[2021] JMCC COMM.27

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2021CD00268

BETWEEN	**ISLAND LUBES DISTRIBUTORS LIMITED**	**1ST CLAIMANT**
AND	**WEST INDIES PETROLEUM LIMITED**	**2ND CLAIMANT**
AND	**JOHN LEVY**	**1ST DEFENDANT**
AND	**DONNA LEVY**	**2ND DEFENDANT**
AND	**SPRINT FUELS & LUBRICANTS LIMITED**	**3RD DEFENDANT**
AND	**COURTNEY WILKINSON**	**4TH DEFENDANT**
AND	**ECOMARINE ENERGY COMPANY LIMITED**	**5TH DEFENDANT**
AND	**ECO PETROLEUM LIMITED**	**6TH DEFENDANT**

IN CHAMBERS

Mrs. Georgia Gibson Henlin QC, Ms. Stephanie Williams and Ms. Peta-Shea Dawkins instructed by Henlin Gibson Henlin for the 1st and 2nd Claimants

Mr. Nigel Jones and Ms. Kashina Moore instructed by Nigel Jones & Co Attorneys-at-Law for the 1st, 2nd and 3rd Defendants

Mrs. Symone Mayhew QC and Ms. Ashley Mair instructed by Mayhew Law, Attorneys-at-Law for the 4th and 5th Defendants

Heard:5th, 13th, 23rd, 30th, July, 9th and 19th August 2021

Injunction – Principles to be applied –

Breach of fiduciary duty- Whether maintainable against former director and officer

Wrongful interference with contractual relations and Procuring breach of contract – Distinction and principles to be applied

Breach of Confidence – Principles to be applied

Laing, J

The Claim

[1] The Claimants are limited liability companies incorporated under the laws of Jamaica. The 1st Claimant ("Island Lubes") is a wholly owned subsidiary of the 2nd Claimant ("WIPL"). Both Claimants are involved in the distribution of lubricants and other products.

[2] The 1st Defendant ("Mr. Levy"), was a director of the 1st Claimant until 16th March 2021 and of the 2nd Claimant until 9th February 2021. He is currently a Director and Shareholder in the 3rd and 5th Defendants.

[3] The 2nd Defendant ("Mrs. Levy"), was the Company Secretary of the Island Lubes up until her resignation by letter dated the 29th April 2020. The Claimants assert that she was a de facto director of Island Lubes.

[4] The 3rd Defendant ("Sprint"), is a limited liability company incorporated under the laws of Jamaica. Mr. Levy and Mrs. Levy are its sole Shareholders and Directors.

[5] The 4th Defendant (Mr. Wilkinson"), was until 9th February 2021 a director of WIPL. He is currently a Director and Shareholder of the 5th Defendant.

[6] The 5th Defendant ("Ecomarine") is a limited liability company incorporated under the laws of Jamaica on the 16th February 2021. Mr. Levy and Mr. Wilkinson are its sole Shareholders and Directors.

[7] Mr. Levy and Mrs. Levy ("referred to together herein as "the Levys", were shareholders in Island Lubes. Pursuant to an Agreement for Sale dated the 14th October 2019 the Levys and other shareholders, sold their shares in Island Lubes

to WIPL ("the Shares"). The Shares were transferred to WIPL on or about 18th February 2020.

[8] At the time of the transfer of the Shares, Mr. Levy and Mr. Wilkinson were Directors of WIPL and Mrs. Levy was its Company Secretary.

[9] There is an allegation that the Levys failed to hand over Island Lubes' property in a timely manner and that Mrs. Levy did not resign her position as Company Secretary in the time as contemplated by Clause 4.3 of the Agreement for Sale. The Claimants have asserted that this amounts to a breach of contract. However, these allegations are not material for purposes of the application which is before the Court.

The claim for breach of duty and/or conflicts of interest/interference with contractual relations

[10] The Claimants aver that the Levys and Mr. Wilkinson as directors and officers of Island Lubes and/or WIPL have a duty to act honestly and in good faith with a view to their best interest.

[11] The Claimants aver that the Levys and Mr. Wilkinson, by virtue of their relationship with the Claimants knew that the Claimants owned certain property and had contracts that support their core business directly and indirectly. These included the contract between BP Marine Limited and Island Lubes for the supply and resale of Castrol branded Marine lubricants within the territory of Jamaica and the Cayman Islands dated the 24th day of June 2015. Also included was the Contract dated the 1st July 2020 between Island Lubes and Kingston Wharves Logistics Limited and Western Terminals Limited.

[12] It is the Claimants' case that Mr. Levy and Mr. Wilkinson were each removed as directors of WIPL on 9th February 2021 and that after their removal the Defendants embarked on a course of conduct or were party to a course of conduct that caused harm to the Claimants. This the Claimants assert was in breach of the Levys and

Mr. Wilkinson's duty as directors to act honestly and in good faith with a view to the best interest of Island Lubes and/or WIPL. It was further submitted that they failed to avoid circumstances that would constitute a conflict of interest whether directly or indirectly and that they exploited the Claimants' property and /or contracts for their benefit or that of connected persons.

[13] An important element of the Claim is that the Defendants also interfered with Island Lubes' contracts and transferred or directed its business and funds to the Levys, Ecomarine and other connected persons or entities. The actions complained of included the following:

> a. *Incorporating the 5th Defendant on the 16th February 2021, as a vehicle to compete with the Claimants and solicit and entice the business, suppliers and employees of the Claimants.*
>
> b. *Terminating the 1st Claimant's contract with Kingston Wharves Limited by letter dated the 26th February 2021 with effect from the 15th March 2021 and directing that a new logistics services agreement be entered into with the 5th Defendant. This letter was signed by the 1st Defendant and copied to the 4th Defendant.*
>
> c. *Terminating the 1st Claimant's banking relationship with Sagicor on or about the 18th day of March 2021 and directing the transfer of the balance in the 1st Claimant's account to the 5th Defendant in the sum of US$9450.00.*
>
> d. *Appropriating the 1st Claimant's property in its email address islandlubes@gmail.com and the associated email server or emails which also contain the 1st Claimant's customers and other proprietary information and which is linked to the 4th Defendant's Samsung Galaxy Note and/or the 2nd Defendant's email address levydm@hotmail.com as the recovery email.*
>
> e. *Commandeering the 1st Claimant's inventory at Kingston Wharves Limited and placing at risk the 1st Claimant's deliveries for the 18th March 2021.*
>
> f. *Contacting the 1st Claimant's customers and attempting to take over the business of the 1st Claimant by representing that the 5th Defendant is the new distributor of the 1st Claimant's products.*
>
> g. *Contacting the 1st Claimant's supplier, Caribbean Industrial & Lubricants Corp and representing that as of the 15th March 2021, the 5th Defendant "will take over from Island Lubes Distributors as the new supplier of Castrol Marine and Energy Lubricants in*

> *Jamaica and the Cayman Islands." He further requested that "all future requests for quotations/nominations in the interim, be sent only to ecomarineandenergy@gmail.com and any calls be directed to [the 1st Defendant] until further notified."*

[14] It is also averred that these acts also directly or indirectly conflict with the interests of the 2nd Claimant because "they" [presumably the Levys and Mr. Wilkinson] knew that WIPL acquired Island Lubes in order to expand its reach in the petroleum sector and that by interfering with and terminating Island Lubes' contracts, WIPL would suffer a loss on its investment. It is important to appreciate that the effect of the actions on WIPL is not a consideration for purposes of this Application, since it was brought by Island Lubes only.

[15] In addition, the Claimants have also claimed for misappropriation, breach of fiduciary duty and/ or conflict of interest and duty of the Levys, Mr. Wilkinson and Ecomarine. These heads of the Claim are based primarily on activity related to Island Lubes' accounts and the transferring of funds therefrom.

[16] There is also an allegation of fraud against the Levys, Mr. Wilkinson and Ecomarine, that they knew and/or ought to have known that they have no right or interest in Island Lubes' supplier or client lists and/or email address but took control of them for the sole purpose of furthering their respective interests. It is further alleged that these same parties knew and/or ought to have known that they had no right or interest in the inventory of Island Lubes or its contract with Kingston Wharves Limited but terminated the contract including the contract dated the 1st July 2020 and took or attempted to take control of its invention to further their personal interests.

