



[2021] JMSC Civ. 54

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU2020CV00615**

<b>BETWEEN</b>	<b>CEAC OUTSOURCING COMPANY LIMITED</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>NATURAL RESOURCES CONSERVATION AUTHORITY</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>NATIONAL ENVIRONMENT AND PLANNING AGENCY</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>NORTH EAST REGIONAL HEALTH AUTHORITY</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>SOUTHERN REGIONAL HEALTH AUTHORITY</b>	<b>4<sup>TH</sup> DEFENDANT</b>

**IN CHAMBERS**

Sundiata J. Gibbs and Mike Hylton instructed by Hylton Powell for the Claimant

Matthew Ricketts, Deborah Lee Shung and Stewart Panton for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Christine McNeil and Carson Hamilton instructed by the Director of State Proceedings for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Heard: February 8, and March 12, 2021

**Amendments to Fixed Date Claim Form after Case Management Conference –  
Civil Procedure Rules 20.4 and 1.1 – New Cause of Action – Constitutional Claims  
– Charter of Rights 13(3)(h) – Whether Charter of Rights applies to Companies –  
section 9 of Natural Conservation Authority Act – section 2(2) of the Natural**

**Resources (Prescribe Areas) (Prohibition of Categories of Enterprise, Construction and Development) Order, 1996**

**MASON J. (AG)**

**BACKGROUND**

[1] On March 23, 2020, CEAC Outsourcing Company Limited (CEAC), filed a Fixed Date Claim Form seeking several orders including mandamus and prohibition. On 21st May 2020, Mr. Justice E. Brown granted leave and ordered that the defendants' affidavits in reply be filed and served by 1st September 2020 and all further affidavits to be filed and served on or before 25 November 2020.

[2] In compliance with Brown J orders, the 2nd Defendant filed on September 1, 2020 an affidavit sworn to by Mr. Peter Knight. Five days later, on September 7, 2020, CEAC filed an application to amend its Fixed Date Claim Form in the following form-

[4] Declaration that the 2nd Defendant's policy set out in its letter dated July 27, 2016 and later implemented, contravened the Claimant's right to equitable and humane treatment by a public authority in the exercise of any function, acknowledged by section 13(3)(h) and guaranteed by section 13(2) of the Constitution.

[5] Declaration that the 2nd Defendant's decision not to enforce the Natural Resources Conservation Authority Act against the 3rd and 4th Defendants in the same manner in which they enforced it against the Claimant contravened the Claimant's right to equitable and humane treatment by a public authority acknowledged by Section 13(3)(h) and guaranteed by section 13(2) of the Constitution.

[6] Declaration that neither the manner nor the extent of the abrogation, abridgment or infringement of the aforementioned constitutional right is demonstrably justified in a free and democratic society.

[5] Vindictory damages arising from the breach of the Claimant's constitutional rights.

[7] A Declaration that the 2nd Defendant's stated policy of allowing entities to operate existing waste disposal facilities without a licence, is a breach of section 2(4) of the Natural Resources (Prescribe Areas) (Prohibition of Categories of Enterprise, Construction and Development ) Order, 1996 as amended.

**[3]** The grounds stated for these amendments can be summarized as:

[2] Section 19 of Constitution allows any person to apply to the Supreme Court for redress

[3] Section 13(3)(h) of the Charter of Fundamental Rights and Freedoms guarantees equitable and humane treatment by a public authority

[4] NEPA acted inequitably and unfairly by failing to enforce NRCAA consistently, equitably or equally against all entities operating waste disposal facilities

## **ISSUES**

**[4]** The relevant issues are:

- i) Whether the nature of the proposed amendments is such that the real issue in dispute will be better determined;
- ii) Whether the defendants will be prejudiced should the amendments be allowed;
- iii) Whether there is a real prospect of the applicant successfully arguing his case based on the proposed amendments; and

- iv) Whether the court should exercise its discretion in accordance with the overriding objective and allow the amendments.

