

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division

2022
CLE/gen/00995

B E T W E E N

PETER J. NYGARD

Applicant

AND

NYGARD FOUNDATION

First Respondent

IPG FAMILY OFFICE LTD.

Second Respondent

GALAXY GROUP LIMITED

Third Respondent

BEFORE: **The Honourable Justice Mrs. Cheryl Grant-Thompson**

APPEARANCES: **Mr. Sidney Collie- Counsel for the Applicant**

**Mrs. Gail Lockhart Charles KC along with Mrs. Syann
Thompson Wells- Counsel for Respondent**

HEARING DATES: September 9th, 2023; September 29th, 2023; November
10,2023; November 16th,2023; November 28th, 2023;

**ASSESSMENT OF DAMAGES JUDGMENT; *Financiera Avenida S.A. v Shiblaq [1990]*
E.W.J. No.224, Hoffman- La Roche & Co. A.G. v. Secretary of State for Trade and
*Industry [1975] A.C. 295, Smith v Day [1882] 21 Ch. D.421***

Headnote: CIVIL PROCEDURE. DAMAGES. This case involves an Application for Assessment of Damages. Initially the Applicant (the Plaintiff herein), by way of a Writ of Summons commenced proceedings against the First Defendant and the Second Defendant in this matter to prevent the sale of the property known as “Union Wharf”. The Third Defendant was then added as a party to the matter, given that they were in possession of the property.

The Applicants requested and received an Injunction preventing the sale of the property, known as “Union Wharf”. The substantive action was never heard by this Honourable Court, however, the Application for the Injunction was heard in full and determined. In a ruling given on the 30th day of September, 2022, the Court granted the Injunction, acceded to the Application to add the Third Respondent as a Defendant to the proceedings, and ordered that the Applicant provide a cross-undertaking in the amount of Two Million Dollars (\$2,000,000.00). The sum of Two Million Dollars was never paid by the Applicant or by his agents. Due to the Applicant’s failure to comply with the Order, the Court subsequently made an Unless Order on the 6th of March, 2023 which stated, amongst other things, that the Applicant was required to provide security for costs valued at One Hundred Thousand Dollars (\$100,000.00). The One Hundred Thousand Dollars was never paid by the Applicant or by his agents. The substantive action was therefore dismissed due to the Applicant’s non-compliance with the Order. These proceedings pertaining to the Assessment of Damages were subsequently commenced. This Honourable Court is now tasked with determining whether the Respondents herein are entitled to any damages and if so in what amount.

Held: The Court found that the Respondents have suffered losses. They are entitled to recover damages sustained by them as a result of the enactment of the Injunction sought by the Applicants.

In making this decision the trial judge relied on the cases of: *Financiera Avenida S.A. v Shiblaq* [1990] E.W.J. No.224, *Hoffman- La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, *Smith v Day* [1882] 21 Ch. D.421

GRANT- THOMPSON J

Background

1. On the 14th of July, 2022, the Applicant, Mr. Peter Nygard, by way of a Writ of Summons commenced proceedings against the First Respondent, Nygard Foundation, and the Second Respondent, IPG Family Office Ltd, in this matter. The relief sought by the Applicant was expressed as follows:

“AND THE PLAINTIFF CLAIMS AS FOLLOWS:

(1) Damages for breach of fiduciary duties on the part of the First and Second Defendants to be assessed if not liquidated forthwith;

(2) Damages for breach of contract on the part of the Second Defendant to be assessed if not liquidated forthwith;

(3) A Declaration that the Plaintiff paid the purchase money to Galaxy Group is the beneficial owner of the Union Wharf property;

(4) An Order preventing the First and Second Defendants whether by themselves or, their servants or agents or otherwise, from selling, disposing, pledging, transferring or otherwise dealing with the said property known as Union Wharf, Bay Street, New Providence, The Bahamas until further order of the Court;

(5) Interest

(6) Further or other reliefs that the Court may deem just

(7) Costs

(emphasis supplied)”

2. Among the relief sought in the original action (2022/CLE/gen/00995) was a Declaration for an Injunction which sought to prevent the First and Second Respondents whether by themselves, their servants or agents or otherwise, from selling, disposing, pledging, transferring or otherwise dealing with the said property known as Union Wharf, Bay Street, New Providence, The Bahamas until a further Order of the Court was made.

