IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL COURT

CLAIM NO. SU2020CD00485

BETWEEN	**PETROLEUM COMPANY OF JAMAICA LIMITED**	**CLAIMANT**
AND	**SEAN KINGHORN**	**1ST DEFENDANT**
AND	**K & K (MANAGEMENT & HOLDINGS) COMPANY LIMITED**	**2ND DEFENDANT**

Application for Summary Judgment – Claim for recovery of possession- Whether defence has real prospect of success-Whether 1st Defendant (an attorney at law) owed fiduciary duties to Claimant-Whether breach of duty- Whether Defendants have real prospect of establishing a proprietary or other estoppel to prevent recovery of possession.

B. St. Michael Hylton QC and Dayna Allen instructed by Hylton Powell for Claimant

Heard: 23rd and 26th August, 2021

By Zoom

Cor : Batts, J

[1] The Defendants did not attend nor were they represented at this hearing. An email from the 1st Defendant was received by the court. He is an attorney at law and the attorney on record for both 1st and 2nd Defendants. The email requested an

adjournment, because of his inability to attend by Zoom, due to recently announced Covid 19 lockdown measures. The 1st Defendant explained that he was outside of Kingston, with no access to the internet, and that his files were locked in his office.

[2] I considered the request to adjourn, and the explanations for absence, but found them unsatisfactory. This matter was listed for hearing, in the legal vacation as a matter of urgency, see the affidavit of urgency filed on the 20th May 2021. The 1st Defendant was present when this was done. In my view there was more than enough time, since the lockdown was announced on or about the 18th August, to make arrangements to be represented at this hearing. I proceeded with the hearing in his absence.

[3] Both parties had filed detailed written submissions and bundles of authorities. Mr. Hylton Queen's Counsel was allowed to speak to his submissions. On completion of the hearing I reserved my decision to the 26th August, 2021. On the 26th August, Mr. Kinghorn was present and, I announced my decision to grant summary judgment on the issue of recovery of possession. I promised to put my reasons in writing at a later date. This judgment is the fulfilment of that promise.

[4] There were three applications before the court. The first was an application by the Claimant that time be extended to file an Amended Reply and Defence to Counter Claim and that the document as filed do stand. The second was an application by the Defendants to cross-examine the Claimant's affiants. The third was the Claimant's application for summary judgment.

[5] I ordered that the Replies, to each Defence as filed, were to stand and time was extended accordingly. The documents had been filed since the 20th May 2021 and there could be no prejudice to the Defendants. The Defendants' application to cross-examine was refused. An application for summary judgment considers only whether or not a party has a real prospect of success. There is to be no trial of the issues or determination of facts. If there are factual issues, with a real prospect of resolution in the Defendants' favour, the matter will be allowed to go to

trial. Cross-examination was therefore refused as being irrelevant to the hearing. The consequential application for a stay (Paragraph 19 of Defendants' skeleton submissions filed on the 18th August 2021) was also refused.

[6] The Amended Particulars of Claim, filed on the 20th May 2021, allege that the 1st Defendant is an attorney at law and was at all material times the Claimant's legal officer, company secretary and, a director. It is alleged that he was also a shareholder and director of the 2nd Defendant. It is alleged that the 1st Defendant owed fiduciary duties to the Claimant (Paragraphs 1 – 4 of Amended Particulars of Claim).

[7] It is further alleged that the Claimant owned several service stations throughout Jamaica, each of which was, operated by persons who were required to sign standard form management agreements. The 1st Defendant prepared these contracts on behalf of the Claimant. The said contracts all provided for the use of the Claimant's trademark and that the Claimant's product was to be sold exclusively at the location. The 1st Defendant it is alleged has an interest in two companies, BKK Investments Company Limited (hereinafter referred to as BKK) and, the 2nd Defendant (paragraph 17 of Amended Particulars of Claim).

