IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL COURT

CLAIM NO. SU2021CD00281

BETWEEN	**WEST INDIES PETROLEUM LIMITED**	**CLAIMANT**
AND	**SCANBOX LIMITED**	**1ST DEFENDANT**
	WINSTON HENRY	**2ND DEFENDANT**
	COURTNEY WILKINSON	**3RD DEFENDANT**
	JOHN LEVY	**4TH DEFENDANT**

Interlocutory injunction – Search, preservation and production order - Whether strong prima facie case required- Whether jurisdiction to prevent a libel at the interlocutory stage- Whether privilege against self-incrimination applicable – Observations on the origin of jurisdiction to grant injunctions – Costs – Whether to be apportioned – Whether certificate for two counsel to be granted.

Georgia Gibson Henlin Q.C., Peta-Shea Dawkins and, Shevaniese Arnold for the Claimant instructed by Henlin Gibson Henlin.

Lemar Neale for the 1st and 2nd Defendants instructed by Nealex.

Symone Mayhew QC and Ashley Mair for the 3rd and 4th Defendants instructed by Mayhew Law.

Heard: 10th and 17th December 2021 and, 18th February, 2022

In Chambers by Zoom

Cor: Batts, J

[1] This judgment will give my decision, and reasons, in two discrete matters. The first is a question of costs, which I had reserved in a judgment delivered in this claim on the 23rd November 2021, on an application by the 3rd and 4th Defendants filed on the 5th October 2021. The parties filed written submissions and, as I understand it, were each prepared to rest on those submissions. The second matter (but the one I will treat with first) concerns applications, filed on the 23rd June 2021 and 1st October 2021, by the Claimant for certain interlocutory relief. These being injunctive orders and orders for the preservation, inspection and delivery of information.

[2] Queen's Counsel for the Claimant indicated at the outset that, whereas the Notice of Application filed on the 1st October 2021 would be argued in its entirety, only paragraphs 1, 3, 4 (as modified) and, 5 of the Notice of Application filed on the 23rd June 2021 would be pursued. The relief sought in the latter is therefore now as follows:

> *"1. An injunction to restrain the Defendants and each of them, whether by themselves, their directors, partners, employees, agents or otherwise howsoever form further disclosing or publishing or causing the disclosure or publication or making any use of the Claimant's confidential and/or private information or any of it including but not limited to the following:*
>
> *a. Bank account information (balances, transfer and other transactions*
>
> *b. Supplier and customer contracts;*
>
> *c. Invoices for customers and from suppliers*
>
> *d. Potential customer negotiations and contact information*
>
> *e. Legal contracts (Non-Disclosure Agreements, Supply Agreements, Consultancy Agreements*
>
> *f. Market research (in the petroleum industry);*
>
> *g. Customer analysis*
>
> *h. Financial data;*
>
> *i. Intercompany communications*

j. *Human Resources Data: employee information, union information, contracts, terminations;*

k. *Sales emails (sales reports, customer reports, customer inquiries);*

l. *Operations email; and*

Health, Safety, Security emails (incident reports).

2.[deleted]

3. *An injunction against the 3rd and 4th Defendants restraining the continuing breach of their fiduciary duties by preventing the said Defendants from sending letters, emails or any correspondence to any person and/or entity including but not limited to clients, customers, financiers and potential investors with false information and/or concerning the proceedings in Court between him and Charles Chambers or other directors and shareholders of the Company in Claim No. SU2020CD00450.*

4. *An order restraining the 3rd and 4th Defendants from publishing defamatory and/or malicious statements or statements that are injurious to the Claimant's business or otherwise in breach of their duty as directors relating to and/or including but not limited to the following statements:*

a. *The company's financial affairs are deteriorating*

b. *The company was sanctioned by Customs by requiring the pre-payment of duties*

c. *The company is being investigated which may result in criminal verdict*

d. *The company's business model for bunkering and land trade is based on a failed business strategy.*

e. *The sums that the Claimant needs to borrow including reference to the sums of US$50-60 million*

f. *Unknown sums owing plus penalties that will result from the findings of the current investigations.*

g. *Any statement that is connected with the reputation of financial affairs of the Claimant Company.*