## **LAW**

**[5]** Rule 20.4 stipulates that with the court's permission, a statement of case can be amended:

- (1) An application for permission to amend a statement of case may be made at the case management conference.

- (2) Statements of case may only be amended after a case management conference with the permission of the court.

**[6]** No guidelines are provided for the amendment for statements of case after the Case Management Conference and as such, one must look to the overriding objectives outlined in Rule 1.1:

(2) Dealing justly with a case includes:

- (a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;

- (b) saving expense;

- (c) dealing with it in ways which take into consideration;

- (i) the amount of money involved;

- (ii) the importance of the case;

- (iii) the complexity of the issues; and

- (iv) the financial position of each party;

- (d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases.

[7] This means that once proper consideration is given to the overriding objective, amendments can be made at any time during the course of a matter.

[8] The courts have provided clarity on what must be considered in light of the overriding objective. Proposed amendments must first be imperative in determining the real issues in dispute. Nonetheless, this does not mean that it is the only determinant of whether an amendment should be allowed. **Caricom Investments Ltd and others v National Commercial Bank and others** [2020] JMCA Civ 15 highlighted this issue clearly at paragraphs 121 and 126:

*The authorities have established that the foremost consideration is whether the proposed amendment is needed in order to determine the real issues in dispute between the parties, in the light of all the relevant circumstances. Part of the appellants' complaint in this appeal is that the learned judge erred in according no weight to this consideration. This consideration was, seemingly, not accorded the primacy of place that it deserved in the learned judge's contemplation. The question is whether this is fatal to his decision.*

*It follows from the authorities that even though amendments should be allowed to enable the real matters in controversy between the parties to be determined, it is not, in and of itself, determinative of the matter since other factors have to be considered, including the stage of the proceedings. Nevertheless, it is an important consideration to be weighed in the balance with other relevant considerations in determining where justice lies. In this case, it would have been one for prime consideration in light of the fact that the trial date was six months away and the learned judge's conclusion that the respondents would not have had to obtain fresh instructions to meet the amendment.*

[9] Other factors the court considered relevant were:

(a) the necessity of the proposed amendments in the determination of the real issues in dispute between the parties;

(b) the desirability that the appellants be given access to the machinery of the court to air their full case in the absence of prejudice to the respondents and other litigants;

(c) the prejudice to the appellants in denying this access in the absence of justification;

(d) compensation in costs as an alternative to refusal of the amendment; and

(e) the fact that the trial date could have been met if the amendment were granted. (at paragraph 146)

[10] The ambit of this criteria is such that amendments for new causes of action are permissible. **The Attorney General of Jamaica v Aaron Hutchinson and Cleveland Vassell** [2015] JMCA Civ 47 illustrates this. One issue that the Court of Appeal considered was whether the torts of false imprisonment and malicious prosecution were fresh causes of action. The facts were that the claimant brought an action for assault against police officers/ Attorney General for physical abuse he suffered at the hands of the police officers. Counsel for the claimant sought to amend the claim by adding the torts of false imprisonment and malicious prosecution. The court held that although these were fresh causes of action, the facts are the same and as such the amendments would be allowed. At paragraphs 21 and 22, it is stated:

*It is clear that amendments to a statement of case after the limitation period may be appropriate in the interests of justice, provided that they are not new causes of actions. In **Brickfield Properties Ltd v Newton, Rosebell Holdings Ltd v Newton**, the court examined whether the applicable rule permitted an amendment to a statement of case after the limitation period. The court held that an additional cause of action could only be added to the statement of claim where the facts, or some part of the facts necessary to establish the claim made in the writ, would suffice to establish the additional cause of action. The court also noted that where a genuine and excusable mistake had been made and no detriment to the defendant had been shown, the judge had [a] discretion to allow the amendment.*

*Harrison JA, in the same case, relied on **Lloyd Banks plc v Rogers and Savings and Investment Bank Ltd v Fincken** to set out the instances where an amendment may or may not take place after the limitation period has expired:*

