

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MR JUSTICE BROWN JA**

SUPREME COURT CIVIL APPEAL NO COA2021CV00086

BETWEEN	JOHN LEVY	1st APPELLANT
AND	COURTNEY WILKINSON	2nd APPELLANT
AND	ECOMARINE ENERGY COMPANY LIMITED	3rd APPELLANT
AND	ECO PETROLEUM LIMITED	4th APPELLANT
AND	WEST INDIES PETROLEUM LIMITED	RESPONDENT

Ms Ashley Mair instructed by Mayhew Law for the appellants

**Ms Stephanie Williams and Ms Keisha Spence instructed by Henlin Gibson
Henlin for the respondent**

29, 30 November, 1 December 2023 and 30 October 2026

Company law – Fiduciary duties of former directors – Allegations of conflict of interest and breach of fiduciary duties - Restraint of trade clause in share sales agreement – Whether restraint of trade clause breached

Injunction – Whether serious issue to be tried – Whether conduct of former directors support a finding of breach of fiduciary duties and conflict of interest – Whether interim injunctions properly granted to company – Whether terms of injunction to prevent procuring or inducing a breach of restraint of trade too wide - Whether damages an adequate remedy – Whether judge erred in granting a mandatory injunction in interlocutory proceedings which provided a final remedy

Costs – Whether judge erred in awarding costs against the successful party

EDWARDS JA

Introduction

[1] This matter involved an appeal and counter-notice of appeal against the decision and orders of Laing J (as he then was) ('the learned judge'), made on 28 September 2021 (and amended on 1 October 2021 pursuant to the slip rule), in the Commercial Division of the Supreme Court. The appeal was filed on 30 September 2021 by John Levy, Courtney Wilkinson, Ecomarine Energy Company Limited ('Ecomarine'), and Eco Petroleum Limited ('Eco Petroleum'), against the respondent, West Indies Petroleum Limited ('WIPL'). The learned judge had granted temporary injunctions in respect of a notice of application for court orders filed by WIPL on 13 September 2021, in its claim against the appellants and others in the court below. The learned judge also made costs orders against WIPL, the successful party in the application for interim injunctions heard and decided by him. The learned judge's reasons for those orders are contained in his written decision bearing neutral citation [2021] JMCC COMM 30.

[2] The counter-notice of appeal was filed on 19 October 2021, by WIPL, seeking to challenge the costs order of the learned judge. That counter-notice was filed out of time. Therefore, on 30 March 2023, WIPL filed a notice of application for court orders seeking an extension of time within which to file application for permission to appeal and for permission to appeal. Interestingly, this application listed Donna Levy and Sprint Fuels & Lubricants Ltd as parties, notwithstanding that the counter-notice of appeal did not name them, although they were defendants in the claim in the court below.

[3] We first heard WIPL's applications for extension of time and for leave to appeal (the counter-appeal). That application was supported by the affidavit of Ronece Simpson, filed 30 March 2023, as well as the affidavits of Ariana Mills, filed on 21 November 2023 and 29 November 2023. Essentially, the application was based on the following grounds:

(a) that leave to appeal was required based on section 11(1)(e) of the Judicature (Appellate Jurisdiction) Act;

- (b) the applicant had been unaware of this fact until after the time for filing had passed;
- (c) the applicant applied for and was refused leave in the court below; and
- (d) that the applicant had an appeal with a real prospect of success.

[4] The latter ground was based on the contention that the learned judge had erred in ordering costs against WIPL, the mostly successful party, on the basis that the application should have been heard together with that of Island Lubes Distributors Limited ('Island Lubes'), and that it was the learned judge himself who had refused WIPL's application to hear the matters together. It was also contended that the delay was not deliberate or inordinate, there was a good reason for the delay, and that the respondents would not suffer any prejudice from the grant of the orders being sought.

[5] We found that WIPL's appeal had a real chance of success, and that, in the circumstances, the delay was not inordinate, and no prejudice would have been caused to the other side in granting the orders sought. In relation to the delay, the evidence was that the application for permission to appeal was filed in the Supreme Court on 20 January 2022, approximately four months after the learned judge's decision on 28 September 2021. The hearing of that application was delayed by over a year due to various reasons that were outside the control of the applicant. In relation to the issue of prejudice, notice of WIPL's intention to appeal the costs order had been given by way of the counter-notice of appeal filed and served as early as 20 October 2021, and the appeal had not yet been heard. Therefore, it could hardly be said that the appellants would have been prejudiced.

[6] We, therefore, made orders granting the extension of time within which to appeal and for permission to appeal the learned judge's order for costs made on 28 September 2021. We also ordered that the costs of the application be costs in the appeal. Thereafter, we heard the appeal and counter-appeal, and made the following orders:

- "1. The appeal is allowed in part.

2. Orders 3a and b of the orders of the Honourable Mr Justice Laing made on 28 September 2021, are set aside.
3. The appellants are entitled to half their costs of this appeal.
4. On the [counter-appeal], costs order made by the Honourable Mr Justice Laing on 28 September 2021 is set aside and substituted therefor is an order that costs be costs in the claim.
5. No order as to costs in terms of the counter-notice of appeal.”

[7] These are our reasons for those orders.

Background

[8] It is necessary, as briefly as possible, to set out the background facts to this case. WIPL is the parent company of Island Lubes, which at the material time, was a limited liability company in the business of importing, distributing and selling lubricants and related products. WIPL was, at the material time, a limited liability company in the business of purchasing and distributing petroleum products, including lubricants. Mr Levy was a director of both companies, and Mr Wilkinson was a director of WIPL. Mrs Levy, the wife of Mr Levy, was the company secretary of Island Lubes, but was also, allegedly, a *de facto* director of Island Lubes. Mr Levy and Mrs Levy were the sole shareholders in Island Lubes until they sold and transferred all their shares to WIPL on or about 18 February 2020. This was done pursuant to a sales agreement dated 14 October 2019.