3. Given that the focus of the proceedings from its inception was to prevent the sale of Union Wharf the company known as Galaxy Group Limited was joined to the proceedings, pursuant to Order 15 Rule 6 of the Rules of the Supreme Court 1976, as the Third Defendant. This was due to the fact that Galaxy Group Limited was the owner of the aforementioned property.
4. The substantive action was never heard by this Honourable Court. However, the Application for the Injunction was heard in full. In a ruling delivered on the 30th day of September, A.D., 2022, the Court determined at paragraphs 35, 36 and 37 that:-

“35. In the circumstances I do find that the Applicant has met the requirements laid out in American Cyanamid and as such the Injunction prayed for is granted. The Court is also of the view that there is a reasonable cause of action and as such the application by the Second Defendant to have the matter struck out is dismissed.

36. The Court also accedes to the Application of the Applicant pursuant to Order 15 Rule 6 of the Rules of the Supreme Court 1976 to have Galaxy Group Limited added as a Defendant.

37. In Conclusion, I also Order that the Applicant provide a cross-undertaking in the amount of Two Million Dollars (\$2,000,000.00) so that the position of the Defendants’ may be adequately protected in light of the Injunction granted. I order a continued stay of the proceedings until the substantive matter is heard. Same should be done with urgency. The Court is available to hear arguments and submissions on the substantive matter on 31st October, 2022 at 11am, if that date and time is convenient to Counsel.”

The Court has since discharged the Injunction.

5. This Order which stated that “*the Applicant provide a cross-undertaking in the amount of Two Million Dollars (\$2,000,000.00)...*” was never paid by the Plaintiff or by his agents. Due to the Applicant’s failure to comply with the Courts Order, the Honourable Court made an Unless Order, (6th of March, 2023 filed the 8th of March, 2023). This Order stated that:-

“1. Unless the Plaintiff at or before 4PM on 7 April 2023 pays into court security for the costs of the Second and Third Defendants in the sum of \$100,000 the Plaintiff’s action shall stand dismissed without further order;

2. In the event that the Plaintiff fails to pay into court security for the costs of the Second and Third Defendants in the sum of \$100,000 on or before 7 April 2023 the following orders shall apply:

a. there shall be a hearing on 5 May, 2023 at 10:00 AM to assess the damages suffered by the Second and Third Defendants arising out of the injunctions issued in this action and to hear the parties on costs

b. The Second and Third Defendants shall lay over their skeleton arguments in support of the assessment of damages and costs hearing on or before 14th April, 2023, and the Plaintiff shall layover his skeleton arguments in support of the same on or before 21st April, 2023.

3. In the event that the Plaintiff complies with the Unless Order and pays into court security for costs of the Second and Third Defendants in the sum of \$100,000.00 at or before 4pm on 7th April, 2023 the following directions shall apply

3.2 By reason of the Plaintiff's failure to comply with the Unless Order and pay into court on or before 4pm on 7th April, 2023, security for costs in the sum of \$100,000.00. The Plaintiff action shall stand dismissed without other order.

*3.3 By reason of the Plaintiff's failure the second leg of the Learned Judge order crystallized. That is to say further hearing was order as follows:-
"there shall be a hearing on 6th May, 2023 at 10:00am to assess the damages suffered by the Second and Third Defendants arising out of the injunction issued in this action and to hear the parties on costs."*

6. In addition to the Plaintiff, Mr. Peter Nygard, having failed to provide the undertaking in the amount of at Two Million Dollars (\$2,000,000.00), he also failed to provide the Security for Costs in the amount of One Hundred Thousand Dollars (\$100,000.00), as ordered by this Court in an Unless Order. The substantive action was therefore dismissed due to the Plaintiff's non-compliance with these two crucial financial Orders relative too these proceedings. This Court then moved to the Assessment of Damages for the Injunction which the Applicant had previously successfully sought, which having been granted the Applicant failed to satisfy the recurring safeguards in order for the matter to proceed to trial.

The Applicant's Submissions

7. Counsel for the Applicant, Mr. Sidney Collie, invited the Court to dismiss the evidence and submissions of the Respondent in the Assessment heard. He submitted to this Honourable Court that there has been no evidence produced either by Affidavit or viva voce evidence to prove or substantiate any costs for the First and Third Respondents in this matter. There has only been evidence proffered on the Second Respondents' behalf according to the Applicant. Counsel for the Applicant submitted that the only evidence

proffered by the Second Respondent was the Fifth Affidavit of Taran Mackey (dated and filed on the 4th of May, 2023).

