

IN THE SUPREME COURT OF BELIZE, A. D. 2014

CLAIM NO. 598 OF 2014

BETWEEN:

(UNICORN INTERNATIONAL SECURITIES LLC CLAIMANT

(AND

(ATTORNEY GENERAL OF BELIZE DEFENDANT

Assessment of Damages - Breach of Constitutional Rights - Remedy - Damages - Assessment - Search and Seizure - Whether damages should be awarded - Measure of damages - Relevant considerations

Hearing Date:

6th February, 2017

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Michael Young, SC, then Yohhahnseh Cave for the Claimant

Solicitor General Ms. Anika Jackson then

Mr. Denys Barrow, SC, and Jaraad Ysaguirre of Barrow and Co. for the Defendant

D E C I S I O N

1. This is an assessment of damages arising from the breach of constitutional rights of the Claimant by the Defendant where this court held on April 15th, 2016 that the Defendant's search and seizure of the Claimant's Company violated Unicorn's rights

under section 20 of the Constitution of Belize. The Claimant and the Defendant have filed written submissions and provided expert reports in order to assist the court in ascertaining the quantum of damages to be awarded in this matter.

Claimant's Submissions on Quantum

2. On March 14th, 2015 Michael Young, SC, advanced comprehensive written arguments on behalf of the Claimant on the quantum of damages. Learned Counsel based the first half of his submissions on case law and statute addressing the question of the award of damages as relief for breaches of fundamental rights and placing such award on firm legal footing, while the latter portion of his submissions addressed the expert report of Owen Codd, Senior Auditor who assessed the quantum of loss suffered by Unicorn. Mr. Young, SC, referred to Section 20 of the Constitution of Belize which grounds the Court's jurisdiction to grant redress for breach of fundamental rights:

"(1) If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction -

(a) To hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) To determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,

And may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 19 inclusive of this Constitution.”

Mr. Young, SC, stated that the jurisdiction to grant redress and relief (including damages) for the breach of constitutional rights is a relatively new jurisdiction and as such the principles for the assessment of damages in such cases are not well developed. He then cites ***Clement Wade v Maria Roches*** Civil Appeal No. 5 of 2004 where Chief Justice Conteh (as he then was) awarded the Defendant Maria Roches the sum of \$150,000 as damages where he had found that her constitutional rights under Section 16 of the Constitution had been violated when she was fired from her teaching position by the Claimant. Ms. Roches had been terminated because as an unmarried teacher in a Roman Catholic school, she had become pregnant and was dismissed because she was not *“exemplary in conduct and language living Jesus’ teaching in marriage and sex”*.

On appeal, the Court of Appeal affirmed the Chief Justice’s decision to award Ms. Roches damages to enforce her constitutional rights, but reduced the amount awarded from \$150,000 to \$60,000. In giving the judgment of the Court, President Mottley cited Hanel-Smith JA in ***Rees v Crane*** that damages for breach of fundamental rights are not as of right, and that constitutional relief was discretionary. In order to determine quantum, the appellant would have to furnish facts from which distress and inconvenience could be determined and prove pecuniary loss. The Court found that there was no direct evidence of Ms. Lucas’ pecuniary loss but she had furnished facts

and evidence from which distress and inconvenience could be determined. The Court also stated that damages awarded should be compensatory and not punitive. The amount of \$150,000 awarded by Conteh CJ in the Supreme Court was therefore reduced to \$60,000 by the Court of Appeal.

3. Mr. Young, SC, also refers to ***The AG of Trinidad and Tobago v. Siewchand Ramanoop*** 2008 UKPC 15 where the Privy Council upheld an award of exemplary damages for breach of constitutional rights evolving from an egregious case of police brutality. Lord Nicholls of Birkenhead reasoned thus:

“Section 14 recognises and affirms the court’s power to award remedies for contravention of Chapter I rights and freedoms. This jurisdiction is an integral part of the protection Chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of State power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the State’s violation of a constitutional right. This jurisdiction is separate from and additional to (without prejudice to all other remedial jurisdiction of the court).

18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of

the constitutional right will not always be co-terminous with the cause of action at law.

19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. Redress in section 114 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expression 'punitive damage' or 'exemplary damages' are better avoided as descriptions of this type of additional award".

