiry of this nature. See **Lasco v Pfizer**.

[36] Counsel advanced that based on a correct interpretation of the Copyright Act 1993, the scope of the injunction was nowhere as wide as found by the learned assessment judge. Counsel submitted that under the Copyright Act, the “source codes” and “object codes” that represent the literary elements of a computer program are what are subject to copyright protection. Consequently, the functionality of a computer program is not protected by copyright law. In support of these submissions counsel relied on the authorities of **Bezpečnostní softwarová asociace — Svaz softwarové ochrany v Ministerstvo kultury** [2011] IP & T 605; **Navitaire Inc v Easyjet Airline Co and another** [2004] EWHC 1725 (Ch); and **Nova Productions Ltd v Mazooma Games Ltd and others Nova Productions Ltd v Bell Fruit Games Ltd** (2007] EWCA Civ 219.

[37] Counsel argued the learned assessment judge formed the erroneous view that the respondent was embargoed from all software development activity connected to bill

payments and collections whether or not the Paymaster program (source codes) was being copied/reproduced. This was, however, not the scope of the injunction. Counsel maintained that it operated only to restrain dealings with the "Paymaster multi-payment collection software system" (the source code that was written to meet Paymaster's specifications) ('the Paymaster system') as opposed to the CSSREMIT program. Thus, counsel submitted, the injunction never prevented the respondent from writing new codes to replicate the functionality of the Paymaster system or meeting the needs of any existing clientele.

[38] Further, Paymaster complained the learned assessment judge erred by including contracts with the appellant and GKRS in the calculation of losses, given that the breakdown in relations preceded the injunction and they would not have continued dealing with Mr Lowe, even if the injunction had not been imposed. Also they had planned to move away from use of the respondent's program, in any event, as it was nearing obsolescence.

[39] On the issue of obsolescence, counsel submitted that the finding of obsolescence was relevant, if not determinative, of the respondent's ability to secure potential licensees and contract renewals over the relevant period, particularly in circumstances where the respondent did not provide any evidence to the court. Consequently, counsel advanced that, the probable counterfactual scenario warranted the learned assessment judge disregarding all entries on Mr Lowe's spreadsheet after 2003 (conservatively) in light of her finding of obsolescence.

Counsel for Mr Lowe

[40] Counsel maintained that the learned assessment judge recognised, as did the Judicial Committee of the Privy Council, that the Paymaster system is a composite of the original single collection system upon which was superimposed adjustments to make it a multi collection system so that it was impossible to separate the two. They had become one integrated modular system.

[41] Counsel argued that whether the program had become obsolete was not the issue as the learned assessment judge correctly recognised that the scope of the injunction prevented the respondent from continuing to develop the software by the adjustment of the entire Paymaster system with the result that he lost his position in the developing market.

Analysis

[42] The injunction's scope was not treated as a significant issue in the substantive matter, as Paymaster at first claimed authorship of and hence copyright in the multi-payment agency software in its entirety. When that claim proved unsustainable, Paymaster then also unsuccessfully argued that there had been a contractual assignment of the software by Mr Lowe to Paymaster. In their judgment the JCPC highlighted the absence of any explanation of the differences between the Paymaster system and Mr Lowe's base program and their effect. This absence, as was seen at the assessment hearing, has implications for the scope of the injunction, causation of loss and ultimately the damages due. The JCPC stated at para. 22:

“...It is not disputed that Mr Lowe gave Paymaster a non-exclusive licence of his CSSREMIT program, which would be wholly inconsistent with any arrangement to assign the copyright of the whole program to Paymaster, **if certain functionalities in the program were treated as a separate program. But there appears to have been no exploration in evidence of whether and if so how the additional functionalities which Mr Lowe added onto his CSSREMIT program could be separated from that program...**” (Emphasis added).

[43] Under section 2(1) of the Copyright Act of 1993 ('the Act'), “computer program”, “literary work”, “work” and “protected work” are respectively defined as follows:

“‘computer program’ means a set of instructions, whether expressed in words or in schematic or other form, which is capable, when incorporated in a machine-readable medium, of causing an electronic or other device having information

processing capabilities to indicate, perform or achieve a particular **function**, task or result;" (Emphasis added).

"'literary work' means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—

- (a) a written table or compilation;
- (b) a computer programme
- ..."

"'work' means—

- (a) A literary, dramatic, musical or artistic work;
- (b) ...
- (c) ...

and accordingly 'protected work' means a work of any of such categories in which copyright subsists by virtue of this Act;"

[44] Section 5(1) of the Act provides requirements for copyright protection as follows:

"5.—(1) Unless otherwise specifically provided in this Act, copyright shall not subsist in any work unless it satisfies the requirements specified in this Part as respects—

- (a) the category of work; and
- (b) either—
 - (i) the qualification of the author; or
 - (ii) the country or place of first publication, or in the case of a broadcast or cable programme, the country or place where it is made or from which it is sent, as the case may be."

[45] Section 6 of the Act details the categories of work eligible for copyright protection. It provides:

"6 (1) Copyright is a property right which, subject to the provisions of this section, may subsist in the following categories of work-

- (a) original literary, dramatic, musical or artistic works;

(b) – (c) ...

(2) – (7) ...

(8) Copyright protection does not extend to an idea, concept, process principle, procedure, system or discovery or things of a similar nature.” (Emphasis added)

[46] No guidance has been given in the Act on what aspects of a computer program are subject to copyright protection.

[47] Case law from the European Union ('EU') and the United Kingdom ('UK') cited by counsel for Paymaster, have established the aspects of a computer program that qualify as “literary work” capable of copyright protection in the EU and the UK. While those cases provide some guidance they have to be viewed with studious caution as the extensive regulatory regimes on which those cases are based, have, unlike our copyright regime, provided guidance on the several aspects of a computer program susceptible to copyright protection.

[48] In the case of **Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury** which involved international law, European union legislation and national legislation, the Czech Republic court made a reference for a preliminary ruling to the Court of Justice of the European Union ('ECJ'). For the purposes of this matter the relevant question determined by the ECJ was whether the graphic user interface ('GUI') of a computer program was a form of expression of that program within the meaning of article 1(2) of Council Directive (EEC) 91/250 (on the legal protection of computer programs) and thus protected by copyright as a computer program under that Directive. EEC 91/250 had been incorporated into the national law of the Czech Republic. Article 1(2) of Directive 91/250 provided: “Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive”.