8. The summary of the Second Respondent's claim for damages were as follows:-

<i>“(i) Loss of Opportunity</i>	<i>\$241,842.32</i>
<i>(ii) Charges to Galaxy for the Period 15th June- 21st November</i>	<i>\$225,000.00</i>
<i>(iii) IPG charges to Galaxy- 22nd November to 31st March, 2023</i>	<i>\$114,000.00</i>
<i>(iv) Gail Lockhart Charles & Co.</i>	<i>\$75, 175.88</i>
<i>TOTAL</i>	<i>\$656,018.20 ”</i>

9. Counsel for the Applicant submitted that since there has been no evidence produced either by Affidavit or viva voce to prove or substantiate any costs for the First and Third Respondents, the claim of loss of opportunity for the sum of Two Hundred One Thousand Eight Hundred Forty-Two Dollars and Thirty-Two cents (\$241,842.32) consequently, should be disallowed.
10. In addition to this, Counsel for the Applicant further submitted that the claim by the Third Respondent for the sum of Two Hundred Twenty-Five Thousand Dollars (\$225,000.00) for the period of June 15th to November 21st has not been proven and should also be disallowed.

11. Counsel for the Applicant then addressed paragraph 7 in the Fifth Affidavit of Mr. Taran Mackey. Mr. Mackey, the Affiant, claimed that the sum of One Hundred Fourteen Thousand Dollars (\$114,000.00) from the period of November 22nd to March 31st, 2023, arose out of Litigation. Counsel for the Plaintiff submitted that this claim is a misnomer. Counsel averred that there is a marked difference between litigation and the hearing of the Injunction. Exhibit 5 of the aforementioned Affidavit is a two (2) line invoice claim for One Hundred Fourteen Thousand Dollars (\$114,000.00) without any detailed particulars of dates, times, nature of service nor amounts related thereto. Counsel for the Plaintiff further submitted that even if dates and times were included, Galaxy Group Limited did not identify the officer or officers or the dollar value per hour for such officers. The question of how Galaxy arrived at the figure of One Hundred Fourteen Thousand Dollars (\$114,000.00) has not been answered or ascertained. Therefore, this purported invoice should be ignored and the claim for One Hundred Fourteen Thousand Dollars (\$114,000.00) disallowed.
12. Regarding the analysis for value of loss of opportunity produced by Mr. Angelo Butler CFA and Ms. Tiffany Cartwright CFA both of Colima Financial Advisors Limited (CCFAL) their analysis was alleged to be fatally flawed for the following reasons:-

“(i) At paragraph 2(1) they said:

The sum of the investment i.e. sale proceeds is \$10,000,000.00 while we are aware of fees related to property transactions, these will be ignored as they have not been disclosed to us. Anyone interpreting this report would need to make appropriate adjustments for the net amounts or these amounts would have to be proved to us at the conclusion of the actual sale.

*(ii) At Sub-paragraph 3, third line therein they said this:-
Assuming that the sale were invested at these rates the value lost for
the period of June to March was \$23, 691.83”*

13. Counsel for the Applicant therefore submitted that based upon these two (2) aspects of the analysis it is not only unsafe, but dangerous for the Court to accept this analysis as a basis to award of the sum of Two Hundred One Thousand Eight Hundred Forty-Two Dollars and Thirty-Two cents (\$241,842.32).

14. Counsel for the Applicant disclosed that Mr. Butler and Ms. Cartwright admitted that no fees related to property transactions of this nature were never disclosed to them. Secondly, that in order to interpret their report “*appropriate adjustments would need to be made for the net amounts*” or these amounts would have to be provided to them at the conclusion of an actual sale. However, no sale ever took place. Counsel for the Applicant further submitted that Mr. Taran Mackey, Managing Director, was not able to assist the Court with the qualifications and experience of Mr. Butler CFA or Ms. Carwright, CFA, nor were their qualifications ever explained to the Court. In addition to this Mr. Butler nor Ms. Cartwright swore Affidavits. They did not give viva voce evidence. As a result of this the claim of Two Hundred One Thousand Eight Hundred Forty-Two Dollars and Thirty-Two cents (\$241,842.32) is wholly unproven, unreliable and should be disallowed.