5. *A mandatory injunction compelling the Defendants to deliver up and permanently delete and/or destroy the information obtained through*

the unauthorised access, manipulation and modification of the Claimant's email servers and/or exchange platform including but not limited to the following:

a Bank account information (balances, transfers and other transactions;

b. Supplier and customer contracts;

c. Invoices for customers and from suppliers;

d. Potential customer negotiations and contact information;

e. Legal contracts (Non-disclosure Agreements, Supply Agreements, Consultancy Agreements;

f. Market research (in the petroleum industry);

g. Customer Analysis;

h. Financial Data.

i. Intercompany communications;

j. Human Resources data: employee information, union information, contracts, terminations,

k. Sales emails (sales reports, customer reports, customer inquiries)

l. Operations emails; and

m. Health, Safety, security emails (incident reports)

6. Cost of the Application be cost in the claim

7. Such further or other orders as the court deems just"

[3] The relief sought in the Notice of Application filed on the 1st October 2021 is as follows:

"1. An order for the preservation and inspection of the information relating to the 1st and 2nd Defendant's unauthorised access, escalation and modification of access and/or facilitation of unauthorised access, escalation and

modification of access to the Claimant's servers including but not limited to the following:

a. *All electronic data in any format, media, or location, including data on hard drives, zip drives, CD-ROMS, CD-RW's, DVD's, Backup tapes, smart phones, memory cards/sticks. Or digital copiers or facsimile machines or cloud storage;*

b. *Any email, electronic message, letter, memo or other document*

c. *All data storage backup files including previously existing backups;*

d. *All data from servers and networking equipment logging network access activity and system authentication;*

e. *A list of all the employees involved in correspondence;*

f. *All electronic data generated or received by employees who may have personal knowledge of the facts involved in the matter between the parties;*

g. *And all computer, electronic, or e-mail message or post or backup files of any type created, as well as any computer messages whether generated or received by the 1st Defendant and/or its agents including the 1st Defendant;*

h. *Electronic data created to the date of this order;*

i. *All information and documents relating to all and any payments received by the 1st and 2nd Defendants*

including banking transit nos. data, name and address of payee

2. *An order for the preservation and inspection of the information relating to the 3rd and 4th Defendants unauthorised access, escalation and modification of access and/or facilitation of unauthorised access, escalation and modification of access to the Claimant's servers including but not limited to the following:*

    a. *All electronic data in any format, media, or location, including data on hard drives, zip drives, CD-ROMS, CD-RW's, DVD's backup tapes, PDA's cellphones, smartphones, memory cards/sticks, or digital copiers or facsimile machines or cloud storage;*

    b. *Any email, electronic message, letter, memo or other document;*

    c. *All data storage backup files including previously existing backups;*

    d. *All data from servers and networking equipment logging network access activity end system authentication;*

    e. *A list of all the parties involved;*

    f. *All electronic data generated or received by employees who may have personal knowledge of the facts involved in the matter between the parties;*

    g. *Any and all computer, electronic, or email message or post or backup files of any type created, as well as any computer messages*

whether generated or received by the 3rd and 4th Defendants and/or this order;

h. *Electronics data created to the date of this order;*

i. *All information and documents relating to all and any payments sent by/and or received by the 3rd and 4th Defendants including banking transit nos., date, name and address of payee.*

3. *An order that the Defendants each produce a list of the information at paragraphs 1 and 2 hereof within fourteen (14) days of the date of this order certifying that they have preserved the electronic documents relevant to this matter in accordance with this order and setting out the documents and the person(s) who has/has had/have custody and/or control of them and the servers and/or discs or place on or in which they are now located and/or stored as well as the person(s) or office, officers or position who/that have /has access to the said information and has duly or responsibility for their safe custody.*