The Notice of Application

[17] By Notice of Application filed 11th June 2021 Island Lubes sought a number of reliefs including a freezing order, a search order, or in the alternative, a preservation order and an interim injunction. The only relief which the Court

granted was the interim injunction in terms of the order dated 16th June 2021 ("the Order"). Having regard to the nature of the *inter partes* hearing and the submissions on behalf of the Defendants, it is necessary to reproduce the material portions of the Order despite its length as follows:

> …
>
> 3. *An injunction to restrain the 1st, 2nd and 4th Defendants by themselves, their servants or agents or otherwise howsoever from using or misusing the confidential information or any information in relation to the contracts, suppliers, customers and employees of the Claimants or any part thereof for any purpose or otherwise exploiting the information.*
>
> 4. *An injunction restraining the 1st, 2nd and 4th Defendants, their servants, and/or agents or otherwise from inducing or procuring breaches by unlawfully interfering in contracts between the Claimants, and their sub-contractors or suppliers or business relationships and to prevent them from committing a repetition thereof.*
>
> 5. *An injunction restraining the 1st and 2nd Defendants as parties to the agreement for sale or otherwise as the servants and/or agents of the 1st Claimant from breaching clause 8 of the agreement dated the 14th day of October 2019 and in particular for the period of three (3) years from:*
>
>   a. *on their own account or in conjunction with others and whether directly or indirectly to establish, develop, carry on or assist in carrying on, be engaged, concerned, interested or employed in, or provide technical commercial or professional advice to any other business, enterprise or venture engaged in supplying goods and services identical, similar or competitive with the marketing, warehousing and distribution of lubricants for passenger and commercial vehicles in Jamaica at the date of signing of the Agreement aforesaid.*
>
>   b. *having any proprietorship interest as shareholder or partner in any business which is identical, similar to or competitive with Island Lubes Distributors Limited in Jamaica;*
>
>   c. *at any time after the Completion Date disclose any confidential information in respect of Island Lubes*

Distributors Limited to any person or use it for any purpose;

d. solicit, canvass or entice away (or endeavour to solicit, canvass or entice away) any of the employees of Island Lubes Distributors Limited, for the purposes of employment by the Vendors in an enterprise or venture materially competing with Island Lubes Distributors Limited;

6. An injunction restraining the 1st, 2nd and 4th Defendants from continuing to breach their fiduciary duties to the 1st and 2nd Claimants and from conflicts of interest by engaging in the following:

a. on their own account or in conjunction with others and whether directly or indirectly to establish, develop, carry on or assist in carrying on, be engaged, concerned, interested or employed in, or provide technical commercial or professional advice to any other business, enterprise or venture engaged in supplying goods and services identical, similar or competitive with the marketing, warehousing, and distribution of lubricants for passenger and commercial vehicles in Jamaica.

b. Having any proprietorship interest as shareholder or partner in any business which is identical, similar to or competitive with the 1st and 2nd Claimants in Jamaica;

c. disclosing any confidential information in respect of the 1st and 2nd Claimants to any person or use it for any purpose;

d. solicit, canvass or entice away (or endeavour to solicit, canvass or entice away) any of the employees of the 1st and 2nd Claimants, for the purposes of employment by the 1st, 2nd and 4th Defendants in an enterprise or venture materially competing with the 1st and 2nd Claimants;

[18] On the 5th July 2021 the date fixed for the inter partes hearing, Counsel for the Defendants highlighted a number of issues which they would be raising. Mr. Jones on behalf of the 1st, 2nd and 3rd Defendants noted in particular the fact that Island Lubes the 1st Claimant was the only applicant but despite that, the orders granted made references to the 2nd Defendant. The parties were unable to proceed and the Court adjourned the inter partes hearing until 13th July 2021. The Court also

extended the injunction until that day but ordered that the 1st Claimant be substituted for "the Claimants" in the order where appropriate.

[19] On the 13th July 2021 the Attorneys-at-Law representing the Claimants filed an Amended Notice of Application in which the 2nd Claimant WIPL was added and reliefs were also sought against the 5th Defendant, Ecomarine. Mrs. Gibson-Henlin submitted that the Application can be amended at any time. Learned Queen's Counsel argued that the amendments arose out of the same facts and would involve the same principles of law. Counsel for the Defendants objected to the hearing of the Amended Notice of Application and I upheld the objections.

[20] There were two main reasons for doing so. The first, was that one issue which fell for determination on the inter partes hearing was whether the injunction was correctly granted. This required determination because it would, affect, *inter alia*, the right of the injuncted parties to apply for the 1st Claimant to satisfy its undertaking in damages. One of the relevant issues in this determination is whether there was a serious issue to be tried in respect of the causes of action which were pleaded as comprising the claims on behalf of the 1st Claimant. By introducing the 2nd Claimant on the inter partes hearing, there was a risk that the clinical analysis required in respect of the 1st Claimant's claim would be made difficult because there were elements of the 2nd Claimant's claim which did not extend to and apply to the 1st Claimant.

[21] The second reason, was that the Court did not consider the issue of the jurisdiction clause in the Agreement when it granted the injunction because the 1st Claimant was not a party to the Agreement. If the Court heard the Amended Notice of Application in which the 2nd Claimant is joined, then the issue of the applicability of the jurisdiction clause would be applicable and this was not considered by the Court on the *ex parte* hearing.

[22] The Court formed the view that it would be prudent on the *ex parte* hearing to concentrate on the Notice of Application as originally filed and determine whether

the injunction was correctly granted and if so, whether it ought to be continued. If continued, the question is raised as to whether there should be any modification. There was no prejudice to the Amended Notice of Application being heard subsequently. Lead Counsel involved are all very experienced practitioners and can ably present the respective positions of their clients by referencing, but without duplicating submissions which would be common to both applications. Accordingly, the Court ordered that the inter partes hearing proceeded on the Notice of Application as originally filed.

The Law related to interlocutory injunctions

[23] The principles applicable to the grant of an interim injunction have been clearly identified in the House of Lords case of ***American Cyanamid v Ethicon*** *[1975] 1 All ER 504* and the issues to be resolved can be conveniently summarised as follows:

(a) Whether there is a serious issue to be tried;

(b) Whether damages are an adequate remedy for either party; and

(c) Where does the balance of convenience lie.

Is there is a serious issue to be tried?

[24] As Lord Diplock established in ***American Cyanamid*** *(supra)* the Claimant needs to establish to the satisfaction of the Court "*that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried*". The learned Judge, at page 510 followed this direction with these words of caution:

> *"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction*

> *was that 'it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing' (**Wakefield v Duke of Buccleugh [1865] 12 L.T. 628 at 629**). So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."*

[25] An important point to note at the outset of the analysis is that the Application is by Island Lubes only. The Court must therefore exercise great care in not conflating the allegations in respect of breaches of the rights of and/or duties allegedly owed to each Claimant. As a result, a nuanced approach will be taken in the analysis of the Claim and limit the consideration to the alleged wrongdoing which affects Island Lubes only, it being the sole applicant. In pursuit of this objective I have asked Mrs. Henlin-Gibson in her oral presentation to ignore the numerous references to "the Claimants" which are present in her written submissions and to restrict the submissions to those which are appropriate to Island Lubes only.

[26] Having regard to the Court's position in limiting the Application to alleged wrongful conduct in respect of Island Lubes, I have not considered the issue posed by Mrs. Gibson-Henlin as to whether the Levys are liable for breach of the Share Purchase Agreement dated the 14th October 2019.

Is there is a serious issue to be tried as to whether the Levys breached their fiduciary duties to Island Lubes?

[27] The evidence in support of Island Lubes' Notice of Application is contained in the affidavit of Gordon Shirley (Mr. Shirley) filed on 11th June 2021. Mr. Shirley is a Director and Chairman of the Board of Island Lubes. His evidence was consistent with the Claim and provided the evidential basis on which the pleadings of the Claimants are based.

[28] Mr. Shirley addresses the alleged unauthorised transfer of funds from the Claimant's account. Mrs. Gibson-Henlin QC at paragraph of her submission stated

that the Levys misappropriated the funds and property of Island Lubes and transferred these funds to themselves or to persons in breach of their fiduciary duties. Furthermore, they terminated Island Lubes' contract with Sagicor Bank and closed its two accounts to conceal their misappropriation of the Claimant's money.

[29] Mr. Shirley referred to the interference with the contracts of Island Lubes and the transfer of its business and funds to the Levys and Ecomarine. He identified a letter dated the 26th February 2021, written by Mr. Levy as director of Island lubes to Kingston Wharves Limited, copied to Mr. Wilkinson, in which Mr. Levy terminated Island Lubes' contract with Kingston Wharves Limited with effect from the 15th March 2021 ("the Kingston Wharves Letter"). Mr. Levy also gave instructions for a new logistics services agreement be entered into with Ecomarine. It was also stated in the Kingston Wharves Letter that "*Although the notice period is shorter than what is required in the agreement, given that the entity is a going concern and will continue under the exact terms and conditions we are hoping to expedite this change over as quickly as possible"*

[30] Mr. Shirley also made reference to a screenshot of a WhatsApp message which he asserts was sent to Jose at Caribbean Industrial & Lubricants Corp. a supplier of Island Lubes ("the Screenshot"). The Screenshot stated the following:

> *As of March 15, 2021 Eco Marine and Energy Company Limited will take over from Island Lubes Distributors as the new supplier of Castrol Marine and Energy Lubricants in Jamaica and the Cayman Islands. We also request that all future requests for quotations/nominations in the interim, be sent only to ecomarineandenergy@gmail.com and any calls will be directed to me on until further notified.*

[31] As it relates to the Kingston Wharves Letter and the Screenshot, it should be noted that they purport to affect, as at 15th March 2021, contracts to which Island Lubes was a party. Mr. Levy was a Director of Island Lubes until 16th March 2021. Accordingly, the Kingston Wharves Letter and the message contained in the Screenshot would have been issued while he was a Director of Island Lubes.