15. Regarding the sum of Seventy-Five Thousand One Hundred Seventy-Five Dollars and Eighty-Eight cents (\$75,175.88), which represented the invoice of Gail Lockhart Charles & Co. Counsel for the Plaintiff submitted that they had queries nor objections relative to this amount.

16. In conclusion, Counsel for the Plaintiff averred that the Second and Third Respondents together have submitted claims for a total of Five Hundred Eighty Thousand Nine Hundred Two Dollars and Thirty-Two cents (\$580,902.32). Gail Lockhart-Charles & Co. claimed professional fees in the amount of Seventy-Five Thousand One Hundred Seventy-Five Dollars and Eighty-Eight cents (\$75,175.88) bringing the total claim in damages to Six Hundred Fifty-Six Thousand Eighteen Dollars and Twenty cents (\$656,018.20). Except for the claim of Seventy-Five Thousand One Hundred Seventy-Five Dollars and Eighty-Eight cents (\$75,175.88) (the invoice which has been satisfactorily particularized) the sum of Five Hundred Eighty Thousand Nine Hundred Two Dollars and Thirty-Two cents (\$580,902.32) has not been proven and ought to be dismissed by the Court. This concluded the submissions of Counsel for the Applicant.

Second and Third Respondents Submissions

17. Counsel representing the Second and Third Defendant, Mrs. Gail Lockhart-Charles, KC, began her submissions by asserting that the Second Affidavit of Managing Director Mr. Taran Mackey brought into sharp focus the damages which loomed, accumulating since the sale of the Union Wharf property teetered on the brink of collapse. Paragraph 12 of the Second Affidavit of Managing Director Mr. Taran Mackey which stated that:

“12. The injunction order has prevented Galaxy from closing the sale of the Union Wharf Property in accordance with the Agreement for Sale, and Galaxy has now been served with a Notice to Complete, which requires it to complete the sale by 28 November, 2022, failing

which, the contract will be terminated and Galaxy will be required to return the deposit to the purchaser”

18. Mrs. Lockhart Charles, KC, submitted that the full scale of the loss incurred has been pellucidly encaptured in the Fifth Affidavit of Managing Director Mr. Taran Mackey (filed in support of the Assessment of Damages). The Affidavit evidence, supplemented by Mr. Mackey’s viva voce evidence established their claims. (See Witness Statements, Cross Examination and Re-Examination at the assessment hearing on 7th September, 2023.)

19. Counsel for the Respondents reminded the Court that the Managing Director’s evidence was derived of his personal knowledge. The Union Wharf property was under contract for sale for the agreed price of Ten Million Dollars (\$10,000,000). That sale collapsed as a result of the imposition of the Injunction requested by the Applicant. The damages claimed are particularized in Mr. Mackey’s 5th Affidavit. A summary of the damages are as follows:

- I. *“the value of the loss of opportunity sustained by Galaxy relative to the termination of the \$10,000,000 sale of its Union Wharf Property to Buccara as a result of the injunction that was granted in this action. The CFAL report exhibited to T5 shows that the value of the loss of opportunity in this case is \$241,842.32.*
- II. *IPG Invoice dated 21 November 2022 in the amount of US \$225,000 representing the charges to Galaxy for the period 15th June 2021 to 21st November 2022 as a result of the litigation.*
- III. *IPG Invoice dated 31 March, 2023 in the amount of \$114,000 representing the IPG charges to Galaxy arising out of the*

litigation for the period 22nd November 2022 to 31st March 2023.

IV. *invoice number 5305 the from Gail Lockhart Charles and Co. to Galaxy in the amount of \$75,175.88 (inclusive of VAT) for professional services and charges in relation to the agreement between Galaxy and Buccara Bahamas Limited for the sale of the Union Wharf property.”*

20. Counsel for the Respondents submitted that the total amount claimed in the value of Six Hundred Fifty-Six Thousand Eighteen Dollars and Twenty cents (\$656,018.20) represented the total of the sums set out in the paragraph above. Counsel for the Respondents reminded the Court that there was no evidence led by Counsel on behalf of the Applicant, Mr. Nygard, to contradict the evidence of the Managing Director, Mr. Mackey.

21. The Managing Director’s evidence was clear, convincing, and reasonable. He fully explained and justified the amounts claimed which represented the damage caused by the Applicants actions in seeking an Injunction, to block the sale. The Third Respondent, Galaxy Group Limited, were entitled to recover these funds upon assessment.