[8] It is also alleged that the 1st Defendant, either by himself and/or through his company, entered into management agreements with the Claimant to operate one or other of the Claimant's service station locations. In breach of his agreement and/or fiduciary duties it is alleged that 1st and/or 2nd Defendants sold the product of suppliers, other than the Claimant, at the locations operated by himself or his companies. (Para. 24 Amended Particulars of Claim). It is alleged that the relevant agreements were terminated in consequence of the said breaches (Para 26 Amended Particulars of Claim) and that, the Defendants have failed, neglected and/or refused to deliver up possession of the service stations to the Claimant.

[9] The Claimant says it has no agreement or dealing with the 2nd Defendant in relation to the operation or management of, and that there is no lease or tenancy agreement with anyone in relation to, the relevant service stations. It is further

denied that either Defendant has any legal or proprietary right to remain in possession. (Paragraphs 30 and 32 of Amended Particulars of Claim).

[10] Although the Amended Particulars of Claim relate to several properties, on the morning of hearing, Queen's Counsel indicated that the application for summary judgment related only to the premises at Lluidas Vale and the remedy of recovery of possession. The claim for amounts due in relation to fuel unpaid for, damages for breaches of fiduciary duty and, breach of contract, could proceed to trial.

[11] The allegations in the Particulars of Claim are supported, evidentially, by an affidavit sworn to by Godfrey Boyd filed on the 20th May, 2021 and, an affidavit of Romayne Bell, filed 27th July 2021. The issues to be determined may be summarised thus:

a). Whether the 1st Defendant was at all material times the Claimants legal officer, director and/or advisor

b). Whether the 1st Defendant owed fiduciary duties to the Claimant and if so whether he acted in breach of them

c). Whether the 2nd Defendant is entitled to an equitable interest in premises known as Petcom Lluidas Vale Service Station or is entitled to rely on an estoppel.

d). whether the Claimant is entitled to recover possession of the said premises

e). whether the Defendants have a real prospect of succeeding on the above referenced issues.

[12] The Defendants, by way of a Defence of 1st Defendant filed on the 8th July 2021 and an Amended Defence of the 2nd Defendant filed on the 24th June 2021, respond to the Claimant's Particulars of Claim and Amended Particulars of Claim. In summary the Defendants deny that the Claimant entered into management agreements with them, (Para 1 of Defence of 1st Defendant). It is alleged that where the service station is owned by the Claimant these agreements are entered into with the operators. It is denied that the 1st Defendant was legal officer, legal

adviser or, an attorney at law for the Claimant. Rather it is said Mr. Colin Karjohn was a client of the 1st Defendant's law firm (Paragraph 2 of Defence of 1st Defendant). Somewhat paradoxically, the Defence alleges that the 1st Defendant's firm was retained by the Claimant to "*provide general legal services*." The firm, it is said, was remunerated by way of payment on invoices until April 2019.

[13] The Defendants allege further that the Claimant was operated as a "*sole tradership.*" Further that the the 1st Defendant's position, as director and/or secretary, was "*nominal*." It is denied that there was ever a board meeting held at which he was so appointed (Paragraph 6 of Defence of First Defendant). It is denied that any fiduciary duties were owed and it is further denied that any, if owed, were breached (Paragraph 8 of Defence). It is denied that the Claimant owns the service stations or the equipment thereon. It is also denied that the service stations are required to exclusively sell the Claimant's product and that management agreements were entered into in relation to the premises (Paragraph 10 – 13 of Defence).

[14] Importantly it is admitted that the 1st Defendant and his wife are directors and shareholders of the 2nd Defendant, (Paragraph 9 of Defence of 1st Defendant). In Paragraph 15 of the Defence it is alleged that the directors and shareholders of BKK are Colin Karjohn, Godfrey Boyd and, the 1st Defendant. It is alleged that it was BKK which entered into possession and operated the service station at Lluidas Vale. A bank account at the National Commercial Bank Jamaica Ltd was opened for that purpose (Paragraphs 25 and 26 of Defence). The Defence contains detailed factual averments (Paragraph 28) in response to paragraphs 33-39 of the Amended Particulars of Claim. However, these do no relate to the Lluidas Vale service station which is the only one now in issue.