*a. If the new plea introduces an essentially distinct allegation, it will be a new cause of action. If factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.*

*b. Where the only difference between the original case and the case set out in the proposed amendments is a further instant of breach, or the addition of a new remedy, there is no addition of a new cause of action.*

*c. A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as to give rise to a cause of action already pleaded.*

*It seems clear in the present case that the facts that give rise to all three causes of action arise out of the single incident and are disclosed in the further statement of case of the respondent.*

[11] The court went further to emphasize in paragraph 23:

*In our view, it could be said that new causes of action arise, that is, false imprisonment and malicious prosecution. However, such causes of action may be added as they arise out of the same facts, or substantially the same facts, as has given rise to a cause of action, assault, which is already pleaded. In our view, no new facts are being introduced by the respondent. He merely wishes to add false imprisonment and malicious prosecution to his statement of case which was omitted by mistake and which was already introduced in the claim. In our view, the learned trial judge did not err in granting the amendment. In the totality of the circumstances, the appellants have already demonstrated by their statement of case that they are able to prepare an amended defence that properly addresses the amended claim form and amended particulars of claim.*

[12] Such liberal application of the court's power to grant amendments has led to some confusion as to what the exact limits should be. When can an amendment be seen as a 'new case' or that a party acted in 'bad faith'?

[13] **Moo Young and Another v Chong and Others** (2000) 59 WIR 369 explains what is meant by good faith and how the court approaches cases where parties seek to change facts. At page 374, it outlines:

*In the instant case, the amendment granted may be permissible if:*

1. *it is necessary to decide the real issues in controversy, however late,*
2. *it will not create any prejudice to the appellants, and is not presenting a 'new case' to the appellants,*
3. *is fair in all the circumstances of the case, and*
4. *it was a proper exercise of the discretion of the trial judge on the state of the evidence.*

[14] On page 376 it goes on to quote **Rondel v Worsley** [1967] 3 All ER 993:

*Where there appears to be good faith and a genuine case the court will allow extensive amendments almost up to the twelfth hour in order that the substance of a matter may fairly be tried. But when a party changes his story to meet difficulties, that fact is one of the matters to be taken into account.*

[15] “Bad faith” is then explained at page 381-382 as being inferred when:

*An amendment would not be made if it is in conflict with and contrary to a specific allegation of fact previously made. For example in the instant case, the amendments relative to the ownership of funds which financed the purchases, the source of such funds and the consequential beneficial interest of the properties concerned are distinctly adverse to the former pleadings of the respondents, and cannot qualify as careless or negligent omissions, justifying the amendments.*

*In the Kettman case [1988] 1 All ER 38, an application for an amendment to pleading to include a new defence, after evidence was heard, was refused, in the circumstances of the case. Lord Griffiths said at pg 62:*

*“There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time. Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies.”*

*It is my view that there exists in the amendments an absence of good faith which will not serve to determine the real controversy between the parties.*

[16] At page 408, the conclusion therefore was:

*Whether it be constitutional law, substantive law or procedural law implicit in our legal system are restraints or limits to prevent abuse. Limits are*



*imposed on the power of the respondent to amend their pleadings so as to ensure a fair trial. One objective of those limitations is to prevent a new defence during the course of the trial. As to whether an amendment will be granted, the test must be satisfied that it is being made in good faith and is in the interests of justice. The amendments granted in the court below are so fundamental that they amount to a new defence so they ought not to have been permitted.*

- [17] In addition to 'bad faith' the court can consider whether the amendment is frivolous, vexatious or an abuse of process. The Court of Appeal in **Pan Caribbean Financial Services Ltd v Robert Cartage and others** [2011] JMCA Civ 2 at paragraph 85 stated:

*In my judgment, Brooks J had properly exercised his discretion in relation to the applications for amendment and order for costs. He correctly bore in mind that the hearing before him had taken place at a CMC and was not the trial of the claim. He had also properly considered whether the claim in its amended state was frivolous or vexatious or was an abuse of the process of the court. He clearly did not find that the applications to amend fell in those categories. I am further of the view that the respondents should be given the opportunity to put forward their case and be allowed to argue the substantive issues on which their claim is based.*

- [18] These considerations lead to the question of how does the court determines when a party would be prejudiced. Is the proximity of a trial date significant? Should a party claiming prejudice be satisfied with being awarded costs?