4. *An order that the Defendants certify the steps taken and tools used to preserve the said information at paragraphs 1 and 2 hereof and the name of employee or third party who carried out the exercise to preserve the information.*

5. *An order that the Defendants, each, permit the Claimant's authorised agent to inspect the information at paragraphs 1 and 2 hereof and as certified at paragraph 3 hereof within twenty-one (21) days of the date of this Order.*

6. *An order that the Defendants, each provide information to the Claimant about the location of the information at*

paragraphs 1 and 2 hereof and as certified at paragraph 3 hereof on or before the 15th October 2021 by filing and serving notice of location of relevant information/property in accordance with the terms of this Order 6.

7. *Specific disclosure of the correspondence prepared by and/or sent by the 3rd and 4th Defendants to BP Latin America LLC and/or any of its subsidiaries or any other communication with BP Latin America LLC regarding the Claimant.*

8. *The Claimant is permitted to inspect and take a copy of the correspondence prepared by and/or sent by the 3rd and 4th Defendants to BP Latin America LLC and/or any of its subsidiaries in or around March 2021 regarding the finances or ability of the Claimant to pay its creditors or BP Latin America LLC and/or any of its subsidiaries or any other communication with BP Latin America LLC regarding the Claimant.*

9. *The time for service of this application is abridged.*

10. *Cost of the Application be cost in the Claim.*

11. *such further or other orders as the Court deems just."*

[4] There were several affidavits filed in support of and opposing the applications. Each party filed written submissions which were as extensive as they were intense. Indeed, the bundles before me were numbered one to twelve and there were additional affidavits filed in the course of the hearing. I do not intend to detail all this material in this judgment. It will suffice, I believe, to outline the parties' respective positions and state the law as I understand it. I will reference the facts and legal position only to the extent necessary to explain my decision.

[5] The Claimant asserts, in written submissions filed on the 7th October 2021, that these orders are necessary to stop and/or minimise any harm caused by the

alleged breaches and to ensure that there is full disclosure and a fair trial. It is the Claimant's case that there is sufficient evidence before the court to establish a serious issue for trial as to whether the 1st and 2nd Defendants breached confidentiality agreements and/or misused confidential information. The 3rd and 4th Defendants are alleged to have aided and abetted that process and also breached a fiduciary's duty of confidentiality. The injunctive orders are to prevent further use or divulging of the information. The preservation orders are to have the information either returned or preserved until trial. The Claimant relies on the express terms of non-disclosure agreements signed in 2019 and 2020, see exhibits GS2 and GS3 to the affidavit of Gordon Shirley filed on the 23rd June 2021 (pages 8 to 10 and 34 to 40 of Supplemental Judges Bundle # 1). The 3rd and 4th Defendants, although not signatory to the agreements, as directors of the Company knew or ought reasonably to have known of the 1st and 2nd Defendants' contractual duty of confidentiality. This notwithstanding, it is alleged that, they participated in and benefitted from the 1st and 2nd Defendant's breach, see paragraphs 27 and 29 of the affidavit of Gordon Shirley filed on the 23rd June 2021 (page 8 Supplemental Judge's Bundle #1) and, paragraphs 5, 14, 16 and, 22 of the Second Affidavit of Gordon Shirley filed on the 5th October 2021 (Bundle #2 Further Supplemental Judges Bundle).

[6] The 1st and 2nd Defendants agree that they were bound by non-disclosure agreements but deny being in breach. They deny allowing any unauthorised access and deny being in possession of any confidential information. They contend, in written submissions filed on the 28th October 2021, that in any event damages are an adequate remedy and hence the application ought to be refused. It is further urged that the grant of preservation and inspection orders will breach their "*privilege against self-incrimination*." It is also asserted that the Claimant has failed to provide evidence that it is able to satisfy an undertaking as to damages. With respect to the order for preservation it is submitted that it is necessary to demonstrate an "extremely strong" prima facie case and that the Claimant has failed so to do. Further there is no real possibility that the material will be destroyed as the Claimant has waited almost one year to make the

application. The orders sought are in any event too wide, and disproportionately so, and are likely to lead to a breach of confidentiality with respect to other clients of the 1st and 2nd Defendants. It is further submitted that the delay in making these applications ought to be fatal.