The evidence of the 1st 2nd and 3rd Defendants

[32] The evidence of Mr. Levy is contained in his affidavit sworn on 5th July 2021 in which he admitted that he is a Director of Sprint and that he is authorized to swear to the affidavit on its behalf and also on behalf of Mrs. Levy.

[33] Mr. Levy explained that he did not resign immediately as a Director of Island Lubes on the sale of the Shares at the request of WIPL's transition team. He said that WIPL was slow in assuming responsibility of Island Lubes and of paying staff, ordering stock, and replacing signatories to its bank account in a timely manner. As a consequence, he had to continue giving Island Lubes funds to assist with its operations. Accordingly, the payments which are complained of constitute a repayment of that loan. He asserted that WIPL did not have any interest in Island Lubes when it acquired it and retained Mrs. Levy on the accounts notwithstanding her resignation.

[34] Mr. Levy stated that he was aware of the business of Island Lubes as he was one of the persons who started the company, by using knowledge of the industry which he had and the experience of having worked with Appliance Traders Limited ("ATL"). He said he was the person who approached BP-Castrol in 2014 requesting the Castrol Distributorship in Jamaica. He maintained that he has not misused any confidential information and that the information he possesses in relation to various lubricants, contact persons with suppliers and the industry, is based on his years of working with ATL.

[35] Mr. Levy denied having abused his position with Island Lubes to secure any personal benefits, to compete with the Claimants or to solicit any business of the Claimants. Furthermore, he was seeking to negotiate contracts for the Claimants benefit and to have the contracts transferred from Island Lubes to WIPL. He also denied having appropriated any of the Claimants' inventory but purchased the inventory with which he has dealt.

[36] As it relates to the email address of Island Lubes, Mr. Levy said he is aware that Mrs. Levy turned over all the information to WIPL and it could have changed all the information in relation to the email. Accordingly, if it has locked itself out it is not the fault of the Defendants.

[37] As it relates to the contracts which Island Lubes had, Mr. Levy has averred that WIPL has not renewed the contracts. He stated that "we" have not sought to compete with Island Lubes and have not been contacting its customers to interfere with the markets in which it operates. He stated that the message displayed in the Screenshot that was exhibited, was immediately retracted. He indicated that they were introducing themselves to persons in Jamaica as Island Lubes does not operate here but operates in the Cayman Islands and in the Bahamas.

[38] It is therefore Mr. Levy's position that the Levys and Mr. Wilkinson have not acted in breach of any duty or done anything which amounts to a conflict of interest. He asserted that they have complied with their obligations and any steps taken do not interfere with the Claimants' business. All payments were legitimate and there has been no misappropriation of funds.

[39] Mrs. Levy supported Mr. Levy's assertion that Island Lubes is involved in the sale/exportation of lubricants and related products but as far as she is aware did not retail products in Jamaica but was or is doing business in the Cayman Islands and the Bahamas.

[40] Mrs. Levy averred that she has never acted in breach of the Agreement for Sale or against the interest of the Claimants and that she has not misused or abused her position with Island Lubes.

The law relating to the duties of directors, former directors and de facto directors

[41] The duties of directors and officers are encapsulated in sections 174 and 174A of the Companies Act, the latter of which was introduced by the Companies (Amendment) Act 2017 and provides as follows:

> ***174.***—*(1) Every director and officer of a company in exercising his powers and discharging his duties shall—*
>
> > *(a) act honestly and in good faith with a view to the best interest of the company; and*
> >
> > *(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, including, but not limited to the general knowledge, skill and experience of the director or officer.*
>
> *(2) A director or officer of a company shall not be in breach of his duty under this section if the director or officer exercised due care, diligence and skill in the performance of that duty or believed in the existence of facts that, if true, would render the director's or officer's conduct reasonably prudent.*
>
> *(3) For the purposes of this section, a director or officer shall be deemed to have acted with due care, diligence and skill where, in the absence of fraud or bad faith, the director or officer reasonably relied in good faith on documents relating to the company's affairs, including financial statements, reports of experts or on information presented by other directors or, where appropriate, other officers and professionals.*
>
> *(4) In determining what are the best interests of the company, a director or officer may have regard to the interests of the company's shareholders and employees and the community in which the company operates.*
>
> *(5) The duties imposed by subsection (1) on the directors or officers of a company is owed to the company alone.*
>
> *(6) Where pursuant to a contract of service with a company, a director or officer is required to perform management functions, the terms of that contract may require the director or officer in the exercise of those functions, to observe a higher standard than that specified in subsection (1).*

[42] The conduct of Mr. Levy which is complained of by Island Lubes was conduct while he was a director and after he had retired from the post of Director. As far as any alleged breach of duty is concerned on his part, for these acts, the Court also has

to consider whether there are any obligations of a director post his directorship which Mr Levy may have breached.

Submissions on behalf of Island Lubes

[43] It was submitted by Mrs. Gibson-Henlin that whereas competition by directors is not as a general rule precluded post resignation, there are circumstances in which it is precluded and will be restrained by the Courts. Counsel relied on the statement of the applicable law contained in the case of **Allfiled UK Limited v Eltis** 2016 FSR 11 as follows:

> *"A director is precluded from acting in breach of [duty] even after his resignation where the resignation may fairly be said to have been prompted and influenced by a wish to acquire for himself any maturing business opportunities sought by the Company and where it was his position in the company rather than a fresh initiative that led him to the opportunity which he later acquired."*

[44] Mrs. Gibson Henlin also relied on the Canadian Supreme Court case of **Canadian Aero Service Limited v O'Malley** 1973 S.C.J 97, where at paragraph 25 the Court made the following observation:

> *"25. An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom he is associated a maturing business opportunity which the company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired."*

[45] I have distilled the submissions on behalf of Island Lubes on the issue of breach of fiduciary duty. I understand them to be, that, although it was not a case of a director's resignation in the instant case, it is clear that the Levys even while they were a director and de facto director/officer respectively, were motivated to use Island Lubes' information to acquire opportunities belonging to it and to exploit them for their benefit and for the benefit of others with whom they are connected.

It was submitted that they set out to use Island Lubes' property and information to compete with it and targeted it while so doing. It was therefore wilful and dishonest and they should not be permitted to profit from their conduct.

[46] Mrs. Gibson-Henlin submitted that the information in relation to Island Lubes' business expansion plans, customers and suppliers is confidential. It was highlighted that this is a case in which the Levys were a director and de facto director/officer of Island Lubes at the time when the actions complained of were commenced. It is alleged that these actions continued thereafter. As it relates to Mrs. Levy it was submitted that she was a de facto director as she remained on the accounts of Island Lubes and managed its communications during the period. It's further alleged that she, together with Mr. Levy closed the accounts of Island Lubes and took its money. It was conceded by Mrs. Gibson-Henlin that it is a question of fact as to whether she was a de -facto director and this is a matter to be determined at the trial.

Submissions on behalf of the 1st to 3rd Defendants on the issue of breach of fiduciary duty

[47] Mr. Jones submitted on behalf of Mr. Levy that because he was removed as director of Island Lubes there is currently no fiduciary duty which Mr. Levy is called upon to honour and which requires this Court's intervention. Counsel relied on the case of ***Attorney General v Blake*** *[1998] 1 All ER 833* where the Court of Appeal found that there was no fiduciary duty owed to a company/employer by a former employee. Counsel noted that the case was appealed to the House of Lords but the finding of the Court of Appeal was not disturbed on this point.

The Court's analysis of the fiduciary duty issue

[48] It should be noted that there are different obligations imposed on an employee than on a director. As it relates to an employee, his ability to pursue business opportunities at the end of his contract of employment will be dependent on any restrictions which might have been created pursuant to his contract of employment.

In the English Court of Appeal case of ***Helmet Integrated Systems Ltd v Tunnard*** *[2006] EWCA Civ 1735* the Court considered these issues and found that the employee (Mr. Tunnard) did not breach his duty in contract by developing a rival product while employed to the Claimant, which he further pursued after this employment ended. The general position was stated by Moses LJ at paragraph 26 in the following terms:

> ***[26]*** *There is no dispute but that Mr. Tunnard owed a duty of fidelity which required him as employee to be loyal to his employer and to act in the best interests of HISL. An employee must act with good faith towards his employer (see eg* ***Robb v Green*** *[1895] 2 QB 315 at 317, 59 JP 695, 64 LJQB 593, 14 R 580). An employee must receive and obey the instructions of his employer, and devote his time and talents to his employer's business. But whilst he must not compete with his employer during the course of his employment, the duty of fidelity imposes no inhibition on his competing against his former employer once he has left. He is entitled to take the skill he has acquired and developed during the course of his employment and apply it for his own benefit once he has left, even if that involves competing against his former employer. He may also take with him and use knowledge and information which he has acquired, provided he does not use or disclose information properly described as a trade secret (see eg* ***Faccenda Chicken Ltd v Fowler*** *[1987] Ch 117 at 136, [1986] 1 All ER 617, [1986] IRLR 69).*

[49] Mrs. Mayhew helpfully presented for the Court's consideration the case of ***Foster Bryant Surveying Limited v Bryant*** *[2007] EWCA Civ 200* In which the English Court of Appeal considered the issue of the director's breach of fiduciary duties after ceasing to be a director. Rix LJ quoted with approval as accurately stating the law, a summary in ***Hunter Kane Ltd v Watkins*** *[2002] EWHC 186 (Ch)* which in turn was largely derived from the judgment in ***CMS Dolphin Ltd v Simonet*** *[2001] 2 BCLC 704* as follows:

> *"1. A director, while acting as such, has a fiduciary relationship with his Company. That is he has an obligation to deal towards it with loyalty, good faith and avoidance of the conflict of duty and self-interest.*
>
> *2. A requirement to avoid a conflict of duty and self-interest means that a director is precluded from obtaining for himself, either secretly or without the informed approval of the Company, any property or business advantage either belonging to the Company or for which it has been negotiating, especially where the director or officer is a participant in the negotiations.*

3. A director's power to resign from office is not a fiduciary power. He is entitled to resign even if his resignation might have a disastrous effect on the business or reputation of the Company.