- [19] **Moo Young (supra)** states at page 375:

*"However late may be the application for amendment, it should be allowed in the above circumstances if it will not injure or prejudice the applicant's opponent. Different considerations, however, govern each case, and it is a matter in the discretion of the trial judge."*

- [20] **Caricom Investments (supra)** goes further to explain at paragraph 36:

*Based on the above analysis, it must be stated that there is nothing inherently wrong with a court granting permission to parties to amend their statements of case in preparation for a retrial, provided that, in addition to the relevant considerations of the individual case, the prohibitions of the:*

- a. relevant limitation periods;
- b. risk of injustice to the other parties in the case;

*c. prejudice to litigants in other cases; and*

*d. general considerations of the administration of justice, are observed and enforced.*

[21] It should be made clear that it is not the state of the law that 'amendments should be allowed as any perceived prejudice can be remedied by an award of cost'. This view stated in **Cobbold v London Borough of Greenwich** [1999] EWCA Civ 2074, and which was brought to my attention by the claimants, was declared to be wrong by the Court of Appeal of England and Wales in **Swain-Mason and others v Mills Reeve (a firm)** (paragraph 123 of **Caricom Investments (supra)**).

[22] In terms of trial dates, Straw J in **Bryan Foster v Vanguard Security Company Limited** [2016] JMSC Civ 98 summarized the law at paragraph 5 as:

*.... If permission to amend is sought close to the trial date, will the amendment put the parties on an unequal footing or place an excessive burden on the respondent to prepare for trial so as to jeopardize the trial date? Will it therefore cause a postponement of the trial? Blackstone's Civil Practice 2008, para. 31.4 quoting the court in **Charlesworth vs Relay Roads Ltd**, [2000] 1 WLR 230. In **Charlesworth**, Neuberger J highlighted the two competing interests to be considered in assisting the determination of the court:*

*However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated in costs.*

*Amendments can be made at trial and after evidence is heard at trial, even after evidence has been concluded depending on the circumstances. In Shaquille Forbes, my brother Fraser J, having examined the relevant authorities allowed an amendment to the claimant's statement of case to correct a clerical or administrative error. This was done after evidence and submissions were completed. (See also judgement of my brother, Jones J [Ag.] [as he then was] in **Rohan Collins & Sonia Collins V Wilbert Bretton** [on behalf of Claudette Davis Bonnick] E227 of 2002 [May 26, 2003] cited in Shaquille Forbes at para. 57).*

*Amendments at trials may only be granted when no injustice will be caused. (See judgement of Fraser J at para. 23 in National Housing Trust quoting Langrin JA [Ag.] in **The Attorney General v Maurice Francis**, Unreported SCCA 13/95 [March 26, 1999].*

- [23] National Housing Trust v Y.P. Seaton & Associates Company Ltd** Claim 2009HCV05733 also explains the issue clearly and addresses the matter of awarding costs.

*It should be noted that the granting of the amendments will not necessarily prejudice the trial dates and therefore the amendments may not impact at all on other litigants or on the overall administration of justice. Even if it does however, the amendments should still be granted since - adopting the words of Brooks J at page 10 of the NHDC case - allowing the amendments will assist the court, "in determining the real questions in controversy between the parties". The amendments will therefore ultimately facilitate the resolution of the matter fairly and justly. (paragraph 54)*

*... I agree with the defendant that costs must be awarded against the claimant. The authorities, including those relied on by the claimant, are all clear that the party who successfully applies for amendments must pay costs to mitigate the prejudice such amendments may visit on the other party. The defendants are therefore entitled to costs of the application and the costs of and occasioned by the amendments. (paragraph 56)*

- [24]** Finally, for the court to properly exercise its discretion, there must be a real prospect of applicant successfully arguing his case based on the proposed amendments. This may, however, be of some difficulty if a court is not seized with much evidence.