[9] It was alleged that, as a term of the sales agreement, among other things, Mr and Mrs Levy were to resign from their positions. Mrs Levy resigned from her position as secretary in April of 2020, but Mr Levy did not resign as director. It was also alleged that Mr and Mrs Levy failed to comply with other terms of the sales agreement including a restraint of trade clause. There was a further complaint that, during this time, various hostile actions were taken by Mr Levy and Mr Wilkinson against both companies as well as WIPL’s chief executive officer. This included sending various correspondence to third parties that, it was alleged, tarnished the companies’ reputations and jeopardized their business and relationships with stakeholders. Of note, were an email sent to Sygnus

Capital Limited and the National Commercial Bank Jamaica Limited ('NCB') in November 2020, and a letter sent to the Minister of Economic Growth & Job Creation and other stakeholders on 3 February 2021. These alleged hostilities culminated in the filing of a claim in the Supreme Court for relief under section 213A of the Companies Act. Thereafter, on 9 February 2021, Mr Levy and Mr Wilkinson were removed from their positions as directors of WIPL. They then went on to form Ecomarine and Eco Petroleum on 16 February 2021 and 6 April 2021, respectively.

[10] On 11 June 2021, Island Lubes and WIPL filed a claim in the Supreme Court, naming Mr Levy, Mrs Levy, Mr Wilkinson, Sprint Fuels & Lubricants Limited ('Sprint Fuels') and Ecomarine as defendants. The claim, which was amended several times, sought injunctions, damages, and other relief, for breach of confidence, breach of contract, breach of fiduciary duty and/or conflicts of interest, interference with contractual relations, misappropriation, detinue or conversion, and fraud. At that time, and at all material times, Mr and Mrs Levy were the sole directors and shareholders of Sprint Fuels, and Mr Levy and Mr Wilkinson were the sole directors and shareholders of Ecomarine. On the said date, Island Lubes filed its first application for an injunction against the appellants, except for Eco Petroleum, who was not yet a defendant to the claim. On 22 July 2021, Eco Petroleum was added as a defendant to the claim.

[11] In the claim, Island Lubes and WIPL alleged, among other things, that Mr Levy, Mrs Levy, and Mr Wilkinson had breached the aforementioned sales agreement, breached their fiduciary duty to Island Lubes and WIPL, and interfered with contractual relations by misusing their positions and confidential information garnered during the course of their directorship with the companies. It was also alleged that, after Mr Levy's and Mr Wilkinson's removal from the claimant companies, they embarked on a course of conduct that caused harm to the companies and that this was done for the improper purpose of securing personal benefits for themselves and the defendant companies.

[12] On 16 June 2021, the learned judge heard the application for interim relief. The application sought a freezing order, a search and seizure order and/or a preservation

order, as well as various other injunctions against the appellants. The learned judge granted various interim injunctions restraining Mr Levy, Mrs Levy, Mr Wilkinson, Ecomarine, and Eco Petroleum, by themselves, their servant and/or their agents from taking certain actions complained of in the application and claim. The other reliefs sought were refused.

[13] The *inter partes* hearing was set for 5 July 2021 but was adjourned to 13 July 2021. An amended notice of application was filed on 6 July 2021, joining WIPL as an applicant for injunctive relief. On 13 July 2021, the learned judge was informed that WIPL was being joined as an applicant for the injunction. Opposing counsel made an objection to this course of action. The learned judge expressed concerns about proceeding with the *inter partes* hearing with WIPL as a joint applicant at that stage, after an interim injunction had already been granted to Island Lubes as the sole applicant. The learned judge upheld the objection of opposing counsel (the full reasons for which will be set out later in this judgment) and he commenced hearing the application, *inter partes*, with Island Lubes as the sole applicant. On 19 August 2021, the learned judge granted an injunction in favour of Island Lubes against Mr Levy, Mrs Levy, and Mr Wilkinson pending the trial of the claim. His reasons for doing so are contained in his written judgment bearing neutral citation [2021] JMCC COMM 27.

[14] On 13 September 2021, the amended notice of application that included WIPL as a 2nd applicant came on for hearing. Concerns were raised by the learned judge and opposing counsel as to the appropriateness of the application in the form it was, having regard to the fact that the Island Lubes' application had already been heard. It was agreed by the parties, with the approval of the learned judge, that it would be more appropriate for WIPL to file a fresh application as the sole applicant for injunctive relief. The hearing thus commenced on that basis.

[15] At the beginning of the hearing, certain concessions were made by the parties, including that the allegations against Mrs Levy would not be pursued. On 28 September 2021, the learned judge granted the injunction, which is the subject of this appeal and

counter-appeal. He found that there were serious issues to be tried with regard to the allegations of: breach of fiduciary duties by Mr Levy and Mr Wilkinson; the procurement of a breach of the sales agreement by Mr Wilkinson, Ecomarine, and Eco Petroleum; and unlawful interference with employee contracts by Mr Wilkinson that caused loss by unlawful means. As to the question of the adequacy of damages, the learned judge found that damages would not be an adequate remedy if injunctive relief was not granted. He found that the balance of convenience lay with WIPL because WIPL's case was stronger, and irreparable damage would be caused to the company if injunctive relief was not granted.