4. A fiduciary relationship does not continue after the determination of the relationship which gives rise to it. After the relationship is determined the director is in general not under the continuing obligations which are the feature of the fiduciary relationship.

5. Acts done by the directors while the contract of employment subsists but which are preparatory to competition after it terminates are not necessarily in themselves a breach of the implied term as to loyalty and fidelity.

6. Directors, no less than employees, acquire a general fund of skill, knowledge and expertise in the course of their work, which is plainly in the public interest that they should be free to exploit it in a new position. After ceasing the relationship by resignation or otherwise a director is in general (and subject of course to any terms of the contract of employment) not prohibited from using his general fund of skill and knowledge, the 'stock in trade' of the knowledge he has acquired while a director, even including such things as business contacts and personal connections made as a result of his directorship.

7. A director is however precluded from acting in breach of the requirement at 2 above, even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself any maturing business opportunities sought by the Company and where it was his position with the Company rather than a fresh initiative that led him to the opportunity which he later acquired.

8. In considering whether an act of a director breaches the preceding principle the factors to take into account will include the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or indeed even private, the factor of time in the continuation of the fiduciary duty where the alleged breach occurs after termination of the relationship with the Company and the circumstances under which the breach was terminated, that is whether by retirement or resignation or discharge.

9. The underlying basis of the liability of a director who exploits after his resignation a maturing business opportunity of the Company is that the opportunity is to be treated as if it were the property of the Company in relation to which the director had fiduciary duties. By seeking the [sic] exploit the opportunity after resignation he is appropriating to himself that property he is just as accountable as a trustee who retires without properly accounting for trust property.

> *10. It follows that a director will not be in breach of the principle set out as point 7 above where either the Company's hope of obtaining the contract was not a 'maturing business opportunity' and it was not pursuing further business orders nor where the director's resignation was not itself prompted or influenced by a wish to acquire the business for himself.*
>
> *11. As regards breach of confidence, although while the contract of employment subsists a director or other employee may not use confidential information to the detriment of his employer, after it ceases the director/employee may compete and may use know-how acquired in the course of his employment (as distinct from trade secrets – although the distinction is sometimes difficult to apply in practice).”*

[50] In my opinion the law as stated in the cases of ***Allfield*** and ***Foster Bryant***, is accurate, in their formulation that the director’s duties can subsist post resignation. It is important to note that in ***Foster Bryant*** the Court expressly stated the position of the director “…*after ceasing the relationship by resignation or otherwise*.” The inclusion of other methods of the relationship ending makes perfect sense because it is an oversimplification to suggest that if a director resigns there is a continuing duty. However, in contrast, if he is removed, then the duty ceases for all intents and purposes.

[51] As was identified in ***Allfield*** and ***Foster Bryant***, a relevant consideration is whether the director’s resignation may fairly be said to have been prompted and influenced by a wish to acquire for himself the company’s corporate opportunities. If it were the position that on removal of a director all his fiduciary duties would end, a shrewd director wishing to acquire the company’s corporate opportunities would simply conduct himself in such a manner in which his removal would become prudent or necessary. This would then provide him with an unrestricted license to pursue those opportunities, unencumbered by any duties post-directorship.

[52] The issue of diversion of corporate opportunities constituting a breach of fiduciary duty is often raised in the context of current directors, but not exclusively so. In ***O'Donnell v Shanahan and others*** *[2008] All ER (D) 72 (Aug)*, the Court considered the breach of fiduciary duty in the context of an unfair prejudice claim

pursuant to section 459 of the UK companies Act 1985. Mr. Richard Sheldon QC sitting as a deputy Judge of the High Court made the following observations:

> *194. In reaching these conclusions, I have had regard to the "corporate opportunity" cases which are considered at length by Lewison J in* ***Ultraframe*** *(at paras 1332 - 1356) and Warren J in Wilkinson (at paras 256 - 269). It is unnecessary to refer to these in any detail in this judgment. I should however draw attention to the following phrases in the judgments in those cases, as attracting the application of the "no profit rule" (although on analysis some may more appropriately be identified as falling under the "no conflict rule") and which appear to me to support the conclusions I have reached:*
>
> > *[directors must not] "divert in their own favour business which should properly belong to the company they represent." (**Cook v Deeks** [1916] 1 AC 554)*
> >
> > *".. a director is precluded from obtaining for himself . without the approval of the company any property or business advantage either belonging to the company or for which it has been negotiating.." or "a maturing business opportunity which his company is actively pursuing" (**Canadian Aero Services v O'Malley** (1973) 40 DLR (3d) 371 at 382) (see also **CMS Dolphin Ltd v Simonet** [2001] 2 BCLC 704 at para 96)*
>
> *195. In* ***Ultraframe****, Lewison J concluded his review of these authorities at para 1355 as follows:*
>
> > *The law relating to the accountability of a director (or former director) for profits derived from the diversion of corporate opportunities is still developing. As the cases stand it is I think possible to draw the following conclusions:*
> >
> > *If a person diverts to himself a business opportunity while in office, he may be liable to account for profits under the 'no conflict rule' or the 'no profit rule' or both;*
> >
> > *The application of the 'no conflict rule' does not depend on establishing that the company has a proprietary interest in the business opportunity that has been diverted;*
> >
> > ***After a person ceases to be in office, he may be liable for the diversion of a business opportunity either under the 'no profit rule'; or because the business opportunity itself is to be treated as the property of the company (in the sense of an intangible asset) and hence is treated for this purpose as trust property."***

(emphasis supplied by this court)

[53] The issue of the diversion of corporate opportunity which may result in a director's breach of fiduciary duty is complicated and depends on the facts of each case. In ***O'Donnell*** (supra) the Court considered some of the general principles applicable in the context of trustees as were distilled in Lewin on Trusts (18th Ed). The Court observed that these principles apply with appropriate modification to the duties of a company director and should be assessed in light of the actual or contemplated scope of the company's business. At paragraph 198 of ***O'Donnell*** the Court extracted the following principles from Lewin on Trusts (18th Ed) at paras 20-44 to 20-46, (omitting the citations) as follows:

> *If a trustee by reason of his position as such obtains an opportunity to purchase or otherwise acquire property from a third party, or obtains special knowledge or information which indicates that such a purchase or acquisition might be worthwhile, then the trustee will be disabled from retaining any benefit resulting from the purchase.... Sometimes the principle is applied where the fiduciary diverts to himself property which should have been, or attempted to have been, acquired for the beneficiaries. In other cases the principle has been applied even though there was no practical question of the acquisition being made for the beneficiaries and there was no detriment to the beneficiaries. [There is then a reference to* ***Regal (Hastings) Ltd v Gulliver*** *and* ***Boardman v Phipps*** *]…*
>
> *In order to found liability under the above rule it is necessary to establish that the trustee was enabled to purchase property as a result of an opportunity or special knowledge or information acquired by him by reason of the trusteeship. What counts for this purpose however is not altogether clear. It is certainly not all knowledge or information which counts, and in general terms a trustee is allowed to use knowledge or information acquired during the course of the trusteeship for his own purposes or for the purposes of other trusts. There are perhaps two circumstances in which a trustee may be liable. The first is where a trustee obtains knowledge or information which is not available to the general public, but is obtained by him as confidential information in the course of his fiduciary relationship, and has special value in that it enables the trustee to assess the commercial feasibility of a purchase by him and the appropriate terms of a purchase offer, and thereby substantially contributes to the successful purchase by the trustee ; liability then attaches whether or not other matters such as the skill of the trustee also contribute to the successful purchase, and even though the purchase involves risk taking by the trustee despite the knowledge and information gained by him. The second is where a trustee obtains confidential information in the course of his fiduciary*

> *relationship and then enters into a purchase for his own benefit in circumstances where his personal interest conflicts or may conflict with his fiduciary duties. A trustee who obtains confidential information as trustee and then uses it for his own purposes or for the purposes of another trust may be exposed not only to a claim at the instance of the beneficiaries but also be exposed to a claim by the person who provides the confidential information and to whom the duty of confidence is owed.*
>
> *If the trustee acquires property without using knowledge or opportunity that he has obtained as trustee, but which he has obtained in his personal capacity, or in some other fiduciary capacity, then he will not be accountable for the profit under the profit rule, and can be made accountable, if at all, only under the conflict rule...*

[54] It is against the background of these principles that one has to consider the evidence of Mr. Levy. He asserted that WIPL did not have any interest in Island Lubes when it acquired it. He stated that he was aware of the business of Island Lubes as he was one of the persons who started it, by using knowledge of the industry which he had and the experience of having worked with Appliance Traders Limited ("ATL"). He said he was the person who approached BP-Castrol in 2014 requesting the Castrol Distributorship in Jamaica. His position was that he has not misused any confidential information and that the information he possesses in relation to various lubricants, contact persons with suppliers and the industry is based on his years of working with ATL.