[49] In his oral evidence Mr Lowe indicated that his software program did not use a graphical, but only a text based interface. However, this decision is useful in so far as it helped to define what aspects of a computer program could attract copyright protection.

[50] Relying on the opinion of the Advocate General, the ECJ held that pursuant to article 10(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights ('the TRIPS Agreement') the **source code** and **object code** of a computer program are forms of expression thereof entitled to copyright protection as computer programs by virtue of article 1(2) of Directive 91/250. Further, in accordance with the definition of interfaces contained in the 10th and 11th recitals in the preamble to Directive 91/250, the court also determined that while the GUI enables communication between the computer program and the user, it does not enable reproduction of that computer program. It was only one element of that program by which persons could make use of that program. Therefore, it did not constitute a form of expression of a computer program within the meaning of article 1(2) of Directive 91/250 and consequently was not subject to copyright protection by virtue of that Directive. While the ECJ went on to outline another basis on which a GUI could attract copyright protection under article 2(a) of Directive 2001/29 if the GUI was the author's own intellectual creation, that is not relevant for the purposes of this case.

[51] Two cases from the UK were also cited by counsel for Paymaster. Both of these cases in relation to literary works were decided with reference to article 1(2) of Directive 91/250, though in respect of the second case it was also with reference to the UK Copyright, Designs and Patents Act as amended by the Copyright (Computer Programs) Regulations (1992) which implemented that Directive. Firstly, in **Navataire Inc v Easyjet Airline Co & another** the claimant owned the copyright in the source code for computer software (OpenRes) which implemented an airline ticketless booking system. The 2nd defendant produced the source code for computer software (eRes) for airline booking for the 1st defendant. Though it was accepted that the underlying software was different for each program the claimant alleged that the eRes interface was substantially indistinguishable from the OpenRes system in terms of "look and feel", duplication of

many commands to achieve particular results and the copying of results displayed on the screen in response to prescribed instructions. The claimant, therefore, maintained that its copyright had been breached by non-textual reproduction of either the whole of the software considered as a single copyright work or alternatively of the various copyrights subsisting in the “modules” making up the system. It was held that though the business functions were similar, as none of the code was read or copied by the defendant the claim would fail.

[52] Secondly, in **Nova Productions Ltd v Mazooma Games Ltd and others; Nova Productions Ltd v Bell Fruit Games Ltd**, the claimant brought two sets of proceedings for copyright infringement concerning coin operated games based upon the theme of pool. In respect of the claim for copyright of literary works, that was made in respect of the claimant’s designer’s design notes and the program which he wrote to implement the game. The judge dismissed the claims. On appeal the appeals were dismissed and in relation to literary works it was noted that “merely making a program which would emulate another but which in no way involved copying the program code or any of the program’s graphics was legitimate”.

[53] While the regulatory frameworks between the EU and the UK on the one hand and Jamaica on the other hand are different, it is clear that there are similarities, in that, for example, while ideas are not subject to copyright protection the source code of the computer program is. That ideas are not subject to copyright is made clear by section 6(8) of the Act. Regarding source codes being subject to copyright protection, that was agreed between the parties based on the tenor of cross-examination conducted by both sides at the hearing.

[54] One of the central complaints of Paymaster is that the learned assessment judge failed to consider relevant evidence that would have assisted her to determine the scope of the injunction. Among those bits of evidence is what Paymaster asked the court to prohibit by the injunction. That is answered in para. 44 of the affidavit of Ms Audrey Marks. It states:

"44. While Mr. Paul Lowe was absolutely free to sell his cash remit system to whom he pleased, he had no right to sell the multi-payment programme developed and fine-tuned by Paymaster for which he had been paid as the programmer to write and as a contracted employee to maintain and correct instructions. That his cash remit system is a fundamentally different programme from that of Paymaster. That the product emanating from both systems is accordingly different."

[55] In keeping with that posture the injunction granted by the court prevented dealings with the "the Paymaster multi-payment collection software system of its computer software program" (already designated 'the Paymaster system'). There was no mention of the cash remit system.

[56] Mr Lowe, in his evidence, confirmed a number of important things relevant to the scope and effect of the injunction. These include: 1) the language used to write the code for his CSSREMIT DOS-based program was "Clipper" and it was "outdated". "DOS" stands for Disk Operating System; 2) in terms of computer programs what one owns is how the program has been designed and written; 3) there were other developers who wrote their own software programs in another language that could deliver the same functions as his program; 4) there were other multi-collection entities in the marketplace using software not developed by him that were competitors to Paymaster and GKRS (eg commercial banking institutions and mortgage companies); and 5) he was proficient in FoxPro computer language and there were at least 10 other languages available that could be used to write software for his DOS-based programs. Critically, however, his view that he was precluded from continuing to utilise his base CSSREMIT program was revealed in the following answer in cross-examination to the query whether he could write a different program that would achieve the same functionalities as his DOS-based program. He replied:

"You cannot copy the program. Because of the wording of the injunction said you cannot copy the ideas out of the previous program to create a new one, which I [sic] why I felt constricted or constrained."

[57] Mr Lowe's view was, however, not just that the program could not be copied. Even though the software that he indicated the Government of the Republic of Trinidad and Tobago was using did not have the Paymaster modifications, he stated that the injunction prevented him from making the adjustments to it they required, hence causing him to lose the contract.

[58] The learned assessment judge noted that Paymaster's position was contained in the redacted witness statement of Mr Dallas. While correctly outlining the position put forward by him in answer to Mr Lowe's claim for damages, the learned assessment judge did not indicate why any or all of his evidence was rejected or qualified. Mr Dallas gave evidence that was utilised by both sides. He noted that the source code was the software program. He also stated at para. 8 of his witness statement that:

"Once Mr. Lowe had ongoing service contracts with clients in relation to his base CSS Remit program at the time the Injunction was granted, the source codes for his base single-payment collections program would be stored and modified separately from the source codes which carried the additional functionalities conforming to the paymaster specifications. The Injunction would not have prevented Mr. Lowe from making updates to his base CSS Remit Program."

[59] Thus on Mr Dallas' evidence the source codes used to achieve the Paymaster functionalities need not have been utilized to service existing clientele. As pointed out by counsel for Paymaster, that evidence was never challenged.

[60] Mr Dallas agreed in cross-examination that the functionalities as Mr Lowe created them were in modular form that he attached to the base CSS Remit program which created a standalone system. He explained that the CSS Remit program was also a standalone program. Therefore, to get to the Paymaster system what was done is another system was taken and modules were built on it which means that in the process modifications were also made to the CSS Remit program. He further indicated that CSS Remit and the Paymaster systems were application systems software.