[16] The appellants filed notice and grounds of appeal on 30 September 2021, and later, on 1 October 2021, filed a notice of application for a stay of execution of 3(a) and (b) of the learned judge's orders. That application was heard by a single judge of this court and "refused in part", on 22 December 2021, with an order made to the effect that the appellants were not required to sell or part with their shares in Ecomarine and Eco Petroleum.

The appeal

[17] The following grounds of appeal, as set out in the notice of appeal filed 30 September 2021, were argued at the hearing:

- "1. The Learned Judge erred when he found that there was a serious issue to be tried on the claim for breach of fiduciary duty in circumstances, where at the time of the incorporation of the 3rd and 4th Appellants [sic] the 1st and 2nd Appellants had ceased being directors of the Respondent and their fiduciary duty to avoid conflicts of interest had ended.
2. The Learned Judge misunderstood misinterpreted and misapplied the evidence before him to draw the inferences that the conduct of the 1st and 2nd Appellants while they were directors of the Respondent was such as to support a claim for breach of fiduciary duty and a duty to avoid conflicts of interests.

3. The Learned Judge erred in granting the orders at paragraphs 3(a) and (b) which are in effect mandatory injunctions as these orders require the Appellants to dispose of their shares and/or wind up Eco Petroleum and Eco Marine, which companies were already established at the time of the granting of the injunction.
4. The Learned Judge erred in particular in granting the orders for injunction and particularly the orders at paragraphs 3 (a) and (b) of the Order which essentially gave the Respondent its final remedy at an early stage of the proceedings in circumstances where the evidence was not overwhelmingly strong;
5. The learned judge failed to consider and apply a higher standard in the exercise of his discretion to grant the injunction having regard to the fact that the effect of some of the orders for injunction in particular the orders at paragraphs 3 (a) and (b) were mandatory in nature and which would effectively dispose of the claim;
6. The Learned Judge erred in granting an injunction restraining the 1st, 3rd and 4th Appellants from inducing or procuring the 1st Appellant's and Donna Levy's breaches of contract dated the 14th day of October 2019 in the terms ordered in circumstances where the terms of the injunction were much wider than the restraint in the said contract and the alleged breaches by the 1st Appellant and Donna Levy.
7. The Learned Judge erred in finding that damages would not be an adequate remedy for the Respondent as it would not be difficult to calculate the loss to the Respondent;
8. The Learned Judge erred in finding that damages would not be an adequate remedy for the Respondent especially in circumstances where if it were to be determined at trial that the 1st and 2nd Appellants had in fact breached their fiduciary duty, they would be liable to account to the Respondent for any profits made as a result of such breach arising from conflicts."

Scope of review

[18] This matter involves the review of the exercise of the discretion of the learned judge in the court below. It is well accepted that the approach to be taken by this court

when reviewing matters of such nature is that it will only set aside such a decision where the judge's discretion was based on a misunderstanding of the law or evidence, an inference that certain facts did or did not exist, or where the decision was one that was so aberrant that no judge regardless of his duty could have reached it (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 and **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, at page 1046).

Ground 1 - The Learned Judge erred when he found that there was a serious issue to be tried on the claim for breach of fiduciary duty in circumstances, where at the time of the incorporation of the 3rd and 4th Appellants [sic] the 1st and 2nd Appellants had ceased being directors of the Respondent and their fiduciary duty to avoid conflicts of interest had ended.

Ground 2 - The Learned Judge misunderstood misinterpreted and misapplied the evidence before him to draw the inferences that the conduct of the 1st and 2nd Appellants while they were directors of the Respondent was such as to support a claim for breach of fiduciary duty and a duty to avoid conflicts of interests.

Discussion

[19] These grounds sought to challenge the learned judge's application of the law and his findings of fact regarding breaches of fiduciary duty and the duty to avoid conflicts.

A. Submissions

[20] It was contended by counsel for the appellants that the learned judge's finding that there was a serious issue to be tried, which was based on his determination that the appellants' conduct was such that it could support a finding of breach of fiduciary duty, was not supported by the evidence before him. It was submitted that, based on the law relating to the liability of a former director for breach of fiduciary duty, where he sets up a business after ceasing his directorship, the inferences made by the learned judge were not supported by the facts. It was argued that fiduciary duties do not survive the ending of a fiduciary relationship, unless it can be established that there was a lack of good faith and exploitation of relevant information during the time at which the person was a director. A causal link would also have needed to be established, it was submitted,

between the exploitation of the relevant information that constituted the alleged breach of duty, and the impugned directors' enterprise. The appellants contended that such a finding was not supported by the facts in this case. There was no evidence, it was said, that prior to their removal as directors, the appellants "were planning to divert the business or any business opportunity of the respondent to themselves". The evidence only showed that the appellants were concerned about the direction and management of the company.

[21] Consequently, it was contended, the use of the two letters written by the appellants prior to their removal as directors by the learned judge, was wrong, as those letters did not support any inference that there had been a breach of fiduciary duty "to avoid conflict of interest by appropriating for themselves a maturing business opportunity of the respondent".

[22] The cases of **Foster Bryant Surveying Limited v Bryant** and another [2007] EWCA Civ 200 ('Foster Bryant') and **Island Export Finance Ltd v Umunna** and another [1986] BCLC 460 ('Island Export') were relied on for these submissions.