[55] Mr. Levy denied having abused his position to secure any personal benefits or to compete with the Claimants or to solicit any business of the Claimants. Furthermore, he claimed that he was seeking to negotiate contracts for the Claimants' benefit and to have the contracts transferred from Island Lubes to WIPL. He also denied having appropriated any of the Claimants' inventory but said that he purchased the inventory with which he has dealt.

[56] As it relates to the contracts of which Island Lubes complains, Mr. Levy has averred that WIPL has not renewed the contracts which Island Lubes had. He stated that "we" have not sought to compete with Island Lubes and have not been contacting its customers to interfere with the markets in which it operates. He stated that the message displayed in the Screenshot that was exhibited, was immediately

retracted. He indicated that they were introducing themselves to persons in Jamaica as Island Lubes does not operate here but operates in the Cayman Islands and in the Bahamas.

[57] It is clear from the evidence of Mr. Levy that it is being asserted by the Levys that the corporate opportunities which the Island Lubes is complaining were diverted were opportunities in respect of which it was not interested and therefore the Levys were free to exploit them without there being liability "*to account for profits under the 'no conflict rule' or the 'no profit rule' or both*". Furthermore, it is being asserted that in addition to Island Lubes expressing no interest in its contract with BP-Castrol, having not renewed it, there is the implication that it was no longer "*property of the company or an intangible asset*".

[58] The issue of the source of the information utilized by Mr. Levy will therefore fall for determination. The Court will be required assess the evidence on this point and to consider whether he would have gained any advantage from his knowledge of the alleged expiry of the BP-Castrol contract which, for example, caused him to have been able to give instructions via the Screenshot, that Ecomarine would be taking over as the distributor. The import of the evidence of the Screenshot will also have to be weighed to determine the purpose for its creation and whether it was indicative of a broader approach to solicit the clients of Island Lubes. If it was purely innocent and permissible, then the question is raised as to why it was withdrawn.

[59] As it relates to the conduct of Mrs. Levy, this touches and concerns her in her capacity as an alleged de facto director. A "de facto" director is a person who acts or purports to act as a director although he or she is not formally appointed in contrast to a "de jure" director who has been formally appointed to that office. Such a person might not escape liability for breach of duty by virtue only of the fact that he or she is not formally appointed. However, the issue as to whether that person is a de-facto director is very fact dependent. In ***Re Hydrodam (Corby) Ltd*** *[1994] 2 BCLC 180* at page 183, Millet J expressed the position in respect of such persons as follows:

> *"A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level."*

[60] Mrs. Levy swore to an affidavit filed 5th July 2021. She confirmed that she was the General Manager of Island Lubes until its shares were sold to WIPL. She said after meeting with members of the transition team put in place by WIPL, she was assured by Mr. Maximilian Campbell the human resources manager that a replacement would be found for her as soon as possible. She said she was also advised that arrangements would have been made to have the directors of WIPL added as signatories to Island Lubes' accounts so that she could be removed but this was never done. As a consequence, she remained employed to Island Lubes until December 2019 although she had resigned in October 2019 and remained on the accounts at the request of the Claimants, but she did not have custody of the cheque books etcetera. Mrs. Levy stated that she handed over all the documents and records pursuant to the Agreement for sale in or around November 2019.

[61] I appreciate that the issue of whether a person is a de facto director is one of fact. During my exchange with Mrs. Gibson-Henlin, I asked learned Queen's Counsel to identify the evidence that Mrs. Levy was held out by Island Lubes as a director, that she purported to act as such, or that she undertook functions in relation to the company which could only properly be discharged by a director. I indicated to Queen's Counsel that Mrs. Levy was the General Manager and the conduct described by Mr. Shirley appeared capable of falling within the scope of duties capable of being conducted by a person in that capacity.

[62] Mrs. Gibson-Henlin's response was that section 7 of the Companies Act speaks to the duties owed by directors and officers. I accept the submissions that on the evidence, even if not deemed to be a de facto director, Mrs. Levy would still have

breached her fiduciary duties to the Company if the allegations are proved on a balance of probabilities.

The Court's conclusion on the issue of breach of fiduciary duty by the Levys

[63] As framed by Counsel for Island Lubes, the breach of the Levys' fiduciary duties to Island Lubes involved a multifaceted scheme including, the diversion of funds, the closing of accounts and the improper transfer of a truck. Having now had the benefit of the Levys' explanation of the transfers, it appears to me that there is a serious issue to be tried as to the validity of those transfers of funds. This dispute as to the transfer of, and the alleged misappropriation of the funds is of relevance in the Court's analysis of whether the Levys are in breach of any fiduciary duties which they may owe to Island Lubes.

[64] I have considered the complaint in respect of all the acts complained of to the extent that they may constitute a breach of duty. However, at this stage I am primarily concerned with those acts of the Levys which are more easily referable to the possible diversion of corporate opportunities belonging to Island Lubes, and it is these acts to which I will attach the most weight.

[65] I have identified some of the facts with which the Court will need to grapple in its determination of whether the Levys have committed a breach of fiduciary duty. At the heart of the analysis will be questions related to the use of funds, termination of a banking relationship and other allegations that Mrs. Gibson-Henlin has identified. Island Lubes has asserted that its access to its e-mail account is being hampered and the explanation by Mr. Levy that it may have locked itself out seems flippant in the circumstances. One would expect that as a former director, he or Mrs. Levy would have been more co-operative in resolving the issue and the attitude of the Levys does raise the question as to whether they are not deliberately retaining control of Island Lubes' email account in order to damage the company and or benefit the defendants.

[66] The Court will be required to examine the evidence as to the markets in which Island Lubes operates and the assertion that it was not interested in pursuing the BP-Castrol contract. There was not any explanation as to why there would not be an interest in what is a commercially viable contract which Ecomarine wanted to acquire. It is also necessary to test the veracity of this evidence especially in light of the evidence of Mr. Shirley that notwithstanding the end of the formal contract between BP and Island Lubes the parties continued on a course of business dealing which was pursuant to a subsisting contract. Furthermore, Mr. Shirley explained that Island Lubes did intend to pursue that business arrangement and that was a factor which influenced WIPL acquiring Island Lubes.

[67] There is also the issue to be resolved of whether after the Levys ceased to be a director and an officer respectively of Island Lubes, Mr. Levy in particular was entitled to pursue the business opportunities he did. This will involve a consideration of whether it was "…*his position with the company rather than a fresh initiative that led him to the opportunity that he later acquired*" (per Rix LJ supra).

[68] In the premises, I find on a balance of probabilities that there is a serious issue to be tried as to whether there is a breach by the Levys of the fiduciary duty they owed to Island Lubes.

The evidence on behalf of Mr. Wilkinson and Ecomarine

[69] Mr. Wilkinson on the other hand was not a director of Island Lubes. Accordingly, to the extent that there are complaints in respect of his conduct, this is grounded in the torts of interference with contractual relations, causing loss by unlawful means, fraud or fraudulent conversion and/or misappropriation.

[70] In his affidavit filed 2nd July 2021, Mr. Wilkinson confirmed that he was a Director of WIPL at the time of the Agreement for Sale but he was unaware of the terms and conditions of the agreement and did not take part in the negotiation or settlement of its terms.

[71] Mr. Wilkinson denied that he and the co-defendants interfered with and or terminated the contractual relations of Island Lubes, nor had he enticed former employees of the 1st Claimant and/or WIPL to join Ecomarine. He explained that the supply/distribution contract between Island Lubes and its main supplier BP Lubricants (Castrol) expired in June 2020 and has not been renewed by either Island Lubes or WIPL. Accordingly, neither Island Lubes nor WIPL had a distribution contract with BP Lubricants at the relevant time.