[15] The 2nd Defendant asserts that up until the end of January 2021 it was in possession of the Lluidas Vale location (Paragraph 3 of Defence of 2nd Defendant). This was pursuant to an agreement with BKK . However, the said property was returned to BKK which now pays rent to the Claimant. The 2nd Defendant states

that "*based on the said agreement"*, and pursuant to representations by the Claimant, the 2nd Defendant made substantial improvements to the Lluidas Vale location (Paragraph 6 of Defence of 2nd Defendant). The improvements were done with the knowledge of the Claimant and based on a promise that the 2nd Defendant would be in occupation of the said property "*for a period sufficient to realise a return on the substantial investment and improvement done…"* The period being no less than 5 years. An estoppel is alleged against the Claimant (Paragraph 8 of Defence of 2nd Defendant).

[16] The 2nd Defendant, (at Paragraph 10 of its Defence), denies paragraph 30 of the Amended Particulars of Claim. It is alleged that *"the 2nd Defendant has been in occupation of the said locations and has been managing the said locations.*" The Claimant has requested and received payment from the 2nd Defendant for fuel supplied and rent. The 2nd Defendant also claims an equitable interest in the Lluidas Vale location based on the said improvements made and the Claimant's acquiescence in the said improvements which are described as "*substantial"*. Detailed particulars of the improvements, and the alleged acquiescence by the Claimant, are contained in Paragraphs 12 (i) to (xii) of the 2nd Defendants Amended Defence. An estoppel is asserted, in respect of the Lluidas Vale location, to prevent the Claimant recovering possession of the said property without first compensating the 2nd Defendant for the improvements made. There is, it is said, no wrongful refusal to deliver up possession.

[17] The Defendants' response to the application for summary judgment is contained in the affidavits of Sean Kinghorn filed on the 5th August 2021, Rohan Murdock filed 5th April, 2021 and, Fitzroy Bennett filed 5th April 2021. I will not, at this stage, review their contents. I will consider the evidence more fully below when outlining the reasons for my decision.

[18] At this juncture it is appropriate to remind myself of the law pertaining to applications for summary judgment. This application is pursuant to Rule 15.2(b) of the Civil Procedure Rules which provides:

> *"15.2 The Court may give summary judgment on the claim or on a particular issue if it considers that -*
>
> *(a)…*
>
> *(b) the defendant has no real prospect of succeeding on the claim or the issue."*

The Judicial Committee of the Privy Council, underscored the import of the provision, in ***Sagicor Bank Jamaica Ltd. v Taylor-Wright [2018] 3 All ER 1039*** per Lord Briggs:

> *"Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary."*

In that case the court decided that, notwithstanding the existence of a factual issue, summary judgment may be entered if the resolution of that factual issue would not affect the ultimate result. A similar point was made by Justice Brooks (now President of the Jamaican Court of Appeal) ***in Blair v Hyman 2005HCV2297*** **(unreported judgment delivered on the 16th May, 2008)** in which he said,

> *"It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trail: See per Lord Woolf MR in Swain v Hillman… However, that does not mean that a court has to accept without analysis everything said by a party in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon these factual assertions may be susceptible of disposal at an early stage so as*

> *to save the cost and delay of trying an issue the outcome of which is inevitable…."*

[19] There is no refinement, or further explanation, necessary to the standard established in the rule. This is that summary judgment may be issued where there is no "*real prospect*" of success on the claim or issue. As per Lord Woolf MR in ***Swain v Hillman [2001] 1 AllER 91 @ 92 j:***

> *"[the relevant rule] enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, as Mr. Bidder submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success."*