[23] WIPL, however, argued that there was more than enough evidence before the learned judge to support his finding that there was a serious issue to be tried in respect of the allegations of breach of fiduciary duty as against Mr Levy and Mr Wilkinson. The fiduciary duties of a director, it was argued, begin during the director's time in office, but do not necessarily end after the director leaves office for whatever reason. The evidence before the learned judge, it was submitted, was that the conduct that necessitated the claim under this ground started whilst Mr Levy and Mr Wilkinson were directors and continued after their termination. The evidence of this conduct was summarized by WIPL as follows:

"a. ...they knew of the [WIPL's] expansion plans including the role of the [WIPL's] subsidiary company in the plans.

b. As directors, [Mr Levy and Mr Wilkinson] embarked on a course of conduct that targeted [WIPL] and its subsidiary and their business in the petroleum products or lubricant market.

c. After [Mr Levy and Mr Wilkinson] ceased to be directors of [WIPL], they continued the course that they had commenced by forming [Eco Petroleum] to carry on a business that competes directly and indirectly with [WIPL] and its subsidiary.

d. They took and misused of [sic] information, property and opportunities of the [WIPL] and its subsidiary.”

[24] In support of those assertions, WIPL pointed to the affidavits of Gordon Shirley filed 11 June 2021, 9 July 2021, and 22 July 2021. In relation to the law relating to a director’s fiduciary duties, the respondent relied on section 174A of the Companies Act of Jamaica, as well as the cases of **Allfiled UK Ltd v Eltis and others** [2015] EWHC 1300 (Ch), **Canadian Aero Service v O’Malley** 1973 Carswell Ont 236 F, **Resfab Manufacturer of Ressort Inc v Archambault** 1985 Carswell Que 286, and **Foster Bryant**. In relation to the latter case, it was submitted that the appellants misconstrued the principles stated therein, and that the learned judge’s application of the case in determining whether there was a serious question to be tried for breach of fiduciary duty was correct.

B. The law and applicable principles regarding the grant of an interlocutory injunction

[25] It has long been accepted that the questions to be considered in determining whether or not to grant an interlocutory injunction are (1) whether there is a serious issue to be tried; (2) whether damages would be an adequate remedy; and, (3) whether the balance of convenience lies with the grant or refusal of the injunction. These are the principles set out in the case of **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504, which were accepted in **National Commercial Bank Jamaica Ltd v Olint Corpn Ltd** [2009] UKPC 16.

[26] In the latter case, the Privy Council reiterated the purpose of an interlocutory injunction and the principles to be applied in determining whether one should be granted.

It noted that the purpose is “to improve the chances of the court being able to do justice after a determination of the merits at the trial”, and that, having considered the various factors and that there is a serious issue to be tried, the deciding factor is whether the grant or withholding of the injunction is likely to cause irreparable prejudice if it is later determined that the injunction should not have been granted. The basic principle, the Board said, is that “the court should take whichever course seems likely to cause the least irreparable prejudice to one party or the other” (see paras. 16 to 19). The court is required to examine the particular facts of the case to determine what the likely effect of the injunction will be.

[27] In respect of the question as to whether there is a serious issue to be tried, the court need only determine that the claim is not frivolous or vexatious. There need not be a ‘prima facie case’ or a ‘strong prima facie case’ (see page 510 of **American Cyanamid**).

C. Analysis and disposal of grounds 1 and 2

[28] The learned judge correctly stated the principles applicable to the grant of an interim injunction and went on to assess the evidence before him to determine whether there was a serious issue to be tried with regards to the allegations. Those allegations surrounded the misuse of confidential information, breach of fiduciary duty, procuring a breach of the agreement, unlawful interference with business contracts of WIPL and the contracts of WIPL’s employees, and causing loss by unlawful means.

[29] In relation to the alleged breaches of the duty to avoid conflict, the learned judge found that the cases of **Allfiled UK Limited** and **Foster Bryant** correctly stated the applicable law in relation to the duties of a former director of a company. From those cases, he considered that it was clear that the duties of a director could subsist after the end of the relationship.

[30] In the case of **Foster Bryant** (relied on by the parties and the learned judge), at para. [8], the court regarded the principles outlined by Livesey QC sitting as a deputy

judge of the High Court in **Hunter Kane Ltd v Watkins** [2003] EWHC 186 (Ch), as a correct statement of the law. Those principles, that were largely based on the principles set out by Lawrence Collins J in **CMS Dolphin Ltd v Simonet and another** [2001] 2 BCLC 704, as cited in **Foster Bryant**, are 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 specificity 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 [sic] 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).”

[31] The learned judge considered the 8th principle above particularly applicable in showing the “multiplicity of factors” that had to be examined in determining whether there had been a breach of fiduciary duty by a former director in diverting a corporate opportunity. Having gone through the various assertions and related evidence on both sides in this regard, the learned judge found that “it is not always possible to find a ‘smoking gun’/conclusive evidence which demonstrates that the former director was plotting to exploit the company’s business opportunity once his relationship with the company was terminated”, and that, in this case, the “contested positions” of the parties raised issues that could only be resolved by examining all the factors at a trial. Among the issues he outlined were the following:

- i. “[W]hether the proposed operations of [Eco Petroleum] will be exploiting a business opportunity that was being explored by WIPL when Mr. Wilkinson was a director...” (see para. [53]);
- ii. “whether the incorporation of Ecomarine and [Eco Petroleum] and their operation in pursuance of business opportunities by Mr. Wilkinson after he ceased to be a director was as a result of ‘...*his position with the company rather than a fresh initiative that led him to the opportunity that he later acquired*’ (per Rix LJ *supra*)” (see para. [56]);
- iii. If yes to the above, “whether this amounts to the wrongful diversion of a corporate opportunity or corporate opportunities of WIPL, which it intended to exploit using its subsidiary Island Lubes, a plan of which both Mr Levy and Mr. Wilkinson were aware” (see para. [56]); and,
- iv. “[W]hether Mr. Levy and Mr. Wilkinson breached their fiduciary duty to WIPL by their conduct” (see para. [56]).