[7] The 3rd and 4th Defendants, in written submissions filed on the 25th October, 2021, submitted that there should be no restraint of an apprehended libel. Further an award of damages is an adequate remedy. The application to deliver up and destroy information, amounts to a predetermination of the substantive issue. With respect to the preservation orders these should be refused because the scope of the order is too wide and is unnecessary. The information, alleged to be in the possession of the 3rd and 4th Defendants, is material they are entitled to as shareholders and directors of the Claimant and most of which they had obtained in the ordinary course of such duties. Save for particulars, related to personal information about Mr. Charles Chambers, there is little particularity as to the information to be preserved. In any event as this is information he had passed through his assigned email with the Claimant he has no right to protect that information. The information lacked the necessary quality of confidence about it. There is, for example, no allegation about trade secrets involved. The court should not support a fishing expedition. The litigation has not yet reached the stage of disclosure so it is premature to seek discovery now and there is no evidence of a likelihood the Defendants will destroy the information. Furthermore, the expert report, in the Claimant's possession and which they have exhibited, suggests that the Claimant will suffer no prejudice if the orders are refused. This is because the Claimant is already in a position to prove the case alleged. These Defendants also submitted that the privilege against self-incrimination applied and that the orders are unnecessary and will increase the cost of this litigation.

[8] No party has challenged the jurisdiction of this court to make injunctive orders or orders for the preservation and delivery up of documents. Reference has been made to rule 17(1) of the Civil Procedure Rules and also to section 49(h) of the Judicature (Supreme Court) Act. It behoves the profession to be reminded that

this court's jurisdiction, to regulate its procedure and to make orders to ensure as far as is possible a fair trial and the integrity of its process, is inherent. Rules and laws may be passed, which concern the ways and means of the exercise of the Court's coercive powers, but they are not its source. The remedy of the injunction was developed by the Court of Chancery (in equity), see generally **Hanbury, Modern Principles of Equity 8th edition page 13 et seq** and, **Spry The Principles of Equitable Remedies 8th edition pages 1 to 25.** In 1724, for example, a church was restrained from ringing its bell at 5 a.m. in consequence of an agreement earlier made, **Dr Martin and Lady Arabella Howard v Nutkin (1724) ER (Chan) page 724.** To be sure statutes have consolidated, and at times extended, the jurisdiction, see **Spry pages 34 et seq.** The Judicature (Supreme Court) Act, which in 1880 fused the courts of common law and equity, is one such enactment. Superior courts of record have since then developed new injunctive orders even before rules in that regard were legislated, for example the "Mareva", as to which see per Laing J in ***Hasheba Development Company Ltd v Petroleum Corporation of Jamaica Ltd et al [2021] JMCC Comm 10*** **(unreported judgment 12th March 2021) at para. 8**. We should however bear in mind the caution, expressed in **Spry at page 25**, which I respectfully adopt as my own:

> *"During many centuries the principles and techniques of equity have been of general importance ,both in so far as their application has often led to a just resolution of disputes that would not otherwise have been possible, and also because their elasticity has led to the development of new rules even entire bodies of law dealing with particular subject matters. It would be especially unfortunate that these principles and techniques should become unduly limited in any way, either because they ceased to be properly understood or else because they came into disfavour.* ***It is hence essential that common law attitudes, which tend towards the formulation of strict and inflexible rules, should not be permitted to limit the ability of courts with equitable jurisdiction to apply their principles in new circumstances and to do justice most nearly in accordance***

with the requirements of each particular case". [Emphasis added]