22. The duties of Mr. Taran Mackey, the Managing Director of the Second Respondent, IPG, included managing assets, running the day-to-day operations of the Nassau office, managing staff, meeting with clients, controlling the financials and Human Resources department of the company. Mr. Mackey gave evidence that he sits on the finance team for the Second Respondent. He prepared the IPG invoices with the assistance of his team. Mr. Mackey confirmed the veracity and genuineness of the invoices submitted for the services provided by IPG to Galaxy (covered by those invoices) relative to the aborted sale. He described the considerable efforts taken to defend the Injunction proceedings.

23. Under Cross Examination Mr. Mackey was directed to invoice Number 5305 issued by Gail Lockhart Charles and Co to Galaxy Group Limited (in relation to the services rendered to Galaxy) in connection with the Union Wharf agreement for sale to Buccara Bahamas Limited. That invoice provided a detailed chronology of the work, time and effort devoted to the Union Wharf sale transaction.
24. Mr. Mackey detailed and defined in testimony his personal involvement in the preparation of the agreement for sale, obtaining the requisite Investment Board approval, futile attempts to obtain an extension of time (when Galaxy Group Limited was faced with a Notice to Complete but could not complete because of the Injunction), the eventual collapse of the sale and the return to Buccara of the deposit. These events as described supported Invoice Number 5305 exhibited to his Fifth Affidavit. In addition to confirming his personal involvement, as a Director in Galaxy, from the commencement of the sale negotiations to the return of the deposit. Managing Director Mackey exhibited in evidence the report of CFAL which professionally assessed the value of the loss of opportunity to Galaxy for the loss of the sale.
25. Counsel for the Respondent pointed out to the Court that the Applicants never called any witnesses to counter any of the evidence provided by the Respondents. Conversely, all of the evidence provided by the Respondents was corroborative of the fact that a lucrative sale relative to the Union Wharf property was pending at the time the action commenced. The sale collapsed due to the imposition of the Injunction prohibiting the completion.

26. Therefore, Counsel for the Respondents submitted that the above losses represent damages that would not have befallen The Third Respondent, Galaxy Group Limited, but for the Injunction. These losses are recoverable on the assessment of damages. In the result, Counsel for the Respondents submitted that an interim award of damages to the Second and Third Respondents in the amount of Six Hundred Fifty-Six Thousand Eighteen Dollars and Twenty cents (\$656,018.20) with liberty to reapply to be awarded to the Second and Third Respondents, such costs to be taxed if not agreed.

Issues

27. This Honourable Court is faced with two (2) issues in respect to this matter:
- a. Firstly, whether the Plaintiff is liable to pay damages; and
 - b. Secondly, what is the correct value of the Damages to be paid.

The Law

28. In the case of **Financiera Avenida S.A. v Shiblaq [1990] E.W.J. No.224**, the English Court of Appeal established the test of whether damages ought to be ordered relative to an Injunction. Lloyd L.J., said this at paragraphs 15 and 16:

“Two questions arise whenever there is an application by a defendant to enforce a cross-undertaking (a promise made by the party getting the injunction to pay damages to the defendant if it turns out that the injunction should have not been given) in damages. The first question is whether the under- taking ought to be enforced at all. This depends on the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff at the trial, the subsequent conduct of the defendant and all the other circumstances of the case. It is essentially a question of

discretion. The discretion is usually exercised by the trial judge since he is bound to know more of the facts of the case than anyone else.

If the first question is answered in favour of the defendant, the second question is whether the defendant has suffered any damage by reason of the granting of the injunction. Here ordinary principles of the law of contract apply both as to causation and quantum....”

29. In the instant case the Applicants undertaking to compensate the Respondents, should be enforced. The Applicant commenced these proceedings against the Respondents seeking to prevent the sale of the property known as “Union Wharf”. They have failed. The Injunction has been discharged. They provided an undertaking in the amount of Two Million Dollars (\$2,000,000.00) to be provided to the Respondents. To date this has never been paid. As a result of the Applicant’s broken promise this Court was mandated to effect an Unless Order for the Applicant to provide a sum of One Hundred Thousand Dollars (\$100,000.00) to the Respondents as security. Yet again the Applicant did not provide the Respondent with the requisite funds. Having reviewed the submissions of both Counsel, the evidence of the Respondents, this Honourable Court takes a dismissal view of the Applicant’s blatant failure to deliver on any of the Financial sanctions and safeguards imposed by Court Order .