[32] The learned judge also accepted that the submission by counsel for WIPL, that the conduct of Mr Levy and Mr Wilkinson whilst they were directors of WIPL, including the

disruptions they caused to the company's affairs by correspondence to the Ministry of Economic Growth and Job Creation, as well as to Sygnus Capital, were capable of supporting the finding of a breach of fiduciary duty. Thus, the learned judge granted the interim injunction.

[33] The learned judge's findings in this regard cannot be faulted. He correctly stated the law and applicable approach and did a thorough and reasoned assessment of the pleadings and evidence before him.

[34] As to ground 1, there was simply no merit. That ground pre-supposes that there can be no fiduciary duty on a former director to avoid conflicts of interest after the directorship has ended. That is not correct. The law is clear that the fiduciary duties of a director, including to avoid conflicts of interest, may subsist after the termination of the directorship, depending on certain factors. This is the position in the case of **Foster Bryant**, relied on by the appellants themselves.

[35] As to ground 2, it could not be said that the learned judge "misunderstood misinterpreted and misapplied the evidence before him to draw the inferences that the conduct of Mr Levy and Mr Wilkinson while they were directors of the Respondent was such as to support a claim for breach of fiduciary duty and a duty to avoid conflicts of interests". The learned judge's findings were based on the conduct of the men both during and after their tenure as directors. It bears repeating that in matters of this nature, as it relates to the question of whether there is a serious issue to be tried, all that is required is for the judge to determine, on the material before him, that the claim is not frivolous or vexatious. Having examined the material that was before the learned judge contained in the record of appeal, we were of the view that the learned judge was well placed to find as he did. In other words, the competing assertions in the pleadings and the evidence before the court, raised issues that needed to be resolved at a trial, and the claim could not be regarded as frivolous by any means. As stated by the court in **American Cyanamid**, at page 510:

“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.”

[36] What is clear, and what would have been made clear to the learned judge, based on the evidence, was that Mr Levy and Mr Wilkinson sat as directors in WIPL meetings where certain prospective business opportunities and matters had been discussed. Further, after their termination, they formed businesses that appear to be of a similar nature and in competition with WIPL.

[37] These grounds, therefore, had no merit.

Ground 3 – The Learned Judge erred in granting the orders at paragraphs 3(a) and (b) which are in effect mandatory injunctions as these orders require the Appellants to dispose of their shares and/or wind up Eco Petroleum and Eco Marine, which companies were already established at the time of the granting of the injunction.

Ground 4 – The Learned Judge erred in particular in granting the orders for injunction and particularly the orders at paragraphs 3(a) and (b) of the Order which essentially gave the Respondent its final remedy at an early stage of the proceedings in circumstances where the evidence was not overwhelmingly strong

Ground 5 – The learned judge failed to consider and apply a higher standard in the exercise of his discretion to grant the injunction having regard to the fact that the effect of some of the orders for injunction in particular the orders at paragraphs 3(a) and (b) were mandatory in nature and which would effectively dispose of the claim

Discussion

[38] These grounds challenged the correctness of the grant of an injunction to restrain Mr Levy and Mr Wilkinson from breaching fiduciary duties and Mr Wilkinson from engaging in a conflict of interest.

A. Submissions

[39] The appellants complained that the learned judge, in making the orders he did at 3(a) and (b) of his orders, effectively gave the respondent the final remedy it sought in the claim. The effect of the orders, they said, was that Mr Levy and Mr Wilkinson would be immediately required to cease their directorship and dispose of their shares in Ecomarine and Eco Petroleum.

[40] This type of order, it was submitted, is not ordinarily granted at the interlocutory stage, and should only be so granted where the merit of the claimant's case is overwhelmingly strong. It was contended that this was not so in this matter. The case of **Cayne and another v Global Natural Resources plc** [1984] 1 All ER 225 and an excerpt from Halsbury's Laws of England (volume 11(2020), para. 1092 – mandatory injunctions on interim applications, were relied on for these submissions. The appellants also relied on the case of **Allfiled UK Ltd** for the proposition that in dealing with an application for injunctive relief, the court should not grant a wider restraint than is necessary and must seek to balance the protection of the claimant's legal rights with the risk of doing injustice to the other side.

[41] Further, it was argued, the terms of orders 3(a) and (b) were too broad to be enforceable, and were highly prejudicial to the appellants, in that the orders sought to prevent the appellants from working in an industry in which they had made their livelihood for years, as well as to prohibit them from purchasing shares in the companies within the lubricant and petroleum industry. This, it was contended, went beyond what was necessary to protect the respondent's interest.

[42] The respondent submitted that the orders did not give it a final remedy and did not require Mr Levy and Mr Wilkinson to dispose of their shares. However, it was argued, the court may grant such an injunction where the court feels "a high degree of assurance that at the trial it will appear that the injunction was rightly granted". The case of **Olint** was relied on in that regard.

B. Analysis and disposal of grounds 3, 4 and 5

[43] In granting injunctive relief a court ought not to grant more than what is required to protect the rights sought to be protected. In **Alfiled UK Ltd**, at para. 122, the court stated as follows:

“Plainly, the court must, in determining whether and if so what interim injunctive relief to grant, seek to (a) **impose no wider restraint that is necessary for the protection of the Applicant's property** and confidential information (see *Commercial Plastics Ltd v Vincent* [1965] 1 QB 623 at 643(C/A)), and (b) **balance the objective of protecting what appear to be enforceable legal rights or interests against the risk that such rights may ultimately not be established in the same form** (or at all) and therefore the risk of doing an injustice.” (**Emphasis added**)

[44] Orders 3(a) and (b) of the learned judge's orders stated as follows:

“3. An injunction restraining [John Levy and Courtney Wilkinson] from breaching their fiduciary duties to [WIPL] and from conflict of interest pending trial or further order, by engaging in, inter alia, 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 petroleum and lubricants for passenger, commercial vehicles, and maritime vessels in Jamaica, by [WIPL];

b. having any proprietorship interest as shareholder or partner in any business which is identical, similar to or competitive with [WIPL] in Jamaica.”