[9] The law governing the exercise of the jurisdiction, which the Claimant now seeks to invoke, is fairly well settled. As regards interlocutory injunctive orders the court should first satisfy itself that there is a serious question to be tried. Thereafter the court should examine whether or not damages in lieu of an injunction will be an adequate remedy for the Claimants and conversely whether, if the injunction is granted but the Defendant ultimately succeeds, the Defendant is adequately protected by the undertaking as to damages. Where these considerations are evenly balanced the court will consider the balance of convenience or, in its more modern formulation, the overall justice of the case, see ***National Commercial Bank Jamaica Ltd. v Olint Corporation Limited [2009] UKPC16,*** explained and applied by this court in ***Algix Jamaica Ltd v J. Wray and Nephew Ltd [2016] JMCC Comm 2 (upheld on appeal in SCCA No. 15 of 2016).***

[10] Orders for preservation and/or production are made in circumstances where the court is satisfied that : there is an extremely strong prima facie case, the prejudice loss or damage (potential or actual) to the applicant is very serious, there is clear evidence the respondent to the application has the questioned items in its possession and, there is a real danger the items will be destroyed, see ***Anton Piller KG v Manufacturing Processes Limited et al [1976] 1 AllER 779*** *and* ***Universal City Studios Inc et al v Mckhtor & Sons [1976] 2AllER 330*** per Templar J at p. 333 b and c. In ***McLennon Architects Limited v Jones and Another [2014] EWCH 2604*** **(TCC)** Akenhead J, at paragraph 29 of a persuasive but more recent judgment, outlined the circumstances in which search and/or preservative orders may be made:

"It is primarily to the overriding objective to which one must look as to the basis on which to exercise the discretion to make this type of order. It may be helpful if I list (non-exhaustively) the factors which might properly legitimately be taken into account:

i. *The scope of the investigation must be proportionate.*

ii. *The scope of the investigation must be limited to what is reasonably necessary in the context of the case*

iii. *Regard should be had to the likely contents (in general) of the device to be sought so that any search authorised should exclude any possible disclosure of privileged documents and also of confidential documents which have nothing to do with a case in question.*

iv. *Regard should also be had to the human rights of people whose information is on the device and, in particular, where such information has nothing or little to do with the case in question*

v. *It would be a rare case in which it would be appropriate for there to be access allowed by way of taking a complete copy of the hard drive of a computer which is not dedicated to the contract or project to which the particular case relates.*

vi. *Usually, if an application such as this is allowed, it will be desirable for the Court to require confidentiality undertakings from any expert or other person who is given access."*

Any such orders must be proven to be "*necessary and proportionate*", see ***M3 Property Limited v Zehomes Limited [2012] EWHC (TCC) 780***.

[11] It is appropriate, at this juncture, to remind myself that in these interlocutory proceedings I am not required to make findings of fact. The trial of the issues in this claim is yet to come. It is however sometimes necessary to consider the relative strength of each case as demonstrated in the affidavits filed. However, where the evidence conflicts, nothing I say should be taken to be a finding one way or the other.

[12] When regard is had to the legal principles outlined above, and the evidence placed before me, I am satisfied that an injunction until trial is appropriate to restrain the use of the material. In this regard, there can be little doubt that a prima facie case has been established, see the affidavit of Gordon Shirley filed on the 23rd June 2021 and Gerald Charles Chambers filed on 29th June 2021 (Bundle #1 pages 6 and 233). The allegations are supported by the expert report of Mr. Shawn Wenzel, an Information Technology Management Consultant, who states in part, see Bundle # 1 (Supplemental Judges Bundle) pages 41 to 44:

> *"Based on my review of the information ……the only reasonable conclusion I can draw is that this email security breach was the result of a conspiracy between Courtney Wilkinson, one of the company directors…and, Winston Henry,… [and much later]…. John Levy appears to be aware of the activities and has taken benefit of the material that was extracted from the unauthorised communications."*