[61] Learned counsel for Mr Lowe contended that the Paymaster system was one composite system comprised of the CSS Remit program on which adjustments were superimposed to create an integrated modular system so it was impossible to separate the two. The learned assessment judge while not expressly accepting that position rejected Paymaster's argument that Mr Lowe was free to develop or rewrite his CSSREMIT software. At para. [46] of her judgment she stated:

"[46]...Prior to the granting of the injunction, [Mr Lowe] 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 [Paymaster] and the injunction precluded this, resulting in the loss of new and pre-existing clientele."

[62] Then at para. [51]:

"[51]...It was submitted by [Paymaster] that the injunction prevented [Mr Lowe] from using the software granted to [Paymaster] and as such he was free to develop his CSSREMIT software or re-writing [sic] same. This, in my view, was the very act that led to [Paymaster's] contention of copyright violation, resulting in the injunction being granted. It is [Mr Lowe's] development and tweaking of the software to meet the specifications of [GKRS] that led to [Paymaster's] allegation of breach of copyright. It would therefore not be reasonable to expect [Mr Lowe] to continue the very essence or act of what led to the institution of proceedings."

[63] From the above discussion, it is apparent that the learned assessment judge failed to take note or adequate note of the fact that Paymaster specifically sought and the injunction only precluded dealings with the Paymaster system. That did not affect the base CSSREMIT program which was customised for and licensed to Mr Lowe's pre-existing clientele. That was the import of Mr Dallas' evidence that was never challenged.

[64] Even if the court is wrong in that conclusion, it seems the most significant and unfortunate misunderstanding of the effect of the injunction by Mr Lowe was that he

thought it prevented him from using ideas from the CSSREMIT program to create a new program. Section 6(8) of the Act clearly states that ideas do not enjoy copyright protection. Thus, even though he agreed that both the Clipper language and DOS-based programs were approaching obsolescence and despite his ability to use other languages or codes such as FoxPro to write programs, he thought he was unable to reproduce anything similar to the Paymaster system on pain of breaching the injunction. Mr Lowe had therefore formed the erroneous view, adopted by the learned assessment judge, that he was embargoed from all software development activity connected to bill payments and collections, whether or not the Paymaster program (source codes) was being copied or reproduced and regardless of the type of coding language that was used.

[65] This mistaken appreciation coloured the way the learned assessment judge viewed the fact that at the time of the injunction the CSSREMIT program was nearing obsolescence. At para. [52] she stated:

“[52] ...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.”

[66] Thus the learned assessment judge failed to realise that the writing of modern source code would not have breached the injunction. Therefore, the injunction could not be blamed for Mr Lowe's failure to update his software. That omission lay at the feet of his misunderstanding.

[67] From the above analysis it follows that I agree with counsel for Paymaster that the injunction did not cause Mr Lowe to lose existing clientele, as, in law, he was not precluded from modifying the base CSSREMIT program to satisfy their needs. Neither was he prevented from updating or rewriting that program using different coding to

modernise it and retain his relevance in the industry, in keeping with ongoing software developments.

[68] Counsel for Paymaster also challenged the inclusion of Paymaster and GKRS on Mr Lowe's spreadsheet. The history of the matter supports the submission that the breakdown in the relationship between Paymaster and Mr Lowe preceded the injunction and was not caused by it. Also the evidence of Mr Dallas that from the year 2000 Paymaster was preparing to move to a Windows based platform, meaning that Mr Lowe would have had to develop a new program to maintain relevance to Paymaster, was not challenged. I agree that it is inconceivable that Paymaster would have continued to do business with the soon to be outdated DOS based payment system and for such a long period as indicated, given the breakdown in the relationship and the move towards more modern software. This in a context where I have found that the failure of Mr Lowe to update his software to maintain its relevance in the market was due to his misunderstanding of the scope of the injunction.

[69] There is also much force in the submission by counsel for Paymaster that it was unlikely from the circumstances outlined in the witness statement of Ms Joan-Marie Powell, Managing Director of GKRS that GKRS would have remained a client of Mr Lowe using his DOS-based system for over 18 years. It was also Mr Lowe's evidence that once the Windows operating system came into the market fully, only a very small portion of the market would be using a DOS based program. Additionally, it is significant that as recorded in Mr Dallas' statement Microsoft indicated that it would stop supporting DOS in December 2001. A fact that Mr Lowe in his oral evidence, when asked specifically about, it did not dispute. Ms Powell clearly outlined that prior to licensing Mr Lowe's program GKRS had taken steps to acquire software to support its entry into the bill collection business and had sent an employee to New York from August 1997 to July 1998 to be embedded in a company to observe operations that included bill payments and cheque cashing. That resulted in the implementation of the "CEMSUP" program for use in GKRS' bill collection business from October 2000.

[70] She also stated that after the injunction was imposed in August 2000, GKRS' stopped using Mr Lowe's program. They then operated their bill collection service manually until the CEMSUP program became fully operational. She also stated that GKRS used CEMSUP until 2002 when it started using "Navigator" a much more modern and advanced software developed by Adjoined Technologies, a software development and consultancy firm in South Florida, United States of America. There is no specific mention by the learned assessment judge of having considered the evidence of Ms Powell, or of having done so, finding it deficient in any way.

[71] Mr Lowe not having updated his source code and the learned assessment judge having found that Mr Lowe's program was approaching obsolescence, I note that counsel for Paymaster has indicated that, conservatively, the probable counterfactual scenario would warrant all the entries after 2003 being disregarded.

[72] After the other grounds have been discussed the impact of the court's finding on these grounds on the quantum of damages will be determined.

Lack of evidentiary support, profitability and market conditions – Grounds (a) - (e); (p) - (s) & (v)

Counsel for Paymaster

[73] In respect of these grounds, the court was referred to the relevant principles outlined in the cases of **Hoffman-La Roche v Secretary of State for Trade** [1975] AC 295, **Bonham-Carter v Hyde Park Hotel Ltd** [1948] 64 TLR 177, **The Attorney General v Peter J Badoo** [2020] JMCA Civ 10, **Lasco v Pfizer, Les Laboratoires Servier** and **Astrazeneca AB**.