30. In response to the second question outlined in the case of **Financiera (supra)** this Court finds that the Respondents have suffered damages as a result of the Injunction. Due to the enforcement of the original Injunction the Defendants were forced to abruptly halt the sale of the Union Wharf property, which resulted in a Loss of Opportunity. Further, the Respondents were made to retain the services of both Counsel Gail Lockhart Charles &

Co. and the services of IPG Family Office Ltd. The damage suffered by the Respondents flows directly from the Injunction, they are confined to the clear, immediate and natural consequences of the Injunction (which was known to the Applicant when they obtained the Injunction).

31. This Court cites the approved obiter dictum applied in the case of **Hoffman- La Roche & Co. A.G. v. Secretary of State for Trade and Industry [1975] A.C. 295** which stated that:

*“The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the **conduct of the defendant** in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is to be 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.”*

32. It is clear to this Court that the conduct of the Applicant was in fact in defiance of the Court's Orders, which resulted in damages which were a direct consequence of the granted Injunction. The Respondents are fully entitled to compensation/damages.

33. Having successfully determined that the Respondents are entitled to damages, the Court must now ascertain the amount, applying the ordinary principles of the law of contract. This concept was further supported by the case of **Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry [1975] A.C. 295**, where Lord Diplock stated at page 361 that:

“... It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is to be 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”

34. The Legal text of Contract Law 4th Edition (written by Mary Charman at pages 226-227) provides that:

*“The normal basis for awarding damages in contract is for loss of bargain, sometimes known as an expectation basis. The aim is restitutio in integrum, and this is best explained in the words of Parke B in *Robinson v Harman (1848)*: “The rule of the common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.”*

The Court seeks to put the Respondents, in so far as money can do, in the same position. This is to make up for their loss at the contract not performed.

35. Applying the general principle of *restitutio in integrum*, to return these parties back to the position they were in before they entered into the contract. The summary of the Defendants claim for damages amounts to a

total of Six Hundred Fifty-Six Thousand Eighteen Dollars and Twenty cents (\$656,018.20). Counsel for the Plaintiff has submitted that the total of Seventy-Five Thousand One Hundred Seventy-Five Dollars and Eighty-Eight cents (\$75,175.88) (which represents the fees of Gail Lockhart & Co.) are not disputed as they were satisfactorily particularized. The Court agreed. By Interim Order the Applicants were instructed to pay those sums to Counsel for the Respondents. Therefore, the sum of Five Hundred Eighty Thousand Nine Hundred Two Dollars and Thirty-Two cents (\$580,902.32) is the only amount being challenged by the Applicant. In order for this Court to successfully determine the exact value which the Respondents should receive, this Court will address the sums of Two Hundred One Thousand Eight Hundred Forty-Two Dollars and Thirty-Two cents (\$241,842.32), Two Hundred Twenty-Five Thousand Dollars (\$225,000.00) and One Hundred Fourteen Thousand Dollars (\$114,000.00) separately.

POINT OF 241,842.32

36. The Court adheres to an overriding objective in achieving justice and fairness, seeking to ensure that the Respondents are not only adequately compensated, whilst not being over compensated. In defence of the claim of Two Hundred One Thousand Eight Hundred Forty-Two Dollars and Thirty-Two cents (\$241,842.32) which represents the Loss of Opportunity, Counsel for the Applicant submitted that there has been no evidence produced either by Affidavit or viva voce, to prove or substantiate any costs for the First and Third Respondents. The claim of loss of opportunity by Galaxy Group Limited, the Third Respondent, herein, has not been proved by any competent officer of the Third Respondent. The sum of Two Hundred One Thousand Eight Hundred Forty-Two Dollars and Thirty-Two cents (\$241,842.32) it was argued should be disallowed. In response to this

Counsel for the Respondent submitted that the amount of Two Hundred One Thousand Eight Hundred Forty-Two Dollars and Thirty-Two cents (\$241,842.32) has in fact be sufficiently particularized in the Fifth Affidavit of Mr. Taran Mackey.