The 1st and 2nd Defendants do not deny the existence of the relevant contractual provisions, see paragraph 10 of the affidavit of Winston Henry filed on 8th October 2021. They however deny misusing or retaining information as alleged, see paragraphs 9,12 13, 14 and 16 of the affidavit of Winston Henry filed on the 8th October 2021 (Bundle # 6). The 3rd and 4th Defendants do not deny having access to the information but they deny obtaining it from the 1st and 2nd Defendants or using it in the manner alleged, see paragraphs 6,11,25, 27 of the affidavit of John Levy filed on 7th October 2021; paragraphs 5 of his second affidavit filed on 16th December 2021 and; paragraph 8 of the affidavit of Courtney Wilkinson filed on 17th December 2021 (First Further Supplemental Bundle pages 376 to 388).It seems to me that it is arguable not only that the information was confidential but also that it may have been improperly used.

[13] The nature of the information is also relevant when considering the 3rd and 4th Defendants' argument that an injunction will not lie to restrain a libel. The authorities cited in support, ***Bonnard v Perryman [1891] 2 Ch 289*** and ***Khuja v***

Times Newspapers Ltd and others [2019] AC 161, establish no such principle. Both cases concerned applications to prevent a publication by newspapers. In one case the Defendant clearly articulated a defence of justification. In the other the material to be published was admittedly true concerning as it did proceedings in court. Each case was considered by full courts, a six-member Court of Appeal on one hand and, a seven-member panel from the UK Supreme Court on the other. In both cases the jurisdiction, to grant interlocutory relief in order to prevent a defamatory publication, was acknowledged. However, each case paid due regard to the public right to know which was not to be lightly interfered with. This factor weighs heavily if the issue concerns a matter of public interest and/or proceedings in court. The practice of "open justice" in our common law jurisdiction is never to be lightly interfered with. Neither case involved allegations of allegedly confidential information being used in breach of fiduciary or contractual duties.

[14] The issue before me is therefore distinguishable. I am not here concerned with issues of free speech or even with the public right to know. The Claimant is a private company and the 3rd and 4th Defendants are directors and/or shareholders who allegedly published private and/or confidential corporate information in breach of their fiduciary duties. The publication was allegedly with intent to injure the Claimant and/or for private gain. The principle normally applicable in defamation claims, being a need to show an overwhelming case on the merits and/or that the case is exceptional, does not apply. There is in this case, as I have said, an arguable case that the Defendants acted and threaten to act in breach of fiduciary duty by communicating to others the Claimant's private and/or confidential information.

[15] The second consideration, when considering whether to grant an interlocutory injunction, has to do with the adequacy of damages as a remedy. I am satisfied that damages will not be an adequate remedy if there is no injunctive relief pending trial and the Claimant ultimately succeeds. The potential effect, on a company of the publication of banking and accounting information, cannot be estimated. In this case there is evidence of some alleged fallout, see paragraphs 29, 32, 33, 37 and,

42 of the affidavit of Gordon Shirley filed on the 23rd June 2021 (Bundle # 1). No one can say what contracts or investments may be lost, or offers of finance not made, due to information published which ought not to have been. The Defendants, on this matter of damages, say that there is no sufficient security to support the proffered undertaking as to damages. I respectfully disagree. The Claimant gave evidence of two motor vessels it owns and their estimated values, see paragraph 48 of the same affidavit of Gordon Shirley. Moreover, as the injunction will be to prevent conduct the Defendants deny and, as the conduct alleged is unlawful, there is little prospect of injury to the Defendants. This is because, if the Defendants are successful at trial, the court will have found they did not commit unlawful acts. Therefore, the consideration of damages as an adequate remedy favours the grant rather than the refusal of an injunction.

[16] In the event another court finds me wrong, on the question of damages, I will consider the overall justice of the case. This also favours the grant of an injunction. Manifestly if the Claimant's confidential information has been used to its detriment then the continuation of such use ought to be prohibited. Restraining the Defendant, from doing that which they deny having done, should cause them no loss. If successful after a trial any embarrassment they may have been caused will be fully vindicated and erased by the court's final judgment. Moreso, because, as I have already indicated, this interlocutory injunctive order involves no finding that the Defendants have in fact misused information.