4. In ***Inniss v. The AG of St. Kitts and Nevis*** 2008 UKPC 42, where a barrister/solicitor was contracted to serve as Registrar of the High Court of St. Kitts and Nevis, and was prematurely terminated from her contract, the Claimant brought an action for breach of her constitutional rights contrary to section 83(3). At trial, the Court found that her constitutional right had been breached, but it was not one of the fundamental rights in the Bill of Rights of the Constitution. Allowing the appeal, the Court of Appeal held that it was not a breach of constitution but a breach of contract. On appeal to the Privy Council assessed, the appeal against the Court of Appeal decision was allowed, and damages were awarded under two distinct heads: (a) damages for premature termination of her contract and (b) damages for contravention of her constitutional right. In awarding the Claimant as redress for the breach of contract and \$50,000 for the breach of constitutional right, the Privy Council made the following statement:

“Allowance must of course be made for the importance of the right and the gravity of the breach in the assessment of any award. The fundamental points are of general application, however. The purpose of the award, whether it is made to redress the contravention or as relief, is to vindicate the right. It is not to punish the executive. But vindication involves the assertion that the right is a valuable one, as to whose enforcement the complainant herself has an interest. Any award of damages for its contravention is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard.”

5. Mr. Young, SC, also brought to the court’s attention **Robert Naidike v. The AG of Trinidad and Tobago** Civil Appeal No. 86 of 2007 where the courts awarded damages for breach of constitutional rights. A professional medical doctor was unlawfully detained by the police for several days, during which time he was violently attacked and beaten and choked by one of the arresting officers. Jamadar JA in delivering the majority opinion stated thus:

“46. In this case, the egregious circumstances surrounding the arrest, delivery into custody and detention of Dr. Niadike make this case one in which the gravity of the breach is properly considered as being immense. In the circumstances of this case, to have violently arrested and beaten Dr. Niadike and to have done so in the presence of his two year old daughter, demonstrated a callousness, cynicism and insensitivity that is reprehensible. To have cursed, abused, disrespected and humiliated him personally, professionally and religiously only served to compound the gravity of the breach in a completely unacceptable manner and contrary to constitutionally avowed values of a democratic society. The ‘appalling’ and ‘deplorable’ circumstances of Dr. Niadike’s subsequent detention for such an extended period also add to the gravity of the breach.

47. In my opinion, even the increased award of \$350,000 for compensation (including an uplift for aggravating factors) is not sufficient to properly vindicate the violation of Dr. Niadike's constitutional right not to be deprived of his liberty without due process (in the circumstances of this case). Such an occurrence must never occur again in Trinidad and Tobago, and an additional award must also be sufficient to deter any further such breaches.

48. In these circumstances, and guided by the opinion of Lord Bingham in Subiah v. the Attorney General, I am of the opinion that an additional award of \$75,000 is justified so as to vindicate and uphold the right of Dr. Niadike to carry on his life in the fullness of liberty that the Constitution enables and guarantees."

Relying on the above authorities, Mr. Young, SC, urged the Court to examine the evidence of the Claimant as contained in the affidavits of its employees Lelani Rivero, Chinique Lewis, Sade Ford, Keisha Guzman and Maria Elisa Lara. He argued that those affidavits tell of the suddenness, shock and bewilderment of the change from peacefully carrying on business under licence from the International Financial Services Commission to the freezing of the business, the carting away of all documents and equipment, cessation of business, shutting down of office, loss of premises as rented premises, effective abandonment of employees and inaccessibility of Claimant to documents and property. One of the essential complaints of the Claimant is that whereas Mutual Legal Assistance and International Cooperation Act (MLAICA) authorizes a search and seizure operation, the State just carted everything away. These acts were draconian and unconstitutional and manifestly disastrous for the Claimant; as these acts on the part of the State were unlawful and unconstitutional, the Claimant seeks redress as the Constitution and the Courts require.

6. In addressing the question as to the quantum of pecuniary loss suffered by the Claimant, Mr. Young, SC, relied on the affidavits and reports of Owen Codd and Maria Elise Lara filed on behalf of the Claimant. Ms. Lara has a degree in Accounting and experience in banking and finance. She was the Financial Controller of the Claimant at the time of the shutting down of the company. Mr. Owen Codd has a degree in Advanced Accounting, Auditing and Attestation and Advanced Financial Reporting with extensive experience in accounting and auditing. He was the auditor of the company prior to the shutting down. Mr. Codd approach used two approaches in accordance with his terms of reference that is, “Existing Portfolio” and “Projected Growth”.