[20] It is against this background that I turn to consider the evidence in order to determine whether the Defence has any real prospect of success on the issues with respect to which the Claimant seeks to have summary judgment entered. In this regard, although separate, they are all interconnected. By this I mean that the existence of a fiduciary duty cannot be determined unless it is decided whether or not the 1st Defendant was a fiduciary. Similarly, the Claimant's entitlement to possession in the circumstances of this case, is only established if there has been a breach by the 1st Defendant of that fiduciary relationship. I will therefore consider the evidence in a holistic manner identifying the determinative aspects, if any, as I go along. It is convenient at the same time to consider the Defendants' response as contained in their affidavits and written submissions.

[21] The first and most important question is whether the First Defendant was a fiduciary with fiduciary duties. The Defendants, as we have seen, denied this in their pleadings. In written submissions it is contended that there is ambiguity about the "*material time*" to consider when, or if, a fiduciary relationship existed. It is said that the absence of evidence that legal fees were paid and, as issue is joined on the assertion, the matter ought to go to trial. As regards the fiduciary as a director

the submission is that the directorship was "*in name only"* as the Claimant had a non-functioning board of directors. The board in other words was a sham.

[22] With all due respect to the 1st Defendant his affidavits, the exhibits thereto and, documents exhibited by the Claimant, demonstrate conclusively that he was in a fiduciary relationship with the Claimant. The 1st Defendant stated in paragraph 2 of his affidavit, filed on the 5th August 2021, that he was never appointed a legal officer of the Claimant. However, letters exhibited in this matter demonstrate the contrary as they are signed by the 1st Defendant in that capacity, see letters dated 26 September 2018 [exhibit GB1 to the affidavit of Godfrey Boyd page 23 of Judges Bundle] and, 8th November 2019 [exhibit GB1 to the affidavit of Godfrey Boyd page 25 of Judges Bundle]. They show either, that the 1st Defendant was holding himself out as a legal officer when he was not or, that he was legal officer. Those letters also have the 1st Defendant noted as a director of the Claimant. He also signed an agreement, [exhibit GB1 to the affidavit of Godfrey Boyd and found at pages 26 to 34 of the Judges bundle], on behalf of the Claimant in the capacity as a director. Even letters exhibited to the 1st Defendant's affidavit have him noted as a director of the Claimant see, exhibits SK4 (14th April 2020), SK 5 (15th April 2020) and SK 7 (27th April 2020). In an affidavit, which is attached as part of exhibit GB 1 to the affidavit of Godfrey Boyd filed on the 20th May 2021 and, which was filed on the 15th February 2018 (see page 35 of the Judges Bundle), the 1st Defendant states at paragraphs 2 and 3:

> *"2. That in 2016, I was asked by the Deputy Chairman of the Petroleum Company of Jamaica Limited Force* (sic) *to take over the legal matters of the Company. I accepted that request and since the year 2016, I have been acting in the role of Legal Counsel for and on behalf of Petcom.*
>
> *3. That in my capacity as Legal Counsel I have inherited certain legal matters involving several rogue dealers. By rogue dealers I mean Dealers of Petcom who have either been cross*

filling in the Petcom Service Station or who are intent on stealing Petcom's equipment.

4. That a Dealer who cross-fills is a dealer who, although he has contracted to purchase petrol exclusively from his marketing company, dishonestly purchases fuel from another source."

[23] Finally, the Claimant exhibits a letter from the Registrar of Companies, dated 14th August 2020, which lists the 1st Defendant as a director of the Claimant [see exhibit GB 1 to the affidavit of Godfrey Boyd filed on 20th May 2021, page 78 of Bundle]. These documents being, the 1st Defendant's letters, the signed agreement, the 1st Defendant's affidavit filed in other proceedings and, the letter from the Registrar of Companies, establish conclusively that it will be futile for the 1st Defendant to deny he was in a fiduciary relationship with the Claimant. In that regard there is no time lapse, on a fiduciary duty owed, insofar as abuse of opportunity or knowledge gained by virtue of that relationship are concerned.