[17] The mandatory aspect of the injunctive order applied for, being for delivery up of the information allegedly taken, will however be refused. It is convenient to discuss this along with the application for preservation, disclosure, search and/or delivery orders. This will also be refused and for similar reasons. Firstly, there is not presented the strong prima facie case necessary for such an order at this stage. The 1st and 2nd Defendants to my mind have credibly indicated that (a) On completion of the contract they returned the confidential information (b) any such orders will necessarily endanger their confidential relationship with their other clients and, (c) the application is premature and should await the normal discovery

process in a civil trial. The 3rd and 4th Defendants have credibly demonstrated that the information is mostly that which would have come to them, and/or which they are entitled to, in their capacities as directors and/or shareholders of the Claimant.

[18] Secondly, the very comprehensive and detailed expert report of Shawn Wenzel (exhibit GS 4 to the affidavit of Gordon Shirley filed on the 23 June 2021, Bundle #1 pages 41 to 202) suggests that the Claimant already has access to the information allegedly taken, see in particular pages 16 to 19 of that report. In other words, the orders for delivering up and/or for search and/or for preservation are really not necessary for the fair disposal of this claim. I agree that the usual rules for disclosure, and the duty of the Defendants in that regard, will suffice. I bear in mind also the time that has elapsed since the alleged taking of the information. The application was only made for preservation and search on the 1st October 2021, although the Claimant became aware of the alleged misuse of information in July 2021, see paragraph 4 of the affidavit of Gordon Shirley filed on the 1st October 2021 .A letter dated 28th December 2020 issued on the Claimant's behalf indicates that the Claimant was aware since that time that the alleged confidential information was in the Defendants' possession, see paragraph 6 and exhibit GS 22 to the same affidavit. It does stand to reason that any real danger of its destruction, if not already actualised, is perhaps overstated. In these circumstances there is no reason why the discovery process ought not to take its usual course.

[19] Before closing on this aspect of the judgment I need to say something about the Defendants' argument that to order disclosure would be to breach the rule against self-incrimination. A submission they supported by reference to the authorities of ***Rank Film Distributors Ltd and others v Video Information Centre (A Firm) and others [1981] 2 All ER 76*** and ***William Clarke v Bank of Nova Scotia Jamaica Limited et al (2009) HCV 05137*** **unreported Judgment of Brooks J (as he then was) delivered on the 23rd February 2010.** With respect to all counsel concerned there is here a great misreading of the cases. The privilege against self-incrimination is reflected in section 16 (6) (f) of the Constitution of

Jamaica. It is consistent with the presumption of innocence and the burden on the Crown to prove its case beyond reasonable doubt. An accused cannot therefore be required to give evidence against his own interest.

[20] In the case cited, in which a privilege against self-incrimination was upheld, that which was to be produced consisted of statements or documents internal to the party against whom the production orders were to be made. The documents may therefore have contained admissions. It is in that context that the decision in ***Rank*** (cited above) is to be understood. Which is why, at page 80 (c) to (d) of the report, Lord Wilberforce was careful to indicate,

> *"Thus, for present purposes, the orders fall under three heads:*
>
> *vii. Requiring the respondents to supply information*
>
> *viii. Requiring the respondents to allow access to premises for the purpose of looking for illicit copy films and to allow their being removed to safe custody.*
>
> *ix. Requiring the respondents to disclose and produce documents.*
>
> *The orders under (2) were upheld by the Court of Appeal and this part of the court's decision was not seriously contested in this House. In any event I am satisfied that there was jurisdiction to make these orders and that the privilege against self-incrimination has no application to them. The privilege against self-incrimination is invoked as regards (1) and (3). The essential question being whether the provision of the information or production of the documents may tend to incriminate the respondents, it is necessary to see what possible heads of criminal liability there may be …"*

[21] In the case at bar the information to be produced falls into Lord Wilberforce's category (2). This is because the "res" of this case is information, allegedly confidential and allegedly the property of the Claimant, which the Defendants are

alleged to have stolen or taken. Production or handing over of that information cannot in law be the production of documents admitting liability. To so hold would be tantamount to saying that a person who has stolen a goat, and who has the stolen goat on his property, cannot be ordered by the court to hand over the goat as to do so would be to admit it had been stolen. This case, in short, does not require the Defendants to hand over their own documents or information or statements only information which is the property of the Claimants.