At paragraph 9 of his affidavit, he states as follows:

“Projections & Loss

The Projections & Loss show the following:

Existing Portfolio

- (i) *Gross Profit for FY15 would have been approximately US\$12,452, 417.00 if the size of the portfolio had remained the same as at 9th September, 2014.*
- (ii) *Projected expenses (not including depreciation and extraordinaries) - US\$3,865,314.00*
- (iii) *Net profit - US\$12,452,417.00*

Portfolio with Growth

- (iv) *Gross profit for FY15 would have been approximately US\$54,448,299.00 based on a growth rate of 5 times the previous year.*
- (v) *Projected expenses (not including depreciation and extraordinaries) - US\$22,241,287.00*

(vi) Net profit - US\$32,207,012.00”

Estimate of Loss

Mr. Young, SC, refers to Mr. Codd’s methods of valuation (a) valuation based on net assets and (b) valuation based on multiple of earnings

“Loss based on Existing Portfolio Size (Without taking Growth into consideration)

Estimate of Loss of Profit for FY15 - US\$12,452,417.00

Estimate of Value of Business - US\$12,000,000.00

US\$24,452,417.00

Loss based on Portfolio Size with Growth Index

Estimate of loss of profit for FY15- US\$31,927,958.00

Estimate of Value of Business - US\$12,000,000.00

US\$43,927,958.00”

This US \$43,927,958.00 is the amount of pecuniary loss sought by the Claimant Company as compensation for damages it sustained through the action of the Defendant and the breach of its constitutional rights. In addition to this amount, Mr. Young, SC, sought vindicatory damages in line with the cases of **Ramanoop** and **Roches** that he cited earlier in his submissions.

Defendant’s Submissions on Quantum of Damages

7. Ms. Anika Jackson (then Solicitor General) filed detailed written submissions on damages on behalf of the Defendant on June 18th, 2015 in response to the Claimant’s submissions. Ms. Jackson concedes that damages may be awarded where there has been an infringement of fundamental rights guaranteed under the Constitution. However, she argues that it must be noted that any such award is discretionary and not as of right, especially where a Declaration would serve to vindicate the constitutional

right infringed. Damages must be proven. Should the Court find that there is a violation of the Claimant's rights under the Constitution, then it is submitted on behalf of the Defendant that the evidence submitted by the Claimant in relation to the issue of damages is questionable and unreliable. The evidence referred to in the Defendant's submissions is the Expert Report of Jose Bautista filed on behalf of the Defendant on June 12th, 2015, as well as evidence presented by the Claimant in the affidavits of Maria Elisa Lara dated March 12th, 2015, Owen Codd dated March 12th, 2015 and Maria Elisa Lara dated March 18th, 2015.

Ms. Jackson contends that Mr. Owen Codd's report is unreliable. The reasons advanced for this contention are as follows:

Mr. Codd is not licensed to practice accountancy in Belize. The affidavit of Mr. Jose Bautista in paragraphs 9 and 10 state that:

(9) "In order to prepare or examine a financial statement or issue any written report or certificate concerning any such statement, an accountant must have a licence from ICAB as provided by Section 9(1) and (2) of the Accountancy Profession Act Chapter 305 of the Laws of Belize Revised Edition 2000.

(10) By letter dated 20th April 2015, ICAB has confirmed that Owen Codd is not licensed to practice accountancy in Belize."

Ms. Jackson further submits that Owen Codd has misrepresented to this court that he is an expert. She relies on the affidavit of Jose Bautista at paragraphs 7 and 8 as follows:

"(7) At paragraph 3 of his First Affidavit, Owen Codd states that he worked as a Senior Audit Manager for the international accounting firm of Deloitte and Touche. I am informed through letter dated the 27th day of May, 2015 by

Mr. Giacomo Sanchez, one of the partners of the said accounting firm, and verily believe that Mr. Owen Codd worked as an audit senior with the accounting firm of Castillo and Tillett until 1990. A copy of the letter is exhibited hereto produced and marked Exhibit 'JB1'. The accounting firm of Castillo and Tillett subsequently became Deloitte and Touche in June 1991 and then Grant Thornton in October 2014. The accounting firm with which Owen Codd worked as audit senior therefore became Deloitte and Touche after he had already left the firm's employment.