[74] Counsel for Paymaster submitted that the alleged losses suffered by Mr Lowe were not substantiated by the material provided at trial. Counsel argued that the necessary evidence of factors of competition, market demand, price maintenance and price plateaus to support his counterfactual construct were not provided to the court. This, it was argued, was an obligation on Mr Lowe as there were other multi-payment solutions and

providers in the market. Instead Mr Lowe only presented a one-page Excel sheet which he prepared himself.

[75] Paymaster also complained that there was no foundation for the learned assessment judge findings that Mr Lowe lost his position as the "front runner" and that the respondent's software was the "only one available on the market that was proven and in production". Counsel for Paymaster added that the learned assessment judge erred in finding that Mr Lowe would have "continued to make a profit" where that finding was based on (i) the continuation of contracts with the appellant and GKRS which, on the evidence, **would not have continued**; (ii) the continuation of a contract with the Government of the Republic of Trinidad and Tobago for which there is **no documentary proof of its existence or termination** and (iii) the establishment of contracts with "potential licensees"/third parties for which there **is no evidence of market demand/behaviour**.

[76] Counsel advanced that the learned assessment judge ought to have found, among other things, that had the injunction not been granted Mr Lowe would (1) still have lost his contract with Paymaster and been entitled to three months' notice in writing or the sum of \$45,000.00 in lieu of notice; (2) more than likely have continued his maintenance contract with GKRS for a few months and earned total fees of approximately \$800,000.04 after one year, and (3) have lost the market for his software as the DOS-based platform would have been virtually extinct by December 2001. Counsel argued, therefore, that the sum of \$845,000.04 was a reasonable assessment of the sums which Mr Lowe could have garnered from his program up to the time it became obsolete.

Counsel for Mr Lowe

[77] Counsel advanced that while the case of **Hoffmann-La Roche v Secretary of State for Trade** was relevant, it only stated a part of the applicable law which was fully outlined by the learned assessment judge. Further, counsel contended that the cases of **Bonham-Carter v Hyde Park Hotel Ltd** and **The Attorney General v Peter Bando** were inapplicable to the quantification of loss in the counterfactual.

[78] Counsel submitted that in conducting her judicial estimation, based on the evidence of Mr Lowe, the learned assessment judge looked at all the circumstances at the time of imposition of the injunction, including the continuing demand for multiple collection systems and made an estimation of what the market might have been. Importantly, counsel pointed out that there was no competing evidence put before the learned assessment judge that a different scenario was reasonable.

Analysis

[79] Having reviewed the judgment of the learned assessment judge, the submissions of counsel and the cases cited, I summarise the law applicable to situations which require quantification of damages in the counterfactual caused by the imposition of an interim injunction, which turns out to have been wrongly granted, as follows:

- a) The undertaking is to be enforced according to its terms.
- b) The approach is compensatory and not punitive.
- c) "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)" quoted by Lord Diplock in **Hoffman-La Roche (F) & Co AG v Secretary of State for Trade and Industry** at page 361.
- d) The assessment judge should determine what the order restrained the Plaintiff from doing and what opportunity the Plaintiff was denied exploitation of. "The outcome of such exploitation is attended by many contingencies but **Chaplin v Hicks** [1911] 2 KB 786 establishes (at 791 per Vaughn 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. A principled approach requires the defendant injunctee 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: **Allied Maples v Simmons & Simmons** [1995] 4 ALL ER 907. As Lord Diplock explained in **Mallet 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 all 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."

The above six principles (with some editorial license applied to generalize their application) are taken from the case of **Les Laboratoires Servier and another v Apotex Inc and others**. I will continue with principles drawn from the case of **Richard John Hone and others v Abbey Forwarding Ltd. (In Liquidation) and another** [2014] EWCA Civ 711 as follows:

- g) "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'."
- h) "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."
- i) "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 [sic] 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."
- j) Damages awarded should neither be "modest" or "generous". Realistic compensation should be awarded for what has occurred.

Then from the case of **Pfizer v Medimpex, NMF and Lasco** the following principles were outlined by Harris J and later approved by this court in **Lasco v Pfizer**:

- k) While damages should be assessed liberally, that is not a substitute for the fundamental principles of the law of evidence. The ultimate process is one of judicial estimation of the available indications. The court must embark on a balancing exercise and have regard to all the relevant evidence in order to determine the appropriate weight to be given in arriving at the final judicial estimate.

- l) The task is to reconstruct the hypothetical market “but for” the injunction.
- m) “The function of the Court at trial is to assess the evidence it hears for itself, bringing to bear its own understanding of the surrounding circumstances and making its own evaluation of the sincerity, reliability and credibility of the evidence given, in the context of an overall assessment of probabilities and of possible prejudices or incentives to embroider or distort. This is not a matter for expert evidence.” Per Sales J in **Astrazeneca AB**.
- n) “One must measure what a witness now says he honestly believes he would have done against such objective benchmarks as are available...The court therefore recognises that evidence presented by the parties in this matter may be innocently self-serving and must be subject to careful scrutiny. Reasonable inferences are therefore to be drawn from actual transactions which took place and which are in line with commercial realism.” Per Norris J in **Les Laboratoires Servier** who relied on Stuart LJ in **Allied Maples v Simmons & Simmons**.

[80] I will add, finally, that in keeping with the principles outlined at e and k in the paragraph above, (that is, it must be established that the chance of making a profit was real and not fanciful and that a liberal assessment of damages does not form a substitute for the fundamental principles of the law of evidence), the basic guidance in **Bonham-Carter v Hyde Park Hotel Ltd** applies with its usual force, to situations involving counterfactuals, to the extent reasonable and possible. Thus where documentation should reasonably exist to prove, for example the existence and details of commercial relationships, it is not enough for an injunctee to simply throw figures at the “head of the court” and ask for damages; he has to prove it.

[81] This last principle is an appropriate one with which to commence the analysis under this group of issues. It is remarkable that in support of a claim for damages of over \$470,000,000.00 spanning a period of 18 years, Mr Lowe produced only a one-page

Excel spreadsheet entitled "Possible Earnings Analysis" prepared by himself! While allowing for the reality that the facts of each case are different, there are examples of the kind of proof that was provided in previous cases that may have been relevant in the present matter. This especially in a context where Mr Lowe himself accepted that there were other multi-payment solutions and providers in the market. In **Les Laboratoires Servier** there was evidence of factors of competition, the market demand, price maintenance and price plateaus. In **Pfizer v Medimpex, NMF and Lasco** and **Astrazeneca AB** available evidence on which possible counterfactuals were constructed included market description/behaviour, the business model and practices of the relevant players, financial records and historical data along with the evidence of accountants, economists and other experts.