- [25] Rose and others v Creativityetc Ltd and others** [2019] EWHC 1043 (Ch) illustrates at paragraphs 46 and 47 the balancing exercise the court undertakes when assessing 'real prospect of success' and the difficulties that can arise especially in the early stages of a case:

*The authorities indicate that the attention paid to the strength and merits of the proposed amended case changes the later a party seeks permission to amend. Any amendment needs to show a case with real prospects of success but in Quah Su Ling (at [38b]) and Nesbit Law Group (at [41]) reference is made to the burden of showing the strength of the new case. It is also of note that at [57] and following in Quah Su Ling Mrs. Justice Carr undertook a detailed analysis of the prospects of the proposed amended case in circumstances where it was not being contended that there was no real prospect of success but where the question was whether the case was sufficiently strong to justify permission for amendment at the late stage reached in those proceedings. Similarly in Nesbit Law Group at [43] regard was had to the*

*strength of the amended case. This changed consideration flows from the fact that the court is at all times carrying out a balancing exercise weighing the relative injustice of granting and of refusing the proposed amendment. In this regard I refer again to Mrs. Justice Carr's first principle at [38a] of Quah Su Ling. The strength of the proposed case is a factor and potentially a significant factor in assessing the degree of the potential injustice to the party seeking to amend if permission is not given and in determining whether that potential injustice outweighs the potential harm to the other party and to other court users of permitting the amendment. At the very lowest the later an amendment is proposed then the more care the court will take in assessing whether a real prospect of success has been shown. However, as matters progress and the further along the continuum the application for permission to amend is made then the more the court has to have regard not just to the question of whether the comparatively low hurdle of showing a real prospect of success has been surmounted but also that of assessing whether the proposed claim is of sufficient strength for the potential injustice to the amending party if permission is refused to outweigh those other considerations.*

*Even when having regard to the strength of the proposed new case the court must be careful not to engage in a mini-trial but a detailed examination of the merits and the contentions can be required as I have already indicated was undertaken by Mrs. Justice Carr in Quah Su Ling. The court has to be conscious that it has not heard the explanations which might be given in cross-examination and that points which appear unanswerable all too often are found to be answerable. It has to be conscious that the evidence currently before it may be supplemented by further evidence at any trial. Though in that latter regard there is a need for a degree of caution. There must be some basis for believing that there will be fuller evidence at a trial and a party whose evidence is inadequate cannot simply assert that there will be better evidence at trial.*

## **Summary of Law**

**[26]** The amendment must be necessary to decide the real issues in dispute. As such, amendments will be allowed to correct mistakes or careless or negligent omissions. New causes of action will be allowed as long as they are based on the facts already before the court. On the other hand, amendments will not be allowed if they present a new case, backtrack on allegations of fact or otherwise change the story to meet difficulties. Such amendments will be seen as being in bad faith, that is, without the purpose of raising the real question in controversy between the parties. It must not be frivolous, vexatious or an abuse of the process of the court.

**[27]** Amendments must not prejudice the other party who cannot be compensated in cost. This is especially relevant in term of the limitation period as it should not have expired. Consideration of proximity of trial dates is also a factor but must be weighed with the need for the trial judge to properly determine issues in dispute. Such a balancing exercise has led to amendments being allowed up to the 12th hour.

**[28]** To properly exercise discretion, the evidence must be considered and one must determine whether the party has a real prospect of successfully arguing his case based on the proposed amendments.