(8) A Senior Audit Manager is a much more substantive post than that of audit senior. An Audit Manager supervises and directs the work of audit seniors. An Audit Manager supervises and directs the work of audit seniors. An Audit Manager becomes a Senior Audit Manager after having held that position for several years."

Ms. Jackson also argues that the report prepared by Owen Codd breached regulations of the Code of Ethics for Professional Accountants which prohibits auditors from preparing financial statements and then auditing those same financial statements on behalf of their clients. She refers to section 13 of Jose Bautista's affidavit:

"(13) Owen Codd prepared the financial statement on behalf of the Claimant and thereafter issued an audit opinion on the fairness of the very same financial statement. The Code of Ethics for Professional Accountants ('IESBA Code') issued by the International Ethics Standard Board of Accountants ('IESBA') of the International Federation of Accountants ('IFAC') states that 'in the case of audit engagements, it is in the public interest and therefore, required by the IESBA Code, that members of audit teams, firms and network practice who provides as assurance service shall be independent of audit clients. A professional accountant in public practice who provides an assurance service shall be independent of the assurance client. Independence of mind and appearance is necessary to enable

the professional accountant in public practice to express a conclusion, and be seen to express a conclusion, without bias, conflict of interest or undue influence of others.”

8. Ms. Jackson argues that Mr. Codd is an unqualified auditor and that he is therefore not an expert in the field of accounting. She refers to the affidavit of Jose Bautista at paragraph 16:

“(16) Further, the format and content of Owen Codd’s audit opinion does not comply with international standards on Auditing (ISA) 700 issued by the International Auditing and Assurance Standards Board (ISAAB) of the International Federation of Accountants (IFAC). He uses the words ‘audit’ and ‘review’ interchangeably when in fact a review and audit are two (2) different types of engagement that produce different levels of assurance as to the truth and fairness of financial statements.”

Mr. Bautista also points out several regulations that govern accountants in producing reports that Mr. Codd’s report has run afoul of. Ms. Jackson contends that a trained auditor would be aware of those regulations and comply with them. She urges the court to disregard the evidence of Owen Codd as he is not an expert and the report prepared by him is inaccurate, unreliable and untrue.

9. Ms. Jackson also argues that the Claimant’s claim for financial loss and damages is grossly inflated. The Defendant’s position as it relates to the pecuniary loss claimed by the Claimant is that the amount shown and projected is largely inconsistent from the financial status of the Claimant. The Claimant primarily makes their income from selling shares/stocks and receiving a commission and minor fees for the sale of shares and stocks. The major profit of the sale of shares/stocks should be forwarded to the clients.

Expenses

<i>Administrative and operating expenses</i>	<i>(1,677,442)</i>	

<i>Loss for the year before depreciation</i>	<i>(850,467)</i>	
<i>Depreciation</i>	<i>(29,593)</i>	

<i>Loss for the year</i>	<i>(880,060)</i>	
<i>Retained deficit brought forward</i>	<i>(171, 428)</i>	

<i>Retained deficit carried forward US\$</i>	<i>(1,051,488)</i>	

Jose Bautista also redid the balance sheet on the same basis. He removed the assets that were listed as 'stock portfolio' and 'commitment to stockholders' because the company does receive the proceeds of these sales as it belongs to the stockholders/clients. The revised balance sheet shows that Unicorn in fact owes \$221,623. Ms. Jackson states that this clearly shows that the company is insolvent in that its liabilities exceed its capital. Further the revised balance sheet also reveals that Owen Codd exaggerated the contents of the balance sheet by including assets that are intangible and impractical such as "goodwill", "intellectual property" and "deferred administrative fees" for a company that has been in existence for less than two (2) years. In reality, Ms. Jackson submits that these are "book entries" as opposed to real capital. (Affidavit of Jose Bautista Exhibit JB3 page 2)

"NET (LIABILITY) ASSETS

Current assets:

<i>Cash on hand and in bank – unrestricted</i>	<i>1,775,274</i>	<i>38,250</i>
<i>Cash on hand and in bank – unrestricted</i>	<i>100,000</i>	<i>100,000</i>

<i>Trades in settlement</i>		522,817	
<i>(5,000)</i>		<i>(5,000)</i>	
<i>Receivable from shareholders</i>		169,330	
<i>Fixed assets</i>		177,077	34,050
<i>Total assets</i>		2,739,498	167,300
<i>Less</i>			
<i>Accounts payable and accruals</i>		<i>(1,576)</i>	-
<i>Stockowners'</i>		<i>(2,364,948)</i>	-
<i>Stockholdings payable</i>			
<i>Stockowners' advances payable</i>		<i>(594,597)</i>	-
<i>Net (liabilities)</i>	<i>US\$</i>	<i>(221,623)</i>	167,300
<i>Assets</i>			
<i>Represented by:</i>			
<i>EQUITY</i>			
<i>Members' initial investment</i>		414,865	138,729
<i>Share capital</i>		100,000	100,000
<i>Retained earnings</i>		<i>(1,051,488)</i>	<i>(171,429)</i>
<i>Deferred administration fees</i>		315,000	100,000
<i>US\$</i>		<i>(221,623)</i>	167,300"

The Financial Statements and Projections prepared by Mr. Bautista show the actual financial position of the Claimant in that it would be operating at a loss and is therefore expected to operate at a loss for years to come.

Unicorn International Securities LLC

Projected business performance adjusted based on amounts provided by OC

Year ended 30 June 2015

	Jul-14	Aug-14	Sept-14	Oct-14	Nov-14	Dec-14	Jan-15	Feb-15	Mar-15	Apr-15	May-15	Jun-15	Total
	US\$	US\$	US\$	US\$	US\$	US\$	US\$	US\$	US\$	US\$	US\$	US\$	US\$
“Sale of stocks”(Sales proceeds from sale of stock)	13,952,704	10,986,223	9,659,088	8,492,270	7,466,404	6,564,462	5,771,475	5,074,281	4,461,308	3,922,382	3,448,558	3,031,972	82,831,127
“COGS” (payable to owners of stock after deduction of fees)	(13,436,454)	(10,579,733)	(9,301,702)	(8,178,056)	(7,190,147)	(6,321,577)	(5,557,930)	(4,886,533)	(4,296,240)	(3,777,254)	(3,320,961)	(2,919,789)	(79,766,376)
“Gross Profit” (Total fees due to Claimant – see income below)	516,250	406,490	357,386	314,214	276,257	242,885	213,545	187,748	165,068	145,128	127,597	112,183	3,064,751
Income Statement adjusted													
Income from fees	516,250	406,490	357,386	314,214	276,257	242,885	213,545	187,748	165,068	145,128	127,597	112,183	3,064,751
Expenses (before depreciation)	(651,103)	(512,672)	(450,741)	(396,292)	(348,420)	(306,331)	(269,326)	(236,791)	(208,187)	(183,038)	(160,927)	(141,487)	(3,865,315)
Net loss	(134,853)	(106,182)	(93,355)	(82,078)	(72,163)	(63,446)	(55,781)	(49,043)	(43,119)	(37,910)	(33,330)	(29,304)	(800,564)

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In conclusion, Ms. Jackson submits that the evidence of the Claimant asserting its claim for damages is unreliable and heavily inflated. The expert report of Jose Bautista definitively established the inaccuracies and errors of the Financial Statements and Projections submitted by the Claimant. The evidence of Mr. Owen Codd should be disregarded by the Court. In addition, no basis for the award of vindictory damages has been established by the Claimant. No damages should be awarded to the Claimant.