[24] In his affidavit, filed on the 5th August 2021, the 1st Defendant was content to say there was never a meeting appointing him legal counsel or director. He asserts that his law firm was retained on a general retainer. He explained the positon in paragraph 9 thus:

"9. That in light of the absence of a legal officer by the expressed agreement mentioned above, whenever there was the need for there to be the representation of a legal officer at PETCOM, I would do so. On these occasions, I took on the role of a legal officer and played that role. That was done gratuitously and with the expressed agreement and understanding that I was not contractually engaged to do so and was doing so to assist in filling a gap which existed at PETCOM. Further, I was authorised by PETCOM to act in this role when needed."

[25] The 1st Defendant goes on to say, in Paragraph 13 of the said affidavit, that he has never been engaged in his personal capacity as an attorney at law but only through his firm. As regards the alleged directorship the 1st Defendant stated that no board

meeting was ever held. Every decision, says the 1st Defendant, was taken by Mr. Karjohn. He denies ever being appointed to the board. He said "*appearances"* of a board that were put forward to third parties was just that "*an appearance."* At paragraph 21 the 1st Defendant makes the astounding admission,

> *"21….. I categorically state that I existed as a Director and Secretary in name only and there will never be produced any Board resolution of any such appointments – unless a document is now fabricated to that effect. It is for this reason that I have not only asked for Mr. Boyd and Mr. Karjohn to be cross-examined, I have asked for the members of the Board to be summoned as witnesses in this matter."*

[26] I have outlined in detail the 1st Defendant's response to the allegation of a fiduciary relationship, in consequence of his being legal officer, legal advisor and director, in order to demonstrate that the response creates no triable issue. This is because the 1st Defendant does not deny that he held himself out as such nor that he acted in the said capacities. In this regard there is no lawful distinction to be drawn between the 1st Defendant as an individual and the 1st Defendant as a partner in his law firm. Also the law is clear that *de facto* directors have the same fiduciary duties as *de jure* directors. Further that de facto directors may arise not only where a director's appointment is irregular but also where, although never appointed director , a person has performed the role. This may be so whether or not there has been a holding out ***Revenue and Customs Commissions v Holland, In re Paycheck Services 3 Ltd. and others [2010] 1 WLR 2793,@ 2805 and, 2825 to 2827,***

[27] On the documentary evidence and the admissions made by the 1st Defendant there is no real, or any, prospect of the 1st Defendant successfully proving at a trial that he had no fiduciary duty to the Claimant. His fiduciary relationship emerged from

his role as attorney at law and/or as a legal officer and/or as a director *de facto* or *de jure,* it matters not in the context of this case.

[28] The next question relates to the consequences flowing from that fiduciary relationship. Essentially the Claimant, you will recall, avers that the 1st Defendant obtained possession and use of the Claimant's service station at Lluidas Vale by himself and/or the 2nd Defendant. In doing so he failed to sign the management agreement which, by virtue of his fiduciary position, he knew all dealers were required to sign. This agreement contains the all-important term that only the Claimant's product was to be exclusively sold at that property. Therefore, the 1st and 2nd Defendants are estopped from denying a duty to sell the Claimants product exclusively. It is further asserted that the 1st and 2nd Defendants sold other product in breach of the or any alleged contract and/or fiduciary obligation. The Claimant was therefore entitled to and did terminate the said contract and is in consequence entitled to an order for possession of the said premises.