[72] The explanation offered by Mr. Wilkinson is that Island Lubes and WIPL failed to take advantage of corporate opportunities in the lubricants business and made it clear after the Agreement for Sale that they were no longer interested in pursuing this line of business. As a consequence, in or around May 2021, Ecomarine concluded and executed a contract with BP Lubricants. Very importantly, Mr. Wilkinson stated the following at paragraph 17 of his affidavit:

> *As a consequence of the contract with BP Lubricants the 5th Defendant has access to the international directory of customers who use its Castrol Lubricants. In the result, the 5th Defendant did not and does not need to access any customer information of the Claimants to establish its business.*

[73] Mr. Wilkinson also denied that he conspired with the Levys to misappropriate the funds of Island lubes and was advised that the US$9,450.00 that was transferred from the bank account of Island Lubes to Ecomarine was on account of a sum owed to Mr. Levy which he instructed to be paid directly to Ecomarine.

Causing loss by unlawful means and unlawful interference with a contract

Submissions on behalf of Island Lubes

[74] It was submitted on behalf of Island Lubes that the elements of the torts of causing loss by unlawful means and unlawful interference with a contract have been settled and applied in the case of ***OGB v Allan*** *(No.3) [2007] 4 All ER 545 HL.* Mrs. Henlin Gibson also relied on the case of ***Akbar Limited v Citibank NA*** *[2014] JMCA Civ 43* in relation to the tort of unlawful interference.

[75] In ***OGB*** the House of Lords confirmed that Liability for inducing breach of contract was established by the famous case of ***Lumley v Gye*** *[1853] 2 E & B 216, 118 ER 749* in which the court based its decision on the general principle that a person who procures another to commit a wrong incurs liability as an accessory. At the time of that decision in 1853, no action could lie against the person procuring the breach of contract although there was obviously a cause of action against the party who wrongfully breached the contract. The solution devised by the court was to allow the party procuring the breach to be sued on tort.

[76] At paragraph 5 of the judgment Lord Hoffman made the following observation:

> *[5] The forms of action no longer trouble us. But the important point to bear in mind about* ***Lumley v Gye*** *is that the person procuring the breach of contract was held liable as accessory to the liability of the contracting party. Liability depended upon the contracting party having committed an actionable wrong. Wightman J made this clear when he said ((1853) 2 E & B 216 at 238, 118 ER 749 at 757): 'It was undoubtedly primâ facie an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortious act of the defendant maliciously to procure her to do so . . .'*

[77] It was also submitted on behalf of Island Lubes that Mr. Wilkinson and Ecomarine procured or induced the breach of the contract of the 14th October 2014. Whereas, WIPL could arguably raise the issue of Mr. Wilkinson and/or Ecomarine procuring breach of the 14th October 2014 contract to which WILP was a party; Island Lubes was not a party to this contract and any claim in respect of its breach or accessory liability arising from it breach is unsustainable. This is because there is no nexus between Island Lubes and the contract which was allegedly breached in order to create the primary liability.

[78] Island Lubes asserts that Mr. Levy, and Ecomarine interfered with its employee contracts in terms of their duty of loyalty and fidelity. An example of this is the allegation that they utilized Andrew Heron while he was still employed to Island Lubes. The essence of this allegation, is that Andrew Herron acted on the instructions of Mr. Levy to refuse to comply with instructions to deliver lubricant to Island Lubes' Customer Reiter Petroleum Inc and to cancel the nomination/quotation that was previously given to it.

The submissions on behalf of the Levys and Sprint in relation to unlawful interference with contract

[79] In summary, Mr. Jones submitted that Mr. Levy was a director of Island Lubes and accordingly, his actions in writing the letter to Kingston Wharves would have been within the normal functions of a director. A similar argument was raised as it relates to the banking contract of Island Lubes with Sagicor. Mr. Jones submitted that Island Lubes has not presented sufficient evidence of the 1st to 3rd Defendants inducing a breach of contract or attempting to do so. As a consequence, there is no need for an injunction prohibiting such conduct.

The submissions on behalf of Mr. Wilkinson and Ecomarine in relation to unlawful interference with contract

[80] The submissions of Mrs. Mayhew supported those of Mr. Jones on this issue and she highlighted the fact that there is no evidence that the contract between Island Lubes and Kingston Wharves was actually terminated/breached.

[81] As it relates to the contracts between Island Lubes and its employees who terminated their contracts by resignation, Mrs. Mayhew indicated that they had given requisite notice and there is no breach of contract. It was submitted that the situation was different from that which arose in the case of ***UBS Wealth Management (UK) Limited v Vestra Wealth LLP and others*** *[2008] EWHC 1974*.

The Court's conclusion on the unlawful interference with contract issue

[82] In the ***UBS*** case (supra) a stockbroking company was sold to the claimant, and its former employees offered contracts of employment with the claimant which contained restrictive covenants. A former director of the company founded Vestra Wealth LLP (Vestra). Seventy-five employees of the Claimant resigned and defected to Vestra. The Claimant sought injunctions preventing Vestra and the former employees/ defendants from taking advantage of their breaches of

restrictive covenants in dealing with clients and/or former clients of the claimant or soliciting staff away from the claimant. The Mr. Justice Openshaw sitting in the English High Court Queens Bench Division, held that springboard relief in the form of an injunction was available to prevent future or further serious economic loss to a former employer caused by former employees taking an unfair advantage of any serious breaches of their contract of employment or acting in concert with others who are breaching their contract.

[83] The observation of the learned judge at paragraph 38 of the ***UBS*** judgment is illustrative of the issues which arise in this claim

> *38 In my judgment, it would be one thing if these members of staff had independently and separately decided to go at times of their own choosing, as they are entitled to do. It is here the secret plotting to go together en masse and to join en masse a new start-up competitor which is objectionable, for, as must have been foreseen and indeed intended, what was sought was a knockout blow to paralyse UBS, to torpedo them, as Mr McGregor put it, to make it difficult for UBS properly and professionally to continue to service their existing clients or even to comply with the FSA criteria. UBS was entitled to their loyalty and fidelity which, it seems to me, it may not have received. It is, to my mind, highly likely that this plotting and planning will be held to have taken place, which would be unlawful in itself or at least an unlawful means conspiracy.*

[84] There is no issue of a restrictive covenant in respect of the former employees of Island Lubes, but the case presented by Mrs. Gibson-Henlin is that there was plotting by the Defendants to interfere with the contracts of Island Lubes and its employees. Mrs. Mayhew submitted that three employees of WIPL joined Ecomarine and this can hardly be said to have led to a crippling of Island Lubes as was the case with UBS.

[85] The assertion that the employees were not employees of Island Lubes has not been refuted and on that evidence the arguments relating to the interference with the contracts of former employees would not be valid. I have also not been pointed to sufficient evidence of a breach of the Island Lubes and Kingston Wharves or the contract between Island lubes and BP which would support a finding that there is a serious to be tried on this issue of inducing breach of contract.

Causing loss by unlawful means

[86] In ***OGB*** Lord Hoffman explained the differences between interference with contracts and unlawful interference. Lord Hoffman summarised the relevant differences at page 558 as follows:

> *The tort of causing loss by unlawful means differs from the **Lumley v Gye** principle, as originally formulated, in at least four respects. First, unlawful means is a tort of primary liability, not requiring a wrongful act by anyone else, while **Lumley v Gye** created accessory liability, dependent upon the primary wrongful act of the contracting party. Secondly, unlawful means requires the use of means which are unlawful under some other rule ('independently unlawful') whereas liability under **Lumley v Gye** requires only the degree of participation in the breach of contract which satisfies the general requirements of accessory liability for the wrongful act of another person: for the relevant principles see **CBS Songs Ltd v Amstrad Consumer Electronics plc** [1988] 2 All ER 484, [1988] AC 1013 and **Unilever v Chefaro** [1994] FSR 135. Thirdly, liability for unlawful means does not depend upon the existence of contractual relations. It is sufficient that the intended consequence of the wrongful act is damage in any form; for example, to the claimant's economic expectations. If the African canoeists had been delivering palm oil under a concluded contract of which notice had been given to the master of the Othello, Lord Kenyon would no doubt have considered that an a fortiori reason for granting relief but not as making a difference of principle. Under **Lumley v Gye**, on the other hand, the breach of contract is of the essence. If there is no primary liability, there can be no accessory liability. Fourthly, although both are described as torts of intention (the pleader in **Lumley v Gye** used the word 'maliciously', but the court construed this as meaning only that the defendant intended to procure a breach of contract), the results which the defendant must have intended are different. In unlawful means the defendant must have intended to cause damage to the claimant (although usually this will be, as in **Tarleton v M'Gawley** (1790) 1 Peake NPC 270, 170 ER 153, a means of enhancing his own economic position). Because damage to economic expectations is sufficient to found a claim, there need not have been any intention to cause a breach of contract or interfere with contractual rights. Under **Lumley v Gye**, on the other hand, an intention to cause a breach of contract is both necessary and sufficient. Necessary, because this is essential for liability as accessory to the breach. Sufficient, because the fact that the defendant did not intend to cause damage, or even thought that the breach of contract would make the claimant better off, is irrelevant.*

[87] Mrs. Gibson-Henlin was asked by the Court to identify the unlawful means on which Island Lubes was relying and Counsel summarized them as follows:

(1) the independent breach of fiduciary duty by the Levys;

(2) the breach of confidence and misuse of confidential information in competition with Island Lubes by the Levys and Mr. Wilkinson;

(3) the misappropriation of Island Lubes money including the sum of US$9,450.00 by the Levys, Mr. Wilkinson and Eco Marine; and

(4) the targeting and enticing of Island Lubes employees.