[45] On a plain reading of these orders, it is evident that the effect of enforcing them, would include, as submitted by the appellants, Mr Levy and Mr Wilkinson having to dispose of their shares already held in Ecomarine and Eco Petroleum, and ceasing their directorship in those companies.

[46] Further, the appellants' submission that these orders went beyond what was necessary to protect the interests of the respondent had merit. The orders, if enforced, would certainly have had the likely effect of causing irremediable prejudice to the appellants. Whilst it is true that a court may make such an order based on the view it takes of the strength of the applicant's case and where the circumstances so warrant, we agreed with the appellants that the orders were unwarranted in the circumstances of this case (see **Olint**, paras. 19 and 20). It was our view that the other injunctions granted by the learned judge were sufficient to restrain the appellants from continuing the alleged harmful breaches.

[47] For those reasons, we granted the order at para. [4] above setting aside orders 3(a) and (b) of the learned judge.

Ground 6 – The Learned Judge erred in granting an injunction restraining the 1st, 3rd and 4th Appellants from inducing or procuring the 1st Appellant's and Donna Levy's breaches of contract dated the 14th day of October 2019 in the terms ordered in circumstances where the terms of the injunction were much wider than the restraint in the said contract and the alleged breaches by the 1st Appellant and Donna Levy

Discussion

[48] This ground challenged the grant of an order for injunction in relation to clause 8 of the sale agreement between Island Lubes and Mr and Mrs Levy.

A. Submissions

[49] Regarding this ground, counsel for the appellants submitted that, in relation to the fourth order granted by the learned judge, which related to clause 8 of the relevant sale agreement, the terms of the injunction were wider than the restraint in the contract. Furthermore, it was submitted, the meaning of the clause is "plain, ordinary, and clear" and the clause only related to Island Lubes and not to WIPL. Counsel rested on the statement of principles in **Allfiled UK Ltd**, at para. 122.

B. Analysis and disposal of ground 6

[50] Clause 8 of the relevant agreement for the sale of shares, insofar as is relevant, enjoined Mr and Mrs Levy, as the vendors, as follows:

"8. RESTRAINT OF TRADE

8.1 Except in relation to any existing entities or ventures at the Completion Date, the vendors hereby undertake to procure that neither they nor any of the Company's directors or officers, for a period of three (3) years after the Completion Date, be:

- (a) on its own account or in conjunction with others and whether directly or indirectly 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 Business in Jamaica at the date of signing this Agreement;
- (b) have any proprietorship interest as shareholder or partner in any business which is identical, similar to or competitive with the Business of the Company in Jamaica;
- (c) at any time after the Completion Date disclose any confidential information in respect of the Company 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 Company, for the purposes of employment by the Vendors in an enterprise or venture materially competing with the Company;
- (e) at any time after Completion carry on business or trade under any name, style, logo, get-up, or image which is or had been used in respect of the Company or which is calculated to cause confusion with such a name, style, logo, get-up or image or infer a connection with the Company or the Purchaser.

..."

[51] At paras. [62] to [67] of his decision, the learned judge assessed whether there was a serious issue to be tried in respect of the claim for inducing and/or procuring a breach of clause 8 of the agreement by Mr Wilkinson, Ecomarine and Eco Petroleum. Having relied on the cases of **OGB Ltd and another v Allan and others; Douglas and another v Hello! Ltd and others (No. 3); Mainstream Properties Ltd v Young and others** [2007] 4 All ER 545 HL, and **Lumley v Gye** [1853] 2 E & B 216; 118 ER 749, the learned judge reasoned as follows:

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

[65] I am prepared to accept at this stage that having regard to the close connection between Mr. Levy and Mr. Wilkinson and their involvement in Ecomarine and [Eco Petroleum], there is ample evidence on which a Court could reasonably conclude that Mr. Wilkinson would have become aware of the restraint imposed on Mr. Levy by the Agreement. In such circumstances there is a serious issue to be tried as to whether Mr. Wilkinson induced a breach by Mr. Levy of the Agreement. By parity of reasoning there is also a serious issue to be tried as to whether [Eco Petroleum] and Ecomarine, subsequent to their incorporation, were responsible for inducing the continuing breach by Mr. Levy."

[52] The learned judge, consequently, ordered as follows:

"4. An injunction restraining [Courtney Wilkinson, Ecomarine and Eco Petroleum] from inducing and/or procuring and/or continuing to induce and/or procure [Mr John Levy and Mrs Donna Levy] to breach clause 8 of the contract dated the 14th day of October 2019 and in particular for the period of three (3) years from the 14th October 2019:

- 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 Business in Jamaica at the date of signing this Agreement.

- b. having any proprietorship interest as shareholder or partner in any business which is identical, similar to or competitive with the Business of [WIPL] in Jamaica;
- c. at any time after the Completion Date disclose any confidential information in respect of [WIPL] 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], for the purposes of employment by [Mr John Levy and Mrs Donna Levy] in an enterprise or venture materially competing with [Island Lubes].”

[53] It is to be noted that this ground, as framed, challenged the scope of the injunction and not the learned judge’s decision to grant it. Whilst the restraint in clause 8 seeks to restrain Mr and Mrs Levy, as vendors, from competing with the business of Island Lubes, WIPL was a party to the contract as the purchaser of all the shares in Island Lubes. It cannot seriously be argued that clause 8 was not intended to enure to the benefit of WIPL. We, therefore, rejected the argument by the appellants that clause 8 only related to Island Lubes.