[82] In delivering its judgment on appeal in **Lasco v Pfizer** this court also noted that the evidence before the trial court included several academic opinions "on the merits of and preferences for one or other of the various types of treatment for hypertension". While 18 years had passed and some information may have been difficult to obtain, there was no indication that any effort had been made by Mr Lowe to place before the learned assessment judge any of these types of evidence to inform his counterfactual. Neither was there produced even any basic documentary evidence of contracts with third parties, accounting reports, or business records relating to past or subsisting business relationships.

[83] The "Key" to the spreadsheet provided by Mr Lowe is indeed key to its analysis. It states as follows:

"Sale' is calculated based on Paul Lowe's Witness Statement and the cost of maintenance as exhibited to the Affidavit of Audrey Marks

From there, 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 costs from year to year.

Then interest Lost is calculated on the value of the sale and the interest that would have been accumulated on that sale for the year

Then as the market expands over time the estimated value of that sale is accounted for as Mr Lowe would have had software [sic] was the only one available on the market that was proven and in production. This would have given him an advantage in the market.”

[84] There are a number of factors that undermine the fundamental assumptions on which Mr Lowe’s Possible Earnings Analysis is based.

- a) The injunction period was 10 years not 18 years which affected the relevant period for calculating losses claimed. (This will be addressed in the next set of grounds discussed.)
- b) As discussed under the previous set of grounds, it is inconceivable that both Paymaster and GKRS would have remained clients of Mr Lowe for 18 years based on i) the breakdown in the relationship between Mr Lowe and Paymaster that led to but was not caused by the injunction and ii) the fact that both Paymaster and GKRS were pursuing other more modern software options before the grant of the injunction, which dilutes the argument that any advantage he had in the market would have been sustainable in the medium and even less so the long term.
- c) Following on the points made at b), it is not the case as stated by the learned assessment judge at para. [45] of her judgment that Mr Lowe’s software “was the only one available on the market that was proven and in production”. Therefore, he would not have had the advantage in the market that she found he did.
- d) The loss of the contract with the Government of the Republic of Trinidad and Tobago was due to Mr Lowe’s misunderstanding of the scope of the injunction, not the injunction itself. This is especially telling as, in Mr Lowe’s

evidence, he indicated that the software that was being used in the Republic of Trinidad and Tobago did not have the Paymaster modifications. Further, and in any event, there was no documentary proof of that contract's existence or termination.

- e) In the absence of evidence of market demand/behaviour there is no evidence to support the establishment of contracts with potential licensee (4) in 2005 and potential licensee (5) in 2010.

[85] At para. [55] of her judgment, the learned assessment judge indicated that while the counterfactual presented by Mr Lowe could have been strengthened by more evidence she accepted on a balance of probabilities that he had suffered loss and was prevented from making future profits by the injunction. She also determined, at para. [56], that he had taken some mitigatory action (to be discussed under the next set of grounds) that was compromised due to his tarnished reputation. Then at paras. [57] and [58] she stated:

"[57] In the circumstances, I have accepted that [Mr Lowe'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 [Mr Lowe].

[58] In the circumstances, I conclude that [Mr Lowe's] counterfactual has a probability of about 60%. I am of the view that the counterfactual scenario required, and it would certainly have been helpful to the Court, more detailed and cogent evidence being elicited by [Mr Lowe.] Also, no explanation was provided by [Mr Lowe] for the lack of such evidence when he was pressed by Learned Counsel for [Paymaster] as to why he did not provide same. A 40% discount for all the possible 'vicissitudes, contingencies and uncertainties...is appropriate.'"

[86] Unfortunately, there appears to have been a number of errors in the learned assessment judge's analysis. Firstly, as has been shown, the majority of the losses suffered by Mr Lowe arose, not because of the imposition of the injunction, but due to his misunderstanding of its scope. The adoption by the learned assessment judge of this legal misconception impacts all her subsequent analyses. Secondly, while acknowledging the lack of "more detailed and cogent evidence" the learned assessment judge accepted Mr Lowe's methodology. This despite it being devoid of the evidential base necessary to construct credible counterfactuals as outlined in previous cases. Further, although the learned assessment judge indicated there were aspects of his calculations that required discounting and necessary adjustments, she gave no indication of what these were or the reasons for holding that view. The failure of the learned assessment judge to disclose her mind in that fashion, means there is now an absence of information on which to objectively assess her decision to apply a 40% discount to account for "vicissitudes, contingencies and uncertainties".

[87] Accordingly, it appears the learned assessment judge's wholesale acceptance of Mr Lowe's counterfactual, but for the discount applied was erroneous. Further will be said on this point under the discussion of the next set of grounds while includes the relevant period for calculating losses claimed. The discussion of the appropriate counterfactual scenario this court should substitute, is best deferred until all the grounds have been addressed.

Relevant period for calculating losses claimed – Grounds (f) & (m) and Approach to claim of loss of reputation – Grounds (n) & (o)

[88] It is useful to consider these two groups of grounds together, as they both concern the appropriate period for which losses could properly be claimed.

Counsel for Paymaster

[89] Regarding the relevant period for calculating losses claimed, counsel submitted that the relevant law was outlined by Harris J in **Pfizer v Medimpex, NMF and Lasco** and upheld on appeal by this court in **Lasco v Pfizer**. The appellant argued that the

learned assessment judge failed to correctly identify the injunction period (10 years as opposed to the 18 years she considered) and to consider the post-injunction period. Counsel argued that the learned assessment judge erred in awarding damages for a period post-2010 (when the injunction was discharged) without any evidential basis to do so.

[90] In respect of the approach to the claim of loss of reputation, counsel argued that the learned assessment judge failed to apply the principle in **Uzor v Chinye & others** and erred when she distinguished the case. Counsel advanced that the alleged reputational damage in this case was not caused by the injunction but by the underlying litigation which ensued regardless of the injunction. Additionally, even if there was reputational “taint” caused by public knowledge of the injunction itself, losses arising therefrom are deemed too remote and are not recoverable as a matter of law and public policy.

[91] Counsel further submitted that the learned assessment judge compounded her error by considering the effect of the “flagrancy of the alleged infringement” on the respondent’s reputation, when that related to the ongoing litigation and not the injunction itself.