[29] The Defendants' response, to these allegations, is to deny any contractual obligation and any breach of fiduciary duty. However, they do not condescend to the particulars. The 1st Defendant, at paragraph 29 of his affidavit filed on the 5th August 2021, denied that he contracted with the Claimant for the locations. He suggests that BKK was in fact the tenant of the Claimant. He explains the involvement of the 2nd Defendant with the Lluidas Vale property on the basis that *"… the 2nd Defendant was the Management Company through which the expenditure of the Lluidas Vale improvements would be channelled."* In an affidavit by Rohan Murdock filed on the 6th August, 2021 it is asserted at paragraph *5* that the 2nd Defendant *"has ceased operating"* the Lluidas Vale location. It is also alleged that the 2nd Defendant expended money to make improvements with the encouragement and knowledge of the Claimant. It is timely to recall that, at paragraph 13 of its Amended Defence, the 2nd Defendant claims an equitable interest in Lluidas Vale by virtue of the improvements made thereon.

[30] It seems to me that the 1st Defendant, a fiduciary who owns and controls the 2nd Defendant, will be unable to establish there was no breach of a fiduciary duty or that his company has an equitable claim such as to resist an order for possession. In the first place the evidence, which is not denied, is that it is the 1st Defendant who prepared the management agreements.These agreements were in a standard form. That standard form included a term that only the Claimant's product would be sold at the location. The Defendants do not deny that other product was sold from the Lluidas Vale location. In the second place as a fiduciary, the 1st Defendant is precluded from using his position, or knowledge gained from that position, to profit at the expense of the Claimant, see ***Regal (Hastings) Ltd v Gulliver and Others [1967] 2 AC 134*** *and* ***Boardman v Phipps [1966]3 ALLER 721*** as discussed in ***Jason Abrahams v Cable & Wireless Jamaica Limited [2020] JMCC Comm 18 (unreported judgment of Laing J) at paragraphs 69 to 79***. It follows that if he, or his company, entered into an agreement with his principal without an exclusivity clause, then he has breached his fiduciary duty by entering into an unfair contract. It is shocking, and one may say preposterous, to suggest otherwise.

[31] There is other documentary evidence, contemporaneous to the events, which make it extremely unlikely that the Defence will succeed. In the first place there is a letter dated 14th October 2020 signed by the 1st Defendant on behalf of the 2nd Defendant. It is addressed to the Claimant and is worthy of quotation in full [Exhibit GB1 to the affidavit of Godfrey Boyd filed on 20th May 2021, page 145 of Bundle].

> *" URGENT AND IMMEDIATE*
>
> *October 14, 2020*
>
> *The Petroleum Company of Jamaica Limited*
> *695 Spanish Town Road*
> *Kingston.*
>
> *Attention: MR. COLLIN KARJOHN*
>
> *Dear Sir,*

Re: Notice of Termination of Operation – Petcom Lluidasvale, Petcom Christiana

By this correspondence we hereby notify you that it is our intention to cease the management of both the Petcom Lluidasvale and Petcom Christiana locations.

This decision is an extremely difficult one for us, since as you know, we have invested heavily in both locations in terms of time, energy and financial resources. These locations taught us the basics of how to run and operate a Service station. It is heart rending for us to cease operating them, it seems to us however that our relationship has been strained since the opening of the Kings Landing Service Station. This was particularly so as Petcom was not chosen as the marketing company to fuel the Station. The exchange of correspondence between us and your Mr. Boyd explains why this occurred.

That strain in our relationship has rapidly escalated into a complete deterioration. Firstly, we were required to pay cash on delivery for fuel. This was then changed to require us to pre-pay for fuel two days in advance. We indicated that this was not financially possible for us and requested a meeting. You did not respond. Yesterday, this deterioration culminated in you placing a lock on the doors of the Petcom Christiana location on the basis that the Station had received fuel from another Marketing Company, though, there is no formal Supply Agreement in place between us. For the record, not only is this a civil wrong, it is a criminal breach under the Rent Restriction Act. Your message, however is clear and well received. The purpose of this correspondence therefore is reach [sic] *out to you for an urgent meeting to agree on a smooth transition towards the cessation of our operations at both locations.*

We wish to do this as a matter of urgency so that there is no misunderstanding or mishap between the relevant parties. Out on [sic] abundance of caution, we have already increased our security presence and personnel at both locations and apprised them of the present impasse. We have also alerted the relevant officers in charge of the Police Stations pertinent to both locations of any possible disturbance and requested their increased presence.