[22] I turn now to give my decision on costs, in relation to a judgment I delivered on the 23rd November 2021, being [2021] JMCC Comm 43 (in this suit). In that judgment I struck out those parts of the claim which did not relate to a breach of the confidentiality agreements and which, were or might conveniently be, covered in an earlier claim. The 1st and 2nd Defendants attended but did not participate in that hearing.

[23] In written submissions the Claimant argues that, when exercising its discretion on costs, the court must have regard to all the circumstances. These are set out in the Civil Procedure Rules, Rule 64: 6(4) and includes whether a party has succeeded on particular issues even if not successful on the entire issue. The Claimant urged me to make no order as to costs. The Defendants had sought to have the entire claim dismissed or, in the alternative, to have seventeen paragraphs of the Particulars of Claim struck out. However, they only succeeded in having eleven paragraphs struck out. The Claimant had therefore been partially successful.

[24] The 3rd and 4th Defendants on the other hand urged this court to award costs in their favour. Reliance was also placed on Rule 64.6 (4) as well as the general principle that costs should follow the event. They relied too on the conduct of the Claimants in duplicating claims which was tantamount to “harassment.” They also seek orders for costs thrown away in relation to the paragraphs struck out, for certificate for two counsel and, for immediate taxation.

[25] Having considered the respective submissions, it is my decision to award the 3rd and 4th Defendants ½ costs of that application and ½ costs thrown away. This is because, although unsuccessful in the application to have the claim dismissed, they were partially successful on the application to have certain paragraphs struck out. Most of the time was spent arguing for striking out of certain paragraphs rather than for dismissal of the entire claim. I will not grant a certificate for two counsel as that application, to strike out, was neither so complex nor unusual as to warrant the same. I will permit immediate taxation as I bear in mind the Defendants are individuals whilst the Claimant is a corporate entity with proven assets. There is pending litigation and the Defendants may need these resources in the short and medium term.

[26] Similar considerations affect my decision on costs in the applications now decided. The Claimant has failed entirely in the application filed on the 1st October 2021. Costs therefore will follow that event. The Claimant has been mostly successful in the application filed on the 23rd June 2021. However, as with most interlocutory injunctions, it is the result of a trial which will determine whether or not a restraint ought to have been imposed. Costs of that application will therefore be costs in the claim. These applications were complex and a certificate for two counsel is appropriate. The applications were heard together and it is fair to say time spent in argument on each evenly balanced.

[27] In the premises my orders are as follows:

1. An order made, until the trial of this action or further order of the court, in terms of paragraphs 1, 3 and 4 of the Notice of Application filed on the 23rd of June 2021.

2. The Claimant through its counsel gives the usual undertaking as to damages.

3. The Notice of Application filed on the 1st October 2021 is dismissed and the relief sought therein is refused.

4. Costs of the Notice of Application filed on the 23rd June, 2021 will be costs in the claim and a certificate for two counsel is granted.

5. Costs of the Notice of Application filed on the 1st October 2021 will go to the 1st, 2nd, 3rd and 4th Defendants to be taxed if not agreed, and a certificate for two counsel is granted.

6. The taxing Master or Registrar should note that both applications were argued at the same time. It is therefore appropriate to apportion the time spent arguing in chambers equally.

7. With respect to the Notice of Application filed on the 5th October 2021, and which was decided on the 23rd November 2021, half costs of the application and half costs thrown away will go to the 3rd and 4th Defendants against the Claimants, certificate for one counsel is granted.

8. Permission is granted for the immediate taxation of all costs awarded.

David Batts
Puisne Judge.