Counsel for Mr Lowe

[92] With regard to the relevant period for calculating losses claimed, counsel submitted that, as the learned assessment judge was satisfied that the evidence before her was sufficient, she was entitled to treat the post-injunction period the same way as the pre-injunction period. The court, counsel maintained, was not in error and was entitled to accept the evidence as to the losses suffered as a consequence of the injunction and apply it as she thought fit and then to apply the discount which in her discretion was appropriate.

[93] With respect to the claim of loss of reputation, counsel advanced that at the time of the injunction, there was expansion and development in the bills collection industry,

which was transitioning to a multi-collection system. Counsel submitted that due to the reputation of the respondent, a Jamaican software developer, as a leader in the industry for many years he was selected by Paymaster to develop an appropriate indigenous system. Counsel maintained that but for the injunction Mr Lowe would have continued to enjoy this reputation. Hence the learned assessment judge was correct to estimate the losses resulting from the injunction which did not arise from any other source such as the bringing of the action or any dispute about breach of contract as suggested by the appellant. Consequently, counsel submitted that the learned assessment judge was correct to distinguish the case of **Uzor v Chinye** as she did.

Analysis

[94] In upholding the decision of Harris J to decline to award damages for the post-injunctive period, this court in **Lasco v Pfizer Limited** opined at para. [144]:

“...At para. [350] vi), which bears specific relevance to the post-injunction period, she indicated that ‘very little [by Lasco and Medimpex], if any, allowances being made for the entrance of other players in the market during the period that the injunction was in place and a paucity of evidence as to how they would have responded to this’. It is apparent, therefore, that she was looking for some basis to assess whether losses in the post-injunction period could be determined to be fairly consequential upon the injunction.”

[95] Firstly, I agree with counsel for Paymaster that, at para. [13] of her judgment, the learned assessment judge erroneously referred to an “eighteen (18) year injunction period” when the period lasted for 10 years. Usually, losses are only calculated for the period of the injunction, as post-injunction the injunctee would be able to resume the previously enjoined activity. Ordinarily a failure to resume thereafter would be the operative cause of any losses and not the now discharged injunction. However, in this case, Mr Lowe posits two bases on which his losses extended beyond the discharge of the injunction. The first basis is that he lost his place in the market as he was unable to utilise or update his software for clients. The second basis is that the injunction damaged his reputation in the industry thereby causing some companies to decline his services

during the existence of the injunction (and presumably that precipitated loss beyond the period of the injunction) and that while he had created new software, due to his reputational damage he had to sell it at a discounted price. The learned assessment judge at para. [48] of her judgment took judicial notice of the public battle between the parties and concluded that battle tainted Mr Lowe's reputation on the market, causing him to have difficulty attracting new clients and maintaining existing ones.

[96] For the reasons previously outlined, relating to the misunderstanding of the scope of the injunction and the lack of sufficient and appropriate evidence in support of Mr Lowe's counterfactual, the learned assessment judge erred in awarding damages for a period after the discharge of the injunction on the first basis.

[97] In answer to the second basis, counsel for Paymaster relied on the case of **Uzor v Chinye & others** in which one of the claims made by the first defendant was that the publication in a national newspaper and other dissemination of a subsequently discharged freezing order made against him, caused him to lose the executive chairmanship of the IMB bank in which he was soon to be confirmed. Judge David Donaldson QC, having earlier indicated that it was agreed on all sides that the manner in which the assessment was to be approached was as set out by Lord Diplock in **F Hoffman-La Roche v The Secretary of State for Trade and Industry**, outlined earlier in this judgment, had this to say on the issue at para. 25(3) of his judgment:

"The other suggested basis was that that failure to obtain the paid chairmanship was caused in part by the publication of the order. Even if that had been established by credible evidence, it would not have fallen within the cross-undertaking. As is clear from Lord Diplock's formulation, the loss for which a defendant is to be compensated is that which results from his being unable to do that which is prohibited by the order, or, equivalently, in the case of a positive order, the loss flowing from the act which the defendant or a third party has been compelled to perform. **The court is not concerned with the fact of the order but with its content and substantive effect.** Loss covered by the cross-undertaking in the case of a freezing order is the loss resulting from the

inability to use the frozen assets, and, in the case of a disclosure order, loss resulting from the disclosure. **But the cross-undertaking does not extend to the injury to reputation or any loss consequential thereon which is caused by the mere fact that a freezing or disclosure order has been made. Such loss does not result from compliance with the order.** Accordingly, even if I were to accept that the making of the order and its publication were the cause of the decision by IMB not to appoint the first defendant, this would not be covered by the cross-undertaking.” (Emphasis added)

[98] Applying those principles to the case at bar, counsel for Paymaster argued firstly that the alleged reputational damage was not caused by the injunction, but the underlying litigation which ensued regardless of the injunction. Secondly, counsel contended that even if the injunction itself caused reputational taint such losses were deemed too remote as a matter of policy and unrecoverable.

[99] At para. [48] of her judgment, the learned assessment judge commenced her outline of the manner in which she accepted that the injunction adversely affected Mr Lowe’s reputation. She stated:

“[48] I take judicial notice that the battle between the parties 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.”

[100] The learned assessment judge’s recourse to judicial notice appears unwarranted, as it is questionable whether the public battle leading to reputational taint was a sufficiently notorious fact that did not require evidence in proof. However, there was evidence coming from Mr Lowe that could provide some support for that conclusion, if accepted. In his witness statement he indicated that at least twice whilst discussing

Information Technology in public when he told a complete stranger his name, the person asked if he was the person that stole Paymaster's program. He also outlined in his statement that in the early stages of the suit he regularly heard Ms Audrey Marks on radio saying that he sold her program to competitors.

[101] Continuing at para. [49] the learned assessment judge outlined the basis on which she did not accept the submissions of counsel for Paymaster. Counsel for Mr Lowe agreed with the manner in which she distinguished **Uzor v Chinye & others** as follows:

"[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."

[102] Analysing the manner in which the learned assessment judge sought to distinguish **Uzor v Chinye**, I make the following observations. The basis on which the distinction is made is somewhat curious, as neither in the cited case nor in the case at bar was the reputational damage said to be caused by the undertaking as to damages. In the cited case, the contention was that the publication of the order caused the loss, while in the case at bar the public nature of the litigation led the judge to apparently conclude that, with public knowledge of the "flagrancy of the alleged infringement" the injunction to prevent that infringement, led to reputational damage as a "substantive effect".