[54] Clause 8 restrains the parties to the contract who were vendors, that is, Mr and Mrs Levy. The learned judge granted the interim injunction to restrain Mr Wilkinson, Ecomarine and Eco Petroleum, who were not parties to the contract, from inducing and/or procuring a breach of clause 8 of the contract, or from continuing to do so. We did not agree, therefore, that the learned judge went beyond what was necessary to protect the rights of WIPL, in the interim.

[55] We found no merit in this ground.

Ground 7 – The Learned Judge erred in finding that damages would not be an adequate remedy for the Respondent as it would not be difficult to calculate the loss to the Respondent

Ground 8 – The Learned Judge erred in finding that damages would not be an adequate remedy for the Respondent especially in circumstances where if it were to be determined at trial that the 1st and 2nd Appellants had in fact breached their fiduciary duty, they would be liable to account to the Respondent for any profits made as a result of such breach arising from conflicts

Discussion

[56] These grounds challenged the learned judge's finding that damages were not an adequate remedy.

A. Submissions

[57] The appellants submitted that the learned judge erred in fact and in law in finding that damages were not an adequate remedy, because the liability of a director for damages for breach of fiduciary duties where the breach is of the no-conflict rule, is limited to profits acquired under the 'no profit rule'. The case of **Boardman and Another v Phipps** [1967] 2 AC 46 was relied on in this regard. Counsel contended that the matter was a commercial one and that although damages would be difficult to quantify, it was not impossible.

[58] The respondent, however, submitted that the learned judge did not err in finding that damages would not be an adequate remedy, since the damage to the respondent's business, financial and contractual relationships, as well as the appellants' improper use or misuse of confidential information to harm the respondent, could not be monetarily assessed. Further, the respondent was of the view that the appellants would not have desisted from their harmful actions towards it if the injunction had not been granted.

B. Analysis and disposal of grounds 7 and 8

[59] The approach a court should take in considering whether damages would be an adequate remedy is set out in **American Cyanamid**, at pages 510 to 511. There, the court said:

“...[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.” (Emphasis added)

[60] Having referenced what he held to be the correct statement of law and the approach in determining whether damages were an adequate remedy, the learned judge found that damages would not be an adequate remedy. In coming to this view, he reasoned, at para. [73] of his decision, that “it would be difficult to calculate the damages which WIPL might suffer if the injunction is not granted” as WIPL’s potential loss of

market share in a limited market would be difficult to quantify. He found that, since Ecomarine and Eco Petroleum were new companies, any potential loss to those parties if they were restrained would be much easier to calculate. Further, he found that there was no evidence to demonstrate that the appellants would be able to pay any damages occasioned if the injunction was not granted, especially since they were new companies.

[61] We were of the view that this was a determination that the learned judge was entitled to make on the evidence before him. We did not accept the appellants' submissions that the damages the respondent would be entitled to, if successful, would be limited to profits acquired under the 'no profit rule'. That is only one measure of damages for one cause of action - breach of fiduciary duty. If the respondent were to be successful under any of the other causes of action, including breach of contract, that too would have to be considered and assessed.

[62] It, therefore, could not have been said that the learned judge was plainly wrong, and we found no merit in these grounds.

The counter-appeal

[63] The sole ground upon which the counter-appeal, filed by WIPL, was based, was that:

"The learned judge erred in the exercise of his discretion when he awarded costs to the Appellants in that he failed to consider that it was the Court that directed the hearing of the applications separately applications [sic], after the Application was amended to include the Respondent and Island Lubes Distributors Limited."

[64] The learned judge awarded the costs of the application "against [WIPL] and in favour of the Defendants (save for the 6th Defendant) in any event, to be taxed if not agreed".

[65] The general rule as to the award of costs, once the court decides to make such an order, is that the court "must order the unsuccessful party to pay the costs of the

successful party” (see rule 64.6(1) of the Civil Procedure Rules). Although, a judge has an unfettered discretion to order otherwise, this must be done judicially and the judge must have regard to all the circumstances of the case (see rule 64.6(2), (3) and (4)). These circumstances include the conduct of the parties before and during the proceedings, whether it was reasonable for a party to pursue a particular allegation or issue, and the way a party has pursued its case. The principles were aptly put by Phillips JA in **Ivor Walker v Ramsay Hanson** [2018] JMCA Civ 19 at para. [42]:

“[42] There is no entitlement to costs. The order for costs always remains within the complete unfettered discretion of the court, although of course the discretion must be exercised judicially. There are so many factors that are open to the consideration of the court when the order of costs is being contemplated. They are set out in detail in parts 64 and 65 of the CPR and they always include a consideration of the conduct of the parties.”

[66] The discretion of a Supreme Court judge to award costs, and what it means to exercise that discretion judicially, was explained by McDonald-Bishop JA (Ag) (as she then was) in **Director of State Proceedings and others v Administrator General of Jamaica (Person entitled to a Grant of Administration in the estate of Tony Richie Richards)** [2015] JMCA Civ 15. At paras. [35] to [36], she said:

“[35] The learned authors of Blackstone’s Civil Practice 2004 at paragraph 66.5, in speaking of the equivalent English statute, the Supreme Court Act 1981, section 51(1), noted that while the statute has granted to the court a wide discretion in awarding costs and that the court has the full power to determine by whom and to what extent costs should be paid (***Singh v Observer Ltd*** [1989] 2 All ER 751), ‘**like any discretion, it must be exercised judicially and on reasons connected with the case** (see ***Donald Campbell and Co. Ltd v Pollack*** [1927] AC 732 and the speech of Viscount Cave LC, which continues to represent the law after the introduction of the CPR...)’ (Emphasis mine).