Supplemental Submissions on behalf of the Claimant in Respect of Damages

10. By order of the court, the parties filed supplemental submissions for the assessment of damages after judgment in favour of the Claimant was handed down in April 2016. The Court had found that the constitutional rights of the Claimant had been violated by the Defendant and that damages were to be assessed. Mr. Yohansseh Cave on behalf of the Claimant submitted that authorities cited in the earlier submissions of Mr. Young, SC, have established that any such award is discretionary and not as of right. In addition, damages must be proved. He further argued that, in keeping with the opinion of Hamel-Smith JA in *Crane v Rees*, the Claimant had furnished evidence as proof of very substantial pecuniary loss. In addition to all the relevant evidence in respect of the issue of damages referred to in the Claimant's earlier submissions, the Court had made an order relating to the issue of damages including expert evidence. The affidavit of Claude Burrell exhibiting his expert report was filed on behalf of the Claimant. That report provided three options to assist the Court in determining the loss incurred by the Claimant:

Option 1:

Assumes that the license was terminated and not renewed

If the Company's brokerage license was not renewed and it has to cease brokerage operations the owners of the Company would be using the book value of the Company as their Claim to losses. Therefore, under this scenario their loss would be \$2,650,186 with the only further adjustments to this amount being:

- 1. If there was not full realization on collecting the August 31st, 2014 accounts receivable of \$847,354.*
- 2. Being able to liquidate August 31st, 2014 fixed assets at full book value of \$171, 856.*

Option 2: Operations continued to date with no growth

If the Company had continued operations to date with no growth a multiple of normalized 2014 net profit along with the value of the company would be used to estimate loss.

<i>Net book value</i>	<i>\$2, 650,186</i>
<i>Based on normalized 2014 net profit</i>	
<i>Assumed for 2015</i>	<i>\$1,232,253</i>
<i>Assumed for 2016</i>	<i>\$1,232,253</i>
<i>Estimated Loss</i>	<i>\$5,114,692</i>

Option 3: Operations continued in line with growth expectation of owner considering the expected growth portfolio and corresponding increase in trading activity, the cumulative projected earnings for 2015 and 2016 would be added to value of the Company in order to estimate the loss under this scenario.

<i>Net book value</i>	<i>\$2,650,186</i>
<i>Cumulative projected earnings for</i>	
<i>2015 and 2016</i>	<i>\$39,600,941</i>

Estimated Loss

\$42,251,127"

11. Mr. Cave submits that there is no evidence that the current market would impact the Claimant Company's business. Moreover, he submits that the evidence tends to show that the Claimant's business was expanding notwithstanding the regulatory framework in place. He further says that the Defendant submitted an affidavit and report from George Swift in answer to the Claimant's expert evidence and that report does not assist the court to arrive at a value of the loss incurred by the Claimant. In the absence of any challenge to the authenticity of the Claimant's primary information (which the Defendant had in its possession after the search and seizure), and failure to assist the court with a calculation, Learned Counsel contends that the Court ought to interpret that the Defendant has no substantive challenge to the information.

12. Mr. Cave further argues that it cannot be assumed that the Claimant had no losses where the Claimant has furnished and presented information of an income. It was for the Defendant to say whether the information was correct, especially in the circumstances where they had access to the primary material.

It is submitted on behalf of the Claimant that the restriction under Section 9 of the Accountancy Profession Act CAP 305 of the Substantive Laws of Belize relates to public accounting. Mr. Cave argues that the section does not invalidate a financial report created by someone who is not licensed and that this happens routinely within organizations and companies. The effect of the Act cannot be construed so as to

invalidate such financial statements created by someone who is not licensed for the purposes of public accounting.

In conclusion, Mr. Cave addresses Mr. Swift's criticism of Mr. Burrell's report on the basis that it was premised on unaudited financial statements. While Learned Counsel concedes that audited financial statements may well be regarded as a more reliable basis of analysis, that fact without more cannot be the basis on which the reliability of the financial statements can be impugned so as to exclude it from consideration altogether. The Claimant has therefore proven substantive pecuniary loss, and the Court ought to also award vindictory damages having regard to the gravity of the consequences of the breach of the Claimant's constitutional rights.