[103] That manner of distinction, however, goes against the principle in **Uzor v Chinye** which held that while the **fact** of a freezing order may cause reputational damage, that was not loss which resulted from **compliance** with the order. Hence loss for reputational damage does not qualify as a "substantive effect" of the injunction and was not covered by or recoverable pursuant to the undertaking as to damages. Viewed in that light, the learned assessment judge erred in distinguishing **Uzor v Chinye** in the manner she did,

in order to include loss suffered due to reputational damage within the compass of her award.

Failure to Mitigate – Grounds (j) & (t)

Counsel for Paymaster

[104] Counsel submitted that, by analogy, the 'duty to mitigate', applies equally to cross-undertakings as it does to damages. The cases of **Pearl Smith v Conrad Graham and Lois Graham** [1996] 33 JLR 189 and **Abbey Forwarding Limited (In Liquidation) and HMRC v. Hone and others** [2012] EWHC 3525 (Ch) were cited in support of that proposition.

[105] Counsel maintained that the learned assessment judge failed to appreciate that the respondent did not mitigate his losses as he:

- i) failed to develop and market his CSS REMIT program for existing and potential clients;
- ii) failed to develop and market new Windows-based (or other) software for potential clients; and
- iii) failed to seek clarification or variation of the Injunction or the consent of the Appellant to do the activities he erroneously believed were enjoined.

[106] Additionally, counsel argued that the learned assessment judge erred when she found that the respondent "tried to reach out to a few companies who declined his services during the existence of the injunction" and that this was sufficiently mitigatory. Counsel maintained this finding was not supported by the evidence, contradicted the respondent's case that he thought he was restricted in creating software with similar functionalities for the duration of the injunction and failed to acknowledge that the refusal to do business with the respondent was nothing new, since, on the evidence, other prospects had refused to do business with him prior to and after the grant of the injunction.

[107] Therefore, counsel ultimately contended that the learned assessment judge erred in not disallowing or discounting sums that could have been avoided by reasonable actions of the respondent.

Counsel for Mr Lowe

[108] Counsel submitted that there was no scope for mitigation on the basis outlined by Paymaster as the injunction prohibited the dealing with the composite Paymaster system, which incorporated the base and the addition. Accordingly, counsel maintained, subsumed within the discounting conducted by the learned assessment judge were appropriate considerations of mitigation.

Analysis

[109] I agree that the duty to mitigate losses applies to a cross-undertaking as to damages. **Abbey Forwarding Limited (in Liquidation) and HMRC v Hone and others** is one such case where that principle was affirmed, which point was not affected on appeal.

[110] The learned assessment judge was not impressed with the argument advanced by counsel for Paymaster that Mr Lowe had failed to develop and market his CSSREMIT program or a new program utilising other software. In her view that was asking Mr Lowe to do the very thing the injunction restrained him from doing. For the reasons already outlined, I am of the view that the learned assessment judge erred in that analysis as ideas cannot be subject to copyright and Mr Lowe was not restrained from replicating the functionalities of his program utilising source code, that was not a part of the Paymaster system.

[111] There is also no evidence that Mr Lowe sought any clarification of the scope of the injunction, especially in light of the nature of the request for the injunction made by Mrs Audrey Marks and the actual wording of the injunction that spoke only to the Paymaster system. The fact that he did not seek permission from Paymaster despite the wording of

the injunction is, however, not unreasonable, given the acrimony that existed between the parties at that time.

[112] The evidence of Mr Lowe that he tried unsuccessfully to have meetings with the Capital Financial Group and Victoria Mutual Building Society, recounted by the learned assessment judge in the form that he “tried to reach out to a few companies who declined his services during the existence of the injunction” was found by her to be mitigatory in nature. That evidence however contradicts Mr Lowe’s contention that he thought he could do nothing with his software. Further, as Mr Lowe admitted in evidence that persons had declined to do business with him before the injunction, there was nothing on the evidence to indicate that those latter refusals were because of the injunction.

Failure to make deductions for taxes/business expenses – Ground (u)

Counsel for Paymaster

[113] Relying on the principles outlined in **British Transport Commission v Gourley** [1956] AC 185, counsel submitted that the learned assessment judge erred in failing to consider that Mr Lowe would have had to meet business expenses and tax liabilities that were not accounted for on his spreadsheet, thereby awarding him a windfall of gross income. Counsel maintained that as Mr Lowe did not provide any business records that should have disentitled him to the sums claimed; but in any event that did not relieve the learned assessment judge of the duty to make the appropriate adjustments and discounts.

Counsel for Mr Lowe

[114] Counsel submitted that this was not a claim by Mr Lowe. Rather, what the learned assessment judge was engaged in was quantification of the loss occasioned by an injunction wrongly imposed by the court at the request of Paymaster, by estimating and reflecting the chances that a particular thing would have happened, in the damages awarded. Counsel relied on the case of **Mallett v McMonagle** [1970] AC 166 in support of this submission.

[115] Thus, counsel advanced, it was in the nature of compensation for goodwill based on an undertaking given to the court, therefore no question of income tax arises. Counsel advanced that there was no provision in the Income Tax Act attaching to damages awarded by the court, due to a wrongfully imposed injunction. The final figure awarded by the learned assessment judge reflected the probable loss given the appropriate legal principles and the counterfactual based on the accepted evidence discounted by 40% to arrive at the final figure representing fair loss.

Analysis

[116] It is settled law that in assessing the actual and prospective loss of a claimant outgoings in the form of taxes and business expenses should be taken into account. This was laid down in the House of Lords case of **British Transport Commission v Gourley**. That principle has been applied in our jurisdiction for example in the case of **Omar Young & Michael Meade v June Black** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 106/2001, judgment delivered 19 December 2003.

[117] The distinction between an award in a claim as opposed to compensation for goodwill, sought to be made by counsel for Mr Lowe, is with respect unsustainable. Claimants are not entitled to windfalls from damage awards. Whatever figure the learned assessment judge found to be reasonable should have been based on adequate evidence on which to construct a counterfactual, which would have also allowed for estimation and deduction of at least the taxes and possibly reasonable business outgoings of Mr Lowe. Taxes and business outgoings have a degree of certainty that is directly opposed to what is captured in "vicissitudes, contingencies and uncertainties". The learned assessment judge accordingly failed to make any reasonable deduction for taxes and business outgoings as should have occurred.

What is a reasonable counterfactual in light of the law and evidence?