I have already addressed the issue of breach of fiduciary duty and the alleged misappropriation of funds. Island Lubes has also asserted a discrete claim in respect of breach of confidential information and it is convenient at this juncture to address that subject, both as an issue in its own right and as a sub issue related to the causing loss by unlawful means head of claim.

Breach of confidence

The submissions of the 1st to 3rd Defendants on the breach of confidence issue

[88] As it relates to the allegation of breach of confidence, Mr. Jones relied on the case of ***Digicel (Jamaica) Limited v Carty and Another*** *[2014] JMCC COMM 14* and the following statement of Sykes J (as he then was) at paragraph 70:

> *Before Digicel can claim successfully the injunction sought it ought to be able to (a) say with some degree of precision what specific trade secret, confidential information akin to a trade secret, pricing formula, list of customers, processes, methodologies were made known to the employee during his employment and (b) show that the clauses are reasonable in the circumstances of the case.*

[89] It was submitted on behalf of the 1st to 3rd Defendants that because Island Lubes is not a party to the Agreement, it can only rely on the tort of breach of confidence if it can establish that information falls within the classification of confidential information. Counsel relied on ***Winfield Boban v Medical Technologies (Meditech) Ltd & Donovan St. L Williams*** *[2016] JMCC COMM 35* in which Batts J referred to the case of ***Coco v A. N. Clark (Engineers Limited)*** *[1969] RPC 41*

and accepted that there are three elements essential to a cause of action for breach of confidence, namely:

> (a) that the information was of a confidential nature;
>
> (b) that it was communicated in circumstances importing an obligation of confidence; and
>
> (c) that there was an unauthorised use of the information.

[90] It was submitted by Mr. Jones that the nature of the confidential information has been limited to contracts and there has been no attempt to establish that these contracts in and of themselves have confidence attached to them neither has there been evidence led that they were imparted in confidence. It was highlighted that Mr. Levy is asserting that he established the business and negotiated the contracts. Therefore, Island Lubes cannot establish that Mr. Levy would have disclosed to himself this information in confidence and accordingly unauthorized use cannot be proved.

[91] Mr. Jones further submitted that Island Lubes has not made out the breach of the duty of confidentiality with sufficient precision. Counsel argued that there is no detail but rather broad statements that the Defendants had knowledge of contracts. He posited that this type of broad statement is not what is contemplated by the authorities. Mr. Jones cited the example of Mr. Shirley averring in paragraph 19 of his 3rd affidavit that as far as he knows the BP Lubricants customer list is not public. Mr. Jones also argued that the contract between BP Lubricants and Island Lubes no longer existed and this fact is not confidential. Furthermore, there is no evidence as to how the contract between BP Lubricants and Ecomarine or any evidence that it was any of the Defendants that reached out to BP Lubricants in an effort to enter into a contract with it.

Submissions on behalf of Mr. Wilkinson and Ecomarine on the issue of breach of confidence

[92] Mrs. Mayhew QC adopted the submissions of Mr. Jones that the description by Island Lubes of the allegedly confidential information is too general. Mrs. Mayhew commended the case of ***Ocular Sciences Ltd & ANR v Aspect Vision Care Ltd & Ors*** *[1997] RPC 289*, in which Laddie J sitting in the Patents Court noted that the rules requiring particularity of pleadings in breach of confidence actions is similar to other proceedings however breach of confidence proceedings can be used to oppress and harass competitors and ex-employees. Because of this well recognized risk, the Courts must be *"…careful to ensure that the plaintiff gives full and proper particulars of all the confidential information on which he intends to rely in the proceedings."*

[93] In further support of her submissions, Mrs. Mayhew relied heavily on the English Court of Appeal case of ***Faccenda Chicken Ltd. v Fowler and Others*** *[1987] Ch 117*. In that case having considered a number of authorities the Court extracted the following principles at page 136-137:

> *Having considered the cases to which we were referred, we would venture to state these principles:*
>
> *(1) Where the parties are, or have been, linked by a contract of employment, the obligations of the employee are to be determined by the contract between him and his employer: cf.* ***Vokes Ltd. v. Heather*** *(1945) 62 R.P.C. 135, 141.*
>
> *(2) In the absence of any express term, the obligations of the employee in respect of the use and disclosure of information are the subject of implied terms.*
>
> *(3) While the employee remains in the employment of the employer the obligations are included in the implied term which imposes a duty of good faith or fidelity on the employee. For the purposes of the present appeal it is not necessary to consider the precise limits of this implied term, but it may be noted: (a) that the extent of the duty of good faith will vary according to the nature of the contract (see* ***Vokes Ltd. v. Heather****, 62 R.P.C. 135); (b) that the duty of good faith will be broken if an employee makes or copies a list of the customers of the employer for use after his employment ends or deliberately memorises such a list, even though, except in special*

> *circumstances, there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer: see* ***Robb v. Green*** *[1895] 2 Q.B. 315 and* ***Wessex Dairies Ltd. v. Smith*** *[1935] 2 K.B. 80.*
>
> *(4) The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more restricted in its scope than that which imposes a general duty of good faith….*
>
> **…**
>
> *(5) In order to determine whether any particular item of information falls within the implied term so as to prevent its use or disclosure by an employee after his employment has ceased, it is necessary to consider all the circumstances of the case. We are satisfied that the following matters are among those to which attention must be paid:*
>
> *(a) The nature of the employment. Thus employment in a capacity where "confidential" material is habitually handled may impose a high obligation of confidentiality because the employee can be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally.*
>
> *(b) The nature of the information itself. In our judgment the information will only be protected if it can properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret eo nomine. The restrictive covenant cases demonstrate that a covenant will not be upheld on the basis of the status of the information which might be disclosed by the former employee if he is not restrained, unless it can be regarded as a trade secret or the equivalent of a trade secret: see, for example,* ***Herbert Morris Ltd. v. Saxelby*** *[1916] 1 A.C. 688, 710 per Lord Parker of Waddington and* ***Littlewoods Organisation Ltd. v. Harris*** *[1977] 1 W.L.R. 1472, 1484 per Megaw L.J.*

The Court's conclusion on the issue of breach of confidence

[94] I find that there is a serious issue to be tried as to whether the three elements of the tort of breach of confidence are satisfied namely (a) that the information was of a confidential nature, (b) that it was communicated in circumstances importing an obligation of confidence and (c) that there was an unauthorised use of the information.

[95] Island Lubes has given sufficient particulars of the confidential information on which it intends to rely at the trial. The information is in respect of its contracts with its suppliers and customers. There has not been an indication of every possible supplier or customer but the main relationships which have allegedly been affected have been identified in the form of the BP contract and the Kingston Wharves contract. Whether this information was of a confidential nature deserving of protection is a finding which will have to be resolved by the trial Court.

[96] I have noted the submissions of that the sale of Castrol products by Island Lubes is information that would have been in the public domain. Even if one assumes that this is so, the public would not have been privy to other elements of the contract which may have assisted Ecomarine in obtaining its contract, including the fact of and date expiration of the formal written contract between BP and Island Lubes. A similar assessment will have to be made in respect of the contract between Island Lubes and Kingston Wharves.

[97] The Court will have to consider whether Mr. Levy and Mrs. Levys came by the information which is asserted to be confidential as a director and officer of Island Lubes or whether it was communicated, imparted or acquired "*in other circumstances which negative any duty of holding it confidential*". Mr. Jones in his submissions referred to the "normal case" of an established employer sharing information with an employee, but this is not the only application of the rule. The rule also governs information acquired by an employee or director, it does not have to be directly communicated by the employer or another employee, for example in the case of an employee who acquires confidential information about a process by viewing it in operation. Therefore, the fact that Mr. Levy might have negotiated the contracts on behalf of Island Lubes does not necessarily mean that the information was not "communicated or imparted to him" or "acquired" by him in his capacity as director and subject to a duty of confidence. Island Lubes asserts that these contracts were critical to its functioning. I therefore find that there is a serious issue to be tried as to whether Mr Levy ought to have appreciated that the information he obtained in respect of the contracts of Island Lubes imposed a positive duty on

him to hold it confidential. Furthermore, the allegation is not (as creatively framed by Mr. Jones), that Island Lubes' case seems to be that the wrong was committed by Mr. Levy communicating the information to himself. Island Lubes position is that Mr. Levy made unauthorized use of the confidential information which he had.

[98] On the pleadings and on the evidence in support of the Application, I find that there is clearly a serious issue to be tried as to whether there was an unauthorised use of the information belonging to Island Lubes for the benefit of the Defendants as evidenced by the Screenshot and the Letter. This will require the Court considering at the appropriate time all the facts surrounding the use of the information in arriving at a conclusion.