37. By paragraph 5 of the Fifth Affidavit of Mr. Taran Mackey, Counsel for the Respondents stated that a report was prepared by Colina Financial Advisors Limited (CFAL) providing an analysis of the value of the loss of opportunity sustained by the Third Defendant, relative to the termination of the Ten Million Dollar (\$10,000,000) sale of Union Wharf Property to Buccara Bahamas Limited as a result of the Injunction that was granted in this action. CFAL reported that the loss of opportunity amounted to Two Hundred One Thousand Eight Hundred Forty-Two Dollars and Thirty-Two cents (\$241,842.32)

38. Having reviewed the evidence provided by Counsel for the Respondents, this Honourable Court finds that the amount of Two Hundred One Thousand Eight Hundred Forty-Two Dollars and Thirty-Two cents (\$241,842.32), claimed does adequately represent the loss of opportunity encountered as a result of the Injunction. After reviewing the contents of Exhibit TM -5 of the Fifth Affidavit of Mr. Taran Mackey, this Court does partially accept the sentiment of Counsel for the Applicant, that since the CFAL were not provided with the fees related to the property transactions, they would have not been able to provide an exact amount for the loss of opportunity. However, though this Court does accept the notion that CFAL would need the fees related to the property transactions in order to provide an amount that is 100% accurate, this Honourable Court is satisfied that the amount provided does in fact, though not perfectly, reflect the loss of opportunity that the Respondents suffered in the matter. It is understood

that the sale of a property is an extremely volatile business, which means the sale price can vary on any day due to factors such as the consistent fluctuation of the market, potential title issues, real estate taxes, or attorney fees, etc. Due to this unpredictability this Court confers that it would be difficult for any institution to predict with 100% accuracy without receiving all of the data. However, although this is true it is accepted that Colina Financial Advisors Limited (CFAL) is a reputable institution who is able to provide, through their calculations, an adequate amount for potential loss.

39. According to the CFAL report, provided at Exhibit TM-5 of the Fifth Affidavit of Mr. Taran Mackey, it was stated that they collected the 91-day Government of The Bahamas Treasury Bill yields from June 2022 to March 2023 from The Central Bank of The Bahamas' website. These are annual fields which were unannualized to apply monthly yields to the totals. The CFAL then utilized these Standard Rates and projected that the value of loss for the time period of June to March was Two Hundred One Thousand Eight Hundred Forty-Two Dollars and Thirty-Two cents (\$241,842.32).

40. This breakdown proves to the Court that the amount of Two Hundred One Thousand Eight Hundred Forty-Two Dollars and Thirty-Two cents (\$241,842.32) was not fabricated or embellished and instead is based on reliable and credible numbers. The Court found the justification reasonable under the circumstances. Therefore, this Court finds that the amount of Two Hundred One Thousand Eight Hundred Forty-Two Dollars and Thirty-Two cents (\$241,842.32) ordered paid to the Respondents, for their Loss of Opportunity.

POINT ON 225,000

41.Regarding the amount of Two Hundred Twenty-Five Thousand Dollars (\$225,000.00) Counsel for the Applicant submitted that the claim by the Third Respondent for the sum of Two Hundred Twenty-Five Thousand Dollars (\$225,000.00) for the period of June 15th to November 21st has not been adequately proved and should also be disallowed. According to the Fifth Affidavit of Mr. Taran Mackey it was submitted that the aforementioned amount represented the IPG Invoice dated 21 November 2022 for the charges to Galaxy for the period 15th June 2021 to 21st November 2022 as a result of the litigation. This Court finds that the invoice provided is not adequately particularized and is not sufficient to justify the entire requested amount of \$225,000. The invoice listed at Exhibit TM-5 [4] in the Fifth Affidavit of Mr. Taran Mackey is without any detailed particulars, such as dates when work was conducted, the time spent each day on the matter, the rate at which the client was charged per hour etc. The invoice simply states, “Director Time spent on Union Wharf Litigation during the period of 15th June 2021 to 21st November 2022”. This information does not assist the Court in specifically determining how the amount of \$225,000.00 was calculated. As a result, it cannot be reasonably concluded that the Respondents should be awarded the full amount of Two Hundred Twenty-Five Thousand Dollars (\$225,000.00).

42.This Court does however accept that the Respondents did retain the services IPG Family Ltd. and their Managing Director. In the result this Honourable Court finds that for a years’ worth of services rendered by IPG Family Ltd. an amount of One Hundred Fifty Thousand Dollars (\$150,000.00) is eminently reasonable and will be awarded, in the absence of appropriate benchmarks.