Supplemental Submissions on behalf of the Defendant in respect of Damages

13. Mr. Barrow, SC, argues on behalf of the Defendant that the breach caused no damage to the Claimant. The damage of which Unicorn complained - the shutting down of its business - had been caused by the prior unsealing in the US of an indictment against Unicorn and its principal, Cem Can, and the contemporaneous suspension in Belize of Unicorn's license to carry on business. It was directly and overwhelmingly as a result of those two occurrences, the Defendant submits, that Unicorn's business was destroyed from the moment they happened. From that moment, (and even before) Unicorn was worthless. This was the condition of the Claimant Company at the time the constitutional breaches took place. Therefore Unicorn suffered no loss from the disruption of the business that occurred when the excessive seizure occurred. As of that

day, because of the suspension of its license, it had become unlawful for Unicorn to carry on business (according to Section 7(2) of the International Financial Services Commission Act CAP 172). Mr. Barrow, SC, argues that an award of damages in this case should be purely nominal and derisory. There has been no evidence that the breach of the Claimant's constitutional rights caused loss and damage for which there should be an award of damages. The heart of the Defendant's case is that before the question of quantum can arise for consideration, Unicorn has to first prove that the breach of its constitutional rights by the Defendant caused the shutting down of its business. That is the loss alleged and the onus is on Unicorn to prove the shut down of its business was caused by the breaches. The appellants say that the Claimant has failed to discharge the onus as to causation.

Unicorn's own witness states that following the seizure the inability of Unicorn to resume business was the loss of its server. In addition, the suspension of Unicorn's business license by the International Financial Services Commission would have made it illegal for the Claimant Company to have carried on business on the day following the search and seizure, even if its property had not been seized. Unlike the hypothetical consequences of a fire or a hurricane, which could have resulted in the destruction of the records, the seizure resulted in no such destruction or permanent loss. It would have been a straightforward matter for Unicorn to have applied for an urgent injunction for their records and property to be speedily returned to them. Mr. Barrow, SC, submits that this shows that the seizure did not cause the loss to Unicorn for which it claimed. Suspension of the licence went beyond affecting Unicorn's ability to trade and carry on.

The suspension shut down the business and the ability to carry on business ceased. It became illegal for Unicorn to carry on business after its license to do so had been suspended. Unicorn was dead. Mr. Barrow, SC, submits that it was therefore the suspension of Unicorn's license and not the seizure that shut down Unicorn, causing loss and damage. If the Court accepts this proposition, then that is sufficient to dispose of the claim and in that event no question of quantum of damages arises.

14. In the event the Court does not agree with the position taken by the Defence as to causation, the Defendant now addresses the question of quantum of damages. Mr. Barrow, SC, contends that even if the Court proceeds on the basis that the breaches of constitutional rights caused damage, that damage was negligible because the breaches disrupted a business that had no value. On 9th September, 2014, Mr. Barrow, SC, argues that Unicorn as a company was worth nothing. He further argues that the unsealing of the indictment against Unicorn the day before as well as the suspension of Unicorn's license on the same day as the seizure meant that the loss and damage to Unicorn had already been caused by a far more potent causative force (the indictment) and was augmented concurrently with the seizure, by another far more potent causative force (the suspension of licence). In these circumstances, this honorable court should only award nominal damages at best. Indeed Mr. Barrow, SC, urges on behalf of the Defendant that Unicorn is not entitled to even nominal damages because the breaches did not cause any damage.

Mr. Barrow, SC, cites *Bunge SA v. Nidera BV* [2015] UKSC 43 at 17 to address the principle of compensation in damages. Lord Sumpton held that to arrive at a valuation of loss caused by a breach of contract, the court may consider, at the date of the assessment, events which have occurred as at that date but which were only contingencies as at the date of the alleged breach. On that approach due weight must be given to the effect of those events on the value of the business as at the date of the breach. Mr. Barrow, SC, says that in essence, if events that occurred after the breach date show that the breach did not cause the loss that at the breach date it was projected it would cause, then to award damages to the injured party for a loss that the breach did not cause, as the subsequent events have shown, would operate as a windfall and not as compensation. He submits the evidence of Unicorn's own expert Claude Burrell that he did his valuation as at a date in the month before the seizure. Clearly this took no account of events subsequent to that date.

It is submitted that the principle that an award of damages will be made to compensate a party and not to produce a windfall is equally applicable to a claim for breach of constitutional rights. This principle renders the valuation done on behalf of Unicorn wholly wrong. On the very day of the breach, Unicorn became obliged to cease to operate and function. Its license to operate its business had been suspended that very day. In that situation, it is wishful to contend that the unlawful seizure of Unicorn's property caused the loss it suffered which was the closure of the operations.