**SUBMISSIONS:**

**[29]** The claimant alleges that the 1st and 2nd Defendants have not performed their statutory duty in prohibiting the 3rd and 4th Defendants from disposing of their waste in an 'illegal' manner, that is, without the necessary permits. The claimant further states that it has lost its investment because on its assessment of the market (as it is the only entity with a permit to dispose of medical waste) the 3rd and 4th Defendants would have no other choice but to engage its services. So far it has lost \$44,000,000 by its services not being used by the said public bodies.

**[30]** The claimant supports its application to amend on the basis that:

- it was not aware that NEPA had taken a deliberate decision not to enforce the Natural Conservation Authority Act (Act) against hospitals
- it filed the application within 5 days of being served with Mr. Knight's affidavit
- it will not be able to reasonably advance a point
- it will start a separate action if amendments are not allowed which will not be in the interest of the overriding objective

- issues of bad faith do not arise
- trial date is a year away
- there is no prejudice

**[31]** The defendants have countered the claimant's allegation by saying that the 3rd and 4th Defendants have commenced the process to obtain the requisite permit. Furthermore, prior actions in non-enforcement were due to stipulations in relevant orders or policy directives. They also state that the claimant's application should be refused as:

- it is made in bad faith as CEAC are attempting to make changes due to evidence presented by the defendants which shows that the relief sought is no longer relevant
- it presents an entirely new case
- hospitals were existing facilities which have/had protection of law and policy directives
- prejudice arises as a new case is being put forward
- there is no arguable claim as a company is not protected under the relevant section of the Charter of Rights
- the overriding objective is breached as they have less time to prepare for the trial
- the trial date is in jeopardy
- it has no reasonable prospect of succeeding
- it is not fair to the defendants

## **ANALYSIS**

**Issue #1: Whether the nature of the proposed amendments is such that the real issue in dispute will be better determined**

[32] The Fixed Date Claim Form filed March 23, 2020 requested mandamus, prohibition, and declaration of breach of section 9 of the Natural Resources Conservation Authority Act (NRCAA). It is clear on the face of the documents that the amendments raise a new cause of action. Initially, the matter was for judicial review, now a constitutional claim is being sought.

[33] It is first necessary to determine whether the amendments have any basis in facts already put forward (**The Attorney General of Jamaica v Aaron Hutchinson and Cleveland Vassell (supra); Moo Young and Another v Chong and Others, (supra)**).

[34] The reasons given in the Claimant's 4th affidavit for the amendments are:

*[3] On September 1, 2020 the 2nd Defendant ("NEPA") filed an affidavit in these proceedings in response to the Fixed Date Claim Form. The director of NEPA, Mr. Peter Knight, swore the affidavit. In it, Mr. Knight confirmed that the 3rd and 4th Defendants ("the Health Authorities") had been acting in breach of section 9(2) of the Natural Resources Conservation Act but NEPA had not sought to enforce against them until CEAC retained an attorney and threatened legal action.*

*[4] The facts sworn to by Mr. Knight further confirm the inequitable and unequal treatment by NEPA which has had a detrimental effect on COCL's business. One such fact, is NEPA's express policy to permit entities to continue to operate incinerators despite having not applied for an environmental permit within the timeline stipulated in section 2(2) of the Natural Resources (Prescribed Areas) (Prohibition of Categories of Enterprises, Construction and Development ) Order 1996 (as amended).*

[35] The following is from paragraph 35 of the Claimant's 3rd affidavit filed in support of the original Fixed Date Claim Form:

*NEPA's failure to enforce the Natural Resources Conservation Authority Act poses a danger to anyone living in the areas surrounding the hospitals. It is also prejudicial to COCL in that the company has invested large sums of money complying with the relevant legal requirements relating to the safe disposal of medical waste while the Southern Authority and the North Eastern Authority are not being regulated in the same way.*