[36] It may be said then, in consideration of the instant case, that although it was within the absolute discretion of the learned judge to award costs in the proceedings before him,

he was, nevertheless, required to exercise his discretion judicially and **not arbitrarily or capriciously. In order to act judicially, he was duty bound to have regard to the provisions of the CPR**, which prescribe the basis and procedure for the quantification of costs. Therefore, **in assessing those costs he should have awarded a sum that was fair and reasonable. This, he would only have been able to do by having regard to rules 65.9 and 65.17(3) (a-h).**" (Emphasis added)

[67] Costs may, therefore, be denied to the successful party but there must be a proper basis for so doing. There is no dispute in this case that WIPL was the successful party. In his conclusion and disposition, having found that there was a serious issue to be tried, and that damages were not an adequate remedy (see para. [78]), the learned judge, at para. [79] of his decision, gave the following explanation as to his reason for awarding costs to the unsuccessful party:

"[79] It is patently clear that this Application should have been made concurrently with the Original Application. It has resulted in an inefficient use of judicial time and increased the cost to the Defendants and in particular the 4th and 5th Defendants. In these circumstances it is my decision that costs of the application should not be costs in the claim, but are awarded against the applicant WIPL and in favour of the Defendants, save for the 6th Defendant in respect of which the evidence was discovered recently. The Taxing Officer will in the usual course take into account the varying levels of participation of each Defendant."

[68] We were of the view that in penalising WIPL with a costs order for the reason he expressed, the learned judge was plainly wrong. The inefficient use of judicial time and increased costs were enabled by the learned judge himself. Whilst WIPL ought properly to have filed a joint application with Island Lubes from the outset, WIPL did attempt to correct that error by filing the amended application to join WIPL to Island Lubes' application before the *inter partes* hearing had commenced. It was the appellants who objected to this course and the learned judge who ruled in their favour on the objection. WIPL maintained that the reason the learned judge gave for not hearing the amended

application amounted to a matter of what he found to be more convenient and less confusing to him.

[69] In his written decision in respect of the Island Lubes application that was heard prior, the learned judge explained the circumstances surrounding the application made by WIPL to amend Island Lubes' application to add WIPL as an applicant so that the matter could be heard together, as well as his rationale for refusing same. At paras. [19] to [22] of that decision, he said:

"[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.”

[70] Further, in the learned judge’s decision in this matter, at paras. [9] and [11], he explained:

“[9] On the 13th July 2021, the Attorneys-at-Law representing the Claimants filed an Amended Notice of Application (the Amended Notice of Application”) by which the 2nd Claimant WIPL was added as an applicant. Mrs. Gibson Henlin Q.C. submitted that a Notice of Application can be amended at any time, and there was nothing to prohibit the Court hearing the Amended Notice of Application at the *inter partes* hearing, despite the fact that the Order was granted in respect of the Original Notice of Application only. 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. I upheld the objections and proceeded with the *inter partes* hearing of the Original Notice of Application filed 11th June 2021. The hearing of the Amended Notice of Application was adjourned pending the hearing of an application by the 1st to 3rd Defendants for a stay of the proceedings. This application was subsequently withdrawn.

...

[11] On 13th September 2021, the Amended Notice of Application came on for hearing. I expressed a concern as to whether it was permissible or appropriate for the Court to

hear the Amended Notice of Application since the Court had already determined the Original Notice of Application. Counsel for the Defendants expressed a similar concern and indicated that the continued existence of references to Island Lubes including the statement that it was claiming reliefs, tended to obfuscate the precise ambit of the application. The Court was not required to rule on this issue because Counsel, in a display of pragmatism, by mutual consent, agreed that the most appropriate course was for a fresh Notice of Application to be filed by WIPL as the sole applicant. Pursuant to that agreed position, an appropriate application was filed ('the Application')."

[71] What is patently clear from the learned judge's reasons in both cases, is that the decision not to hear the amended application was not due to any prejudice to the appellants which might have arisen due to the late addition of WIPL to the application. The learned judge himself said there was none. The course taken of filing a fresh notice of application was a mutual position adopted by all the parties and there was no indication that this course caused any prejudice to the appellants. The reasons given by the learned judge for ordering costs against WIPL are the same reasons he said the applications ought to have been heard together. However, those reasons were the very same ones proffered to him when Island Lubes and WIPL had made their application to amend to join WIPL to the application for the injunction. He rejected those reasons, and then, as asserted by counsel in their oral submissions "having embarked on the course he directed, he later changed his mind". His later position on the issue was, therefore, wholly inconsistent with his earlier one, and for those reasons. We found that the learned judge's reason for departing from the general rule that costs follow the event was not justified. Further, this being an application for an injunction, based on usual practice, an order for costs in the claim would have been the more appropriate order to make in the circumstances.

[72] The learned judge's decision as to costs in the application brought by WIPL for an interim injunction, therefore, could not stand.

Conclusion

[73] The learned judge was plainly wrong in respect of the orders he made at 3(a) and (b) of his orders, and therefore, grounds 4 and 5 had merit. There was no merit in the remaining grounds of appeal. The learned judge was plainly wrong to make the costs order he made, and the sole ground in the counter-appeal had to succeed.

[74] It was for those reasons that we made the orders set out at para. [6] above.

DUNBAR GREEN JA

[75] I agree with the reasons for decision as set out in the judgment of Edwards JA.

BROWN JA

[76] I too agree and have nothing further to add.