[118] One of the contentions of counsel for Mr Lowe was that Paymaster having not put forward its own counterfactual the learned assessment judge was entitled to accept the counterfactual put forward by Mr. Lowe. That submission, however, ignores the fact that

Mr Lowe had the burden of proof and counsel for Paymaster challenged, in my view accurately, the basis on which the counterfactual could be accepted based on both law and facts. In a subtler submission, counsel also contended that the tenor of the submissions made on behalf of Paymaster related to what could have happened *notwithstanding* the injunction, while the counterfactual was meant to address what likely would have happened *but for* the injunction. The counterfactual in this scenario however has to be influenced by both considerations which contribute in opposing ways to the determination of the causation of any loss suffered by Mr Lowe.

[119] Counsel for Paymaster submitted that, given the breakdown in the relationship between Paymaster and Mr Lowe and Mr Dallas' evidence that even before the injunction Paymaster had taken steps in early 2000 to move towards a Windows-type operating system, it is highly likely that Mr Lowe's contract would have been terminated even if the injunction had not been granted. In relation to Paymaster, therefore, counsel advanced that Mr Lowe would only have been entitled to \$45,000.00 in lieu of three months notice in keeping with the Terms of Agreement dated 1 February 1999.

[120] Regarding the contract with GKRS, counsel submitted that, given GKRS' acquisition of CEMSUP which became operational by October 2000, it was reasonable to allow for one year's fees under the maintenance contract which Mr Lowe indicated he could have had with them but for the injunction which at the highest monthly rate amounted to \$800,000.04.

[121] Counsel for Paymaster argued that i) there was nothing preventing the continuation of the contact with the Government of the Republic of Trinidad and Tobago; and ii) Mr Lowe had not produced any evidence other than his say so to a) support the existence of the contract and b) the basis on which it was allegedly terminated; therefore, Mr Lowe's evidence was wholly unsubstantiated.

[122] In seeking to craft a reasonable counterfactual the court is handicapped by the dearth of supporting evidence of a nature and breadth outlined earlier, that would provide

business and economic indicators regarding the market that would likely have existed, but for the injunction.

[123] The court however is mindful, that whilst counsel for Paymaster has substantially relied on the fact of the approaching obsolescence of the Paymaster system created by Mr Lowe at the time the injunction was imposed, it was sufficiently valuable for Paymaster to claim copyright in it (and then latterly assignment to them of the copyright) and seek an injunction to protect their claim. The court also bears in mind that one submission advanced by counsel for Paymaster is that the learned assessment judge having come to a finding of obsolescence of the software, conservatively, should have disregarded all entries in Mr Lowe's Excel spreadsheet after 2003.

[124] With regard to the contract with the Government of the Republic of Trinidad and Tobago, for the reasons advanced by counsel for Paymaster, I accept that the claim by Mr Lowe should be wholly disallowed. However, in respect of Paymaster and GKRS given i) the established fact of the relationships that existed between Mr Lowe and both entities, ii) the history of Mr Lowe's business of licensing and maintaining his software in Jamaica up to the point of the injunction, such as he provided in his evidence, iii) the agreed approaching obsolescence of Mr Lowe's software; iv) the fact that his failure to update his software was due to his misunderstanding of the scope of the injunction; and v) the fact that Microsoft ceased providing support for their DOS in December 2001, I will accept entries in the spreadsheet up to 2002. That would have allowed ample time for both Paymaster and GKRS to gradually transition to the new systems each was engaging, without the abruptness caused by the injunction. While I accept that the relationship between Paymaster and Mr Lowe was deteriorating before the injunction, given the scale of the investment in the Paymaster system, I find that the relationship would likely have continued until Paymaster made the gradual transition of which I have spoken.

[125] As August 2002 represents just a short period after the imposition of the injunction, the impact of the absence of the usually required detailed information such as market behavior and the business models and practices of the relevant players is

minimised. The short period also warrants a lower percentage discount for “vicissitudes, contingencies and uncertainties” than the 40% utilised by the learned assessment judge. I consider 10% to be an appropriate figure. Mr Lowe did not provide any information concerning his taxes or other business outgoings and there is no information before the court concerning what those rates were in the early 2000s. The court will, therefore, conservatively utilise a figure of 15% which should be deducted from the counterfactual figures as at August 2002, after which a further 10% for “vicissitudes, contingencies and uncertainties” will be discounted.

[126] Utilising that methodology, the following is the counterfactual that the court will substitute:

Accumulated sales and interest for Paymaster and GKRS up to August 2002
= **\$4,776,413.39** [(Paymaster – Sale (1) \$1,555,196.73 + Interest lost (1) \$292,999.06) plus (GKRS – Sale (2) \$2,464,000.00 + Interest lost (2) \$464,217.60)] **less** 15% for business outgoings including taxes
= **\$4,059,951.38 less** 10% for “vicissitudes, contingencies and uncertainties” = **\$3,653,956.24.**

[127] Accordingly, the appeal should be allowed, the award of the learned assessment judge set aside and the award of \$3,653,956.24 with interest at the usual rate allowed for judgment debts substituted.

Further submissions

[128] Counsel were provided with an embargoed advance copy of the judgment and advised that, at the handing down of the judgment, they would be invited to make submissions on costs.

[129] After the decision was handed down, Mr Cowan, counsel for Paymaster, indicated that counsel on both sides had arrived at an agreement concerning i) the period for which interest should be paid, ii) restitution of the balance of a previous payment made by

Paymaster to Mr Lowe, less the sum awarded to Mr Lowe and iii) that costs of the appeal should go to Paymaster to be agreed or taxed. Mr Chen, counsel for Mr Lowe confirmed the agreement. Orders were made to reflect that agreement.

LAING JA (AG)

[130] I too have read the judgment of my brother D Fraser JA and agree with his reasoning and conclusion.

BROOKS P

ORDER

- i) The appeal is allowed.
- ii) The order of Palmer-Hamilton J, made on 11 June 2020, is set aside.
- iii) Substituted therefor is the following: Mr Lowe is awarded damages of \$3,653,956.24 plus interest thereon calculated at the rate of 6% per annum.

BY CONSENT

- iv) The period for which interest shall be calculated is from 25 August 2000 to 25 August 2020 and the total of damages and interest amounts to \$8,038,703.73.
- v) Mr Lowe shall pay to Paymaster (Jamaica) Limited the sum of \$21,961,296.27 that represents the balance due to Paymaster (Jamaica) Limited, after the sum of \$8,038,703.73 is deducted from the sum of \$30,000,000.00, which was previously paid by Paymaster (Jamaica) Limited to Mr Lowe.
- vi) Costs of the appeal to Paymaster (Jamaica) Limited to be agreed or taxed.