Despite all of this, we remain disheartened at these unfortunate and absolutely, regrettable outcomes, and do not wish for any furtherance of an impasse or show of might.

Our Mr. Sean Kinghorn called you several times this morning to speak with you on these matters but without success. Please be kind enough to let us have your urgent response to our correspondence as we seek nothing but an amicable resolution, we are willing to meet with you at your earliest convenient time.

Yours truly,

K & K (Management and Holding) Co. Ltd.

_____
(for) Sean Kinghorn (Mr.)

Copy: Ms. Judy Ann Kinghorn – Director
Mr. Rohan Murdock – Group Accountant
Nr, Godfrey Boyd "

In this letter the Defendants clearly acknowledge that in October 2020, they were in fact managers of the Lluidas Vale location and that, they intended to cease management.

[32] Secondly there is a letter dated 23rd October 2020 from the 2nd Defendant, signed by the 1st Defendant, to the Claimant's legal representative [exhibit GB 1 to the affidavit of Godfrey Boyd filed on 20th May 2021, page 154 of the Judges Bundle]. It is a response to an expressed allegation that product other than the Claimant's was sold at the location. Having denied the existence of a written agreement the Defendants went on to state:

"We end with this; it seems to us a very far stretch to impose an exclusivity clause which effectively is tantamount to a restraint of trade where Petcom itself cannot produce even a written agreement between us detailing the terms of the agreement it attempts to enforce. That we think will be an interesting point to argue."

The Defendants are of course incorrect. As a fiduciary the 1st Defendant is precluded from selling other product of the Claimant at the Claimant's location even without a written agreement in place. A contrary assertion, in the absence of proof the beneficiary (Claimant) obtained independent legal advice, may be described as a "*very far stretch*". In this case the 1st Defendant prepared the standard form contracts applicable. He, of all people, knew of the expressed term as to exclusivity of product. There is no doubt that such a term will be implied and/or imposed in any oral agreement entered into between the parties. The Defendants have no real prospect of succeeding in an argument that they had no duty to sell only the Claimant's product at the Claimant's location.

[33] In the same letter under reference the Defendants end by proposing a continuation of the relationship on the basis that they be allowed to pay for fuel after delivery and not be required to pre-pay. The proposal runs counter to the assertion that the Defendants were not the tenants/managers of the Lluidas Vale location. It is clear also, from the fact that the 2nd Defendant is claiming a right to remain in possession (for 5 years) based on improvements done, that it is the 2nd Defendant which is in possession of the premises. In light of BKK's disavowal of any interest (see letter dated 30th October 2020 exhibit GB 1 to the affidavit of Godfrey Boyd filed 20th May 2021 ,page 158 of Judges Bundle), the Defendants cannot realistically base their right to remain in possession on any alleged interest of BKK . The futility of the position is underscored by the further letter from the 2nd Defendant to the Claimant's attorney dated 8th November, 2020 (exhibit GB 1 to affidavit of Godfrey Boyd filed 20th May 2021, page 161 of Judges Bundle), the third paragraph of which admits, that the 2nd Defendant occupied and operated the location.

[34] There is also an undated watts app message (exhibit GB 1 to the affidavit of Godfrey Boyd filed 20th May 2021, page 167 of Judges Bundle) in which the 1st Defendant acknowledges making payments re Lluidas Vale. The message reads,

> *"Also – as indicated I have made arrangements with my bank to pay your invoices directly from*

my K and K account. That is for Lluidas Vale and Christiana."