POINT ON 114,000

43. According to the Fifth Affidavit of Managing Director Mr. Taran Mackey and submissions provided by Counsel for the Respondents, the amount of One Hundred Fourteen Thousand Dollars (\$114,000.00) represents IPG charges to Galaxy which arose out of litigation for the period of 22nd November 2022 to 31st March, 2023. After reviewing that evidence provided, this Honourable Court agrees with Counsel for the Applicant that this sum was not adequately particularized or detailed to the Court. In the Fifth Affidavit of Mr. Taran Mackey (filed the 4th of May, 2023), the only reference made to the amount One Hundred Fourteen Thousand Dollars (\$114,000.00) was at paragraph 7- which simply stated that an invoice was owed and amounted to \$114,000. The exhibited Invoice in the Fifth Affidavit of Mr. Taran Mackey did not provide a breakdown of what work was provided which constituted the \$114,000. On the 7th of September, 2023, Mr. Taran Mackey provided evidence during his Cross-Examination which briefly outlined some of the work that he performs as Managing Director of IPG. At pages 3-4 of the Transcript (dated the 7th of September, 2023) Mr. Mackey stated that some of his duties as Managing Director were to run the day-to-day operations of the Nassau office, manage staff, meet clients and also control the financials and Human Resources. However, though this was done, no evidence was provided which outlined an itemized list of what was the value of each action conducted on the Respondents behalf. As a result of this, there only exists a brief list of services that Mr. Taran Mackey allegedly performed with no exact understanding of what he charged for said services. Therefore, this Court finds that the amount of One Hundred Fourteen Thousand Dollars (\$114,000.00) cannot be awarded to the Respondents in its entirety.

44. Notwithstanding the amount of One Hundred Fourteen Thousand Dollars (\$114,000.00) was not adequately particularized, the Managing Director Mr. Taran Mackey rendered his professional services for the Respondents and is entitled to compensation. Due to his position as Managing Director and the list of completed tasks provided by Counsel for the Respondents, this Honourable Court is of the view that the IPG charges to Galaxy from 22nd of November, 2022 to the 31st of March, 2023 valued at \$114,000 should be decreased to One Hundred Thousand Dollars (\$100,000).

Conclusion

45. In conclusion, pursuant to the legal concept of *restitutio in integrum* this Court understands that for justice to be truly done, the Respondents must be compensated in a way that returns the parties to their original state before the Injunction was granted. However, it is also understood that “he who asserts must prove”. The Respondents have a duty to provide the Court with sufficient particularized evidence in order to substantiate the amount they are asking to be compensated for. This Court finds that:

- a. The Respondents have suffered damage as a result of the Injunction. They were forced to abruptly halt the sale of the Union Wharf property, to retain the services of Gail Lockhart Charles & Co., to also retain the services of IPG Family Office Ltd. to perform a variety of necessary services;
- b. The Defendants are entitled to the sum of Two Hundred One Thousand Eight Hundred Forty-Two Dollars and Thirty-Two cents (\$241,842.32), for their Loss of Opportunity;
- c. The full amount of Two Hundred Twenty-Five Thousand Dollars (\$225,000.00) cannot be awarded to the Respondents, for the retention of the professional services of IPG Family Ltd. The amount of One Hundred Fifty Thousand Dollars (\$150,000.00) is to be

awarded to the Respondents, for the settlement of the professional services rendered by IPG Family Ltd.;

- d. The IPG charges to Galaxy from 22nd of November, 2022 to the 31st of March, 2023 valued at One Hundred Fourteen Thousand Dollars (\$114,000.00) should be decreased to the sum of One Hundred Thousand Dollars (\$100,000), as this amount was not adequately particularized by the Respondents; and
- e. Including the professional fees of Counsel Mrs. Gail Lockhart Charles, KC, which amounts to Seventy-Five Thousand One Hundred Seventy-Five Dollars and Eighty-Eight cents (\$75,175.88), the total amount that must be paid by the Applicant amounts to Five Hundred Sixty-Seven Thousand Eighteen Dollars and Twenty cents (\$567,018.20).

46. I promised to put my reasons in writing, this I now do.

Dated this 28th day of November A.D., 2023.

The Honourable Madam Justice Mrs. Cheryl Grant-Thompson