[99] In ***Coco v A. N. Clark*** (supra), the Court accepted that the obligation of confidence could arise where there is no contract between the owner of the information and the party alleged to have misused it. In such as case the issue is raised as to whether the obligation is brought into being and an additional question of what amounts to a breach of that obligation. As it relates to Mr. Wilkinson, I have noted the evidence that once the contract was signed between Ecomarine and BP, Ecomarine was given access to the BP customer list. Even if this is correct, it does not resolve the issue of whether confidential information was utilized in Ecomarine obtaining the contract with BP in the first place, prior to the entry into that contract. Mrs. Gibson-Henlin has also raised an arguable point, that whereas the information was the information belonging ultimately to Island Lubes, Mr. Wilkinson came by it in his capacity as director of its parent WIPL. Accordingly, it would still be imbued with the confidential nature and it was received by Mr. Wilkinson in circumstances importing an obligation of confidence.

The Court's conclusion on the issue of causing loss by unlawful means

[100] Based on the Court's findings above, the Court further finds that there is a serious issue to be tried as to whether the defendants caused loss to Island lubes by the use of unlawful means.

Are damages an adequate remedy

[101] In **American Cyanamid** at page 510-511 the Court details the approach to be followed especially in assessing whether damages are an adequate remedy for either party, as follows:

> *"So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.*
>
> *As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction.*
>
> *It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."*

[102] Mrs. Gibson-Henlin submitted that it would be difficult to calculate the damages which Island Lubes may suffer if the injunction is not granted. It was submitted that even if it may be quantifiable, it is not necessarily adequate because the petroleum space in which Island Lubes operates is small and it would lose market space which it would be unable to regain if the injunction is refused. Mrs. Gibson-Henlin further submitted that the Defendants have not produced any evidence that they will be able to pay damages if the Court finds in favour of Island Lubes at the trial. Mrs. Gibson-Henlin further submitted that equity frowns on the conduct of the Defendants in circumstances such as these.

[103] The submissions of Mr. Jones and Mrs. Mayhew were similar. The essence of those submissions on this issue was that any loss which Island Lubes could suffer between now and the trial is largely economic loss that could be adequately compensated in damages. It was also submitted that the undertaking in damages given by Island Lubes is inadequate because Island Lubes is financially weak and the vessels which were offered in support of the undertaking were old and of significantly less value than Island Lubes asserted. More importantly, it was noted that the vessels belong to WIPL Reference was made assets.

[104] I find that it would be difficult to calculate the damages which Island Lubes might suffer if the injunction is not granted and that an award of damages will not adequately compensate the company. Its loss of market share due to the conduct of the Defendants and their use of Ecomarine might not be regained and the knock on effect will not necessarily be compensated by a monetary award. There is also an absence of any evidence defendants would be able to pay such damages. Accordingly, I find that damages would not be an adequate remedy for Island Lubes in this case.

[105] Ecomarine is a relatively new company and so is the commercial venture of the Defendants. In such circumstances, any potential losses to the parties which are restrained would be much easier to calculate. I acknowledge that it would still be difficult to calculate the loss of any market Ecomarine it might have gained if

permitted to compete freely under the control and direction of Mr. Levy, the Levys and/ or Mr. Wilkinson. It is therefore doubtful whether damages would be an adequate remedy for the defendants. The vessels referred to by Island Lubes are owned by WIPL and would necessitate a more robust undertaking in damages if the Court were prepared to grant the injunction.

The balance of convenience

[106] The Court having concluded that there is doubt as to the adequacy of the respective remedies in damages available to Island Lubes on the one hand, the Defendants on the other hand, or to both" it next has to consider the balance of convenience. The ***American Cyanamid*** principles have been endorsed by the Privy Council in ***National Commercial Bank Jamaica Limited v Olint Corp. Ltd.*** *[2009] UKPC 16.* Helpful guidance as to how the Court should approach the determination of the balance of convenience is contained in the Judgement of the Court delivered by Lord Hoffman in particular at paragraph 16-18 where he said as follows:

> *"[16] ...It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in* ***American Cyanamid Co v Ethicon Ltd*** *[1975] 1 All ER 504, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.*

> *[17] In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in* ***American Cyanamid*** *[1975] AC 396, 408:*
>
> > *'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'*
>
> *[18] Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."*

[107] It is difficult to determine where the balance of convenience lies in this case because the injunction will prevent the Defendants from continuing their business. However, I find that the course which will result in the least irremediable prejudice is for the Court to grant the injunction. I have noted the submissions of Mrs. Mayhew that Ecomarine has already commenced business operations and entered into contracts with 3rd parties such as suppliers and employees and lessees. The injunctive relief which seeks to enjoin the two directors of Ecomarine would prevent them from carrying out their statutory duties to the 5th Defendant. Mrs. Mayhew relied on the case of ***Thermanscan Limited v Norman*** *[2009] EWHC 3694* at paragraph 21 where Mr. David Donaldson QC sitting as a Deputy High Court Judge in the Chancery Division of the English High Court commented as follows:

> *It is one thing for the court to delay the start of a new business; it is another to require its temporary suspension when it has already been started. If the Defendant were now to be required to cease until trial the activities which he has already commenced and engaged in over the last three months, his chances of his successfully resuming if the trial goes in his favour would seem likely to be seriously jeopardized. This possibility would appear to me to be likely to be of greater significance and impact than any loss which might be caused to the Claimant by the Defendant's attempts during the interim period to solicit the Claimant's clients of last year*

[108] Each case will turn on its particular facts. In the case before me, Ecomarine is not being restrained from commercial activity. It is free to carry out its business but not under the control and direction of the Levys and/or Mr. Wilkinson. A neutral director can be retained and its business continued.

[109] I am not convinced by the submissions of Mrs. Mayhew that there has been an unreasonable delay in applying for the injunction in this case and I have accepted the submissions of Mrs. Gibson-Henlin that the situation was a fluid and constantly evolving one with Island Lubes trying to ascertain what exactly was being done by the Defendants.

[110] In assessing the balance of convenience I have placed weight on the fact that Island Lubes has been in the market before Ecomarine, and is deserving of the Court's protection by an injunction based on the claim and the evidence filed in support of this application.

[111] Mrs. Mayhew has also submitted that the Court should consider the relative strengths of the parties' cases respectively and in support of her submissions relied on the case of ***Lansing Linde v Kerr*** *[1991] 1 WLR 251*. This position is consistent with the case of ***David Orlando Tapper*** *[2016] JMCA Civ 11*, in which the Court of Appeal in overturning the trial Judge's decision refusing an injunction, granted an injunction to the Claimant and criticised the decision of the trial Judge in not having examined the relative strength of each party's case.

Conclusion and disposition

[112] I acknowledge that this is an early stage in the proceedings and that all the pleadings and evidence is not before me. However, based on my analysis of the pleadings and the evidence which I considered in arriving at my conclusion that there was a serious issue to be tried, and damages are not an adequate remedy, I have concluded that on balance the claim of Island lubes is stronger than that of the Defendants.

[113] I have noted the observation in ***Ocular Sciences*** (supra) at page 56 that "*it is well recognised that breach of confidence actions can be used to oppress and harass competitors and ex-employees*." This case includes a breach of confidence component, but it is also more than that. Nevertheless, I do appreciate that there is the need for caution. However, having considered the relevant issues as I have demonstrated above, I am of the view that the injunction previously granted by the Court should be continued with a few modifications.

[114] For the reasons stated herein I make the following orders:

1. An injunction is hereby granted until trial of the claim or further order of the Court:

(a) restraining the 1st, 2nd and 4th Defendants by themselves, their servants or agents or otherwise howsoever from using or misusing the confidential information or any information in relation to the contracts, suppliers, customers and employees of the 1st Claimant or any part thereof for any purpose or otherwise exploiting the information.

(b) restraining the 1st, 2nd and 4th Defendants, their servants, and/or agents or otherwise from inducing or procuring breaches by unlawfully interfering in contracts between the 1st Claimant, and its employees, sub-contractors or suppliers or business relationships and to prevent them from committing a repetition thereof.

(c) restraining the 1st and 2nd Defendants from breaching their fiduciary duties to the 1st Claimants and from conflicts of interest by engaging on their own account or in conjunction with others and whether directly or indirectly to establish, develop, carry on or assist in carrying on, be engaged, concerned, interested or employed in, or provide technical commercial or professional advice to any other business, enterprise or venture engaged in supplying goods and services identical, similar or competitive with the marketing, warehousing, and distribution of lubricants for passenger and commercial vehicles in Jamaica.

2. The 1st Claimant is to fortify its undertaking as to damages by the provision of the sum of US$150,000.00 or its Jamaican dollar equivalent within 14 days of the date hereof. This may be done by:

(i) payment into court of the said sum;

(ii) the deposit in an interest bearing account at a financial institution to which Counsel for the parties are signatories; or

(iii) provision to Counsel for the Defendants of a letter of guarantee by a bank licensed to operate in Jamaica confirming that the sum will be paid to the defendants or any of them, if an order to that effect is made by the Court.

3. If the 1st Claimant fails to comply with order 2 herein, the injunction shall cease to have any further effect.

4. Costs are to be costs in the Claim

5. The Claimant’s Attorneys-at-Law are to prepare file and serve a copy of this order.