[35] The documentation noted above cumulatively decides the factual issue as to whether the 1st and/or 2nd Defendants operated the service station. In this regard it matters not which of the Defendants did so. The 2nd Defendant is, for all intents and purposes, the alter ego of the 1st Defendant and is controlled by him. The court need not postpone a judgment for possession in order to determine that factual question. This is because it makes no practical difference, to the giving effect of an order for possession, whether it is the 1st or 2nd Defendant, operating the service station. An order against the 2nd Defendant, will ultimately be enforced against the 1st Defendant as the director and controller of the 2nd Defendant. It therefore suffices that there is no real prospect of either Defendant establishing that neither of them is operating the service station. The evidence is such that a court will be satisfied that one or the other or both is in possession.

[36] The documentation is clear that the 1st Defendant, either by himself or through the agency of the 2nd Defendant, breached his fiduciary duty to the Claimant. He has not denied that other product was sold at the location. There is no doubt that to do that for profit is a breach of his fiduciary duty. He was aware of the import of the exclusivity clause. The failure to deny on affidavit, or in any of the contemporary correspondence, that other product was sold is telling.

[37] The Claimant is also entitled to possession because the Defendants had terminated, and/or acquiesced in the termination of, the management agreement be it written or oral. The assertion that they erected structures and did improvements cannot give them a proprietary interest in the property. Firstly, because as a fiduciary the 1st Defendant is not entitled to profit in that way from the beneficiary. Secondly, because any alleged representation that the Defendants would be allowed to remain for 5 years, even if true, would necessarily be subject to the same obligation to pay rental and to sell only the Claimant's product exclusively. The breach of the latter obligation, which is not denied, releases the Claimant from the alleged or any consequence of the representation.

No such estoppel or other equity could, or would, therefore be given effect. The Defendants therefore have no real prospect of establishing an equitable right to remain at the premises.

[38] In arriving at this decision I have come to the conclusion that the 1st Defendant was in a fiduciary relationship to the Claimant, because he had been a *de facto* director and/or legal officer and/or attorney at law acting on the Claimant's behalf, and that the Claimant is therefore entitled to recover possession of its premises. It is unnecessary for me to decide what other, if any, consequences, flow from the relationship. The other issues in this matter, including those related to a claim for amounts allegedly owed for fuel supplied, and/or for compensation with respect to representations allegedly made, and/or for improvements allegedly done in consequence, remain to be determined. In that latter regard the court may have to consider the circumstances under which a fiduciary may claim such compensation from the beneficiary. Those are not issues resolved in this judgment. I will therefore fix a date for case management and order, unless the parties wish otherwise, that the matter first proceed to mediation.

[39] Finally, I note that the Claimant attached several documents to the Godfrey Boyd affidavit filed on the 20th May 2021, as a single exhibit "1". I once again caution against the adoption of this practice which precludes the affiant signing an exhibit slip for each document, and thereby, affirming the correct document is attached. Also when there is an affidavit with several documents, as in this case, a single exhibit number makes it difficult for the judge to identify the particular document referenced and, particularly so, where there are documents and evidence with similar dates. In this case the Judges Bundle was, very helpfully, indexed and paginated and I used the page numbers for that purpose.

[40] In the final analysis therefore, and for all the reasons stated herein, summary judgment was on the 26th August 2021 entered for the Claimant against the 1st and 2nd Defendants and the following orders made:

i. The 1st and 2nd Defendants or either or both of them do forthwith deliver up possession, of the Petcom Lluidas Vale Service Station located at all that parcel of land part of Worthy Park in the parish of Saint Catherine and being the land comprised in certificate of title registered at Volume 1362 Folio 227 of the Register Book of Titles and the fuel pumps, tanks, fittings and other equipment installed and located at the said premises, to the Claimant.

ii. The costs of this application to the Claimant to be taxed or agreed.

iii. Leave to appeal and application for a stay refused

iv. Case Management Conference fixed for the 17th January 2022 at 11:00 a.m. for 1 hour.

v. Parties are to proceed to mediation which is to be completed on or before the 10th January 2022.

David Batts
Puisne Judge