Mr. Barrow, SC, also relies on *MMP GMBH v Antal International Network Ltd* [2011] EWHC 1120 (Comm) as authority for the principle that the court should treat Unicorn's business at the breach date as worth nothing. In that case it was decided that in arriving at the value of a company at the date of breach, the court would take account of what a prudent purchaser, after performing due diligence, would be prepared to pay for the business it had been operating. Mr. Barrow, SC, submits that no sensible person would have taken over Unicorn or its business, even as a gift or even if he was paid to do so. Unicorn had no value; it was a liability and a danger. He poses the following rhetorical questions: Which person in his right mind would take, even as a gift, a company or a business that was under criminal indictment by the US government for money laundering and other financial crimes? Would anyone have exposed himself to the risk of prosecution that would have come from ownership of an alleged money laundering operation? Even if there had been no search and seizure, Unicorn still would not have been able to carry on its business. Apart from this, there is the fundamental fact that there is simply no evidence as to the value of Unicorn as at September 9th, 2014, the date of the seizure. The evidence of Claude Burrell, Unicorn's expert, speaks to the supposed value as at 31st August, 2014. That evidence is meaningless. **The relevant date is 9th September, 2014. It is not merely a hypothetical case that Unicorn was valueless on that date.** The defendant says this is the fact because of the US indictment and the suspension of the licence. The Claimant says nothing to refute that. He concludes that the evidence is clear and compelling that the termination of Unicorn's business was caused by the unsealing of the indictment in the United States of America

against Unicorn, unsealed the day before the seizure took place. The actual instrument of that termination of Unicorn's operation was the suspension of Unicorn's license to carry on that business on the same day that the seizure took place. It is therefore submitted that the seizure did not cause the damage to Unicorn that it has claimed. Even if Unicorn could get past the issue of causation, it is clear that because of those two operating factors, the indictment and the suspension of licence, the value of Unicorn's business as at the time of the seizure was zero. It therefore follows that no damages should be awarded to Unicorn. On the issue of costs, the defendant says it was unreasonable for Unicorn to seek damages of \$42,251,127.00. The adventurism and opportunism that the claim for that range of damages represented takes the case out of the protective ambit carved out in the Supreme Court Rules for genuine claims for constitutional declarations and public law remedies. The Claimant acted unreasonably in so doing. The Defendant seeks its costs.

Ruling

15. I am grateful to all counsel for these extensive submissions on the issue of damages to be awarded for this breach of constitutional rights. Having considered all the submissions in their entirety, I am of the view that Mr. Barrow SC's submissions must prevail. I fully agree with the submission that in determining quantum of damages the relevant date for the court's consideration is the date that the breach of constitutional rights occurred, that is, on September 9th, 2014. I also agree that the value of Unicorn at that date was nil, as its business licence from the International Financial Services Commission had been and remains suspended indefinitely. Further to Mr. Barrow SC's

point of causation is the fact that all Unicorn's documents and possessions seized by the state have since been returned to Unicorn by the state by order of this very court dated December 16th, 2014. Yet, as Unicorn's licence from the International Financial Services Commission remains suspended, Unicorn remains closed to date and still unable to continue its business. There were no arguments advanced before me on behalf of the Claimant in the substantial case against the International Financial Services Commission regarding suspension of Unicorn's licence other than a bare assertion that the licence should be restored. On that basis, no damages will be awarded. I bear in mind that the award of monetary damages for breaches of constitutional rights is discretionary as cases have shown that at times a mere declaration is enough. I only go on to say that in these circumstances, where the state acted in furtherance of a US indictment against the Claimant for money laundering and other financial offences and where the Claimant's licence was suspended by the International Financial Services Commission, the court's declaration of the breach of constitutional rights as pronounced in the court's order dated 18th May, 2016 is sufficient to vindicate the constitutional rights contravened during the search and seizure. I also agree with Mr. Barrow SC's submissions that the request by the Claimant for over \$42 million in damages is outrageous and opportunistic. The breach of constitutional rights which occurred in this case is vastly different from the breaches that occurred in cases such as *Clement Wade v Maria Roches* and *Inniss v The AG of St. Kitts and Nevis* and *The AG of Trinidad & Tobago v Ramanoop* cited on behalf of the Claimant. The Court awards costs to the Defendant to be taxed if not agreed.

Dated this Friday, 24th day of November, 2017

Michelle Arana
Supreme Court Judge