- [36] It is clear that the reasons stated in the 4th affidavit can be properly summarized by paragraph 35 of the 3rd affidavit. As such, the Claimant has neither 'backtracked on facts' nor sought to 'change [its] story'. It has always said that actions of the 1st and 2nd Defendants were unfair and affected business. No new facts are being alleged.
- [37] Parties should be able to rely upon any cause of action which substantially arises from facts previously alleged. In other words, a new cause of action may be added if it arises out of the same facts, as to give rise to a cause of action already pleaded (**The Attorney General of Jamaica v Aaron Hutchinson and Cleveland Vassell (supra)**).
- [38] Initially, CEAC wanted NEPA to enforce the Act. Now, it wants damages. A proposed amendment with the addition of a new remedy is not a new cause of action. Therefore, a claim for damages/vindictory damages is permissible (see **The Attorney General of Jamaica v Aaron Hutchinson and Cleveland Vassell (supra)** at paragraph 21 (b)).
- [39] This leads to the primary question of whether these amendments will assist the court in determining the real issue.
- [40] The claim CEAC seeks to put forward is that actions of the defendants had negative consequences for its business and it wants redress. It has lost money as it was not able to benefit from its monopoly in the market of medical disposal services. The request for mandamus and prohibition will provide no form of compensation. On the other hand, the proposed amendments offer the possibility of vindictory damages. Such amendments further particularize concerns which CEAC has stated from the inception of the case. This means, therefore, that the real issues in dispute have been clarified by the amendments: whether it was reasonable or permissible for the 1st and 2nd defendants not to perform duties, and whether the 1st and 2nd defendants have any liability towards a company operating for profit for any inaction it has taken in regard to a public body.



[41] Should the amendments not be allowed, then it seems this will be the end of the matter. The claimant's core concern of losing money due to the 1st and 2nd Defendants inaction will not be addressed. Can it then be said that they acted in bad faith? The Claimant has not put forward new facts nor retracted admissions that it has made. Although Christopher Burgess has stated in his 4th affidavit that it was upon reading Mr. Knight's affidavit filed 1st September 2020 that he got confirmation of NEPA's inaction, he has spoken of NEPA's inaction in prior affidavits and its impact on his business. It seems, therefore, that the amendments CEAC wishes to now add could have been made in the initial Fixed Date Claim Form filed March 23, 2020.

[42] I wish to add a few words in regard to the Claimant's submission that it will start a separate action if the amendments are not allowed. I find that statement is a threat of abuse of the process of the court. As I have stated, the proposed amendments could have been made in the original Fixed Date Claim Form. The omission, in my view, was purely negligent.

**Issue #2: Whether the defendants will be prejudiced should the amendments be allowed**

[43] In assessing prejudice, it is necessary to look to the overriding objectives outlined in Rule 1.1 particularly the importance of the case, the complexity of the issues and ensuring that it is dealt with expeditiously and fairly.

[44] The defendants have argued that prejudice would arise as they will be faced with a 'new case' and will have less time in which to prepare or possibly lose the trial date.

[45] As I have stated, the amendments do raise a new cause of action. I also acknowledge that it is imperative that cases be dealt with expeditiously. These must, however, be weighed with the fact that the case is of some importance as constitutional issues are being claimed. Fairness considers both sides. A litigant must not be deprived of the opportunity of having the case determined on the

merits (**Pan Caribbean Financial Services Ltd v Robert Cartage and others (supra)**; **Baldwin Atkins v George Bailey (supra)** at paragraph 58). On the other hand, a party must be given the opportunity to properly prepare his defence. Trial dates are but one factor in several that must be considered. Amendments can be made before and during trial. Furthermore, the case at bar is fairly recent, having been filed in 2020 with only two hearing dates thus far.

[46] Trial dates are precious but I am of the view that should the amendments be granted, the one day allotted for trial and time for each party to speak will be insufficient. This, therefore, means that the scales weigh towards granting the amendments but vacating the current trial date to allow the defendants the opportunity to prepare for a trial involving such complex and novel constitutional issues. Additionally, an award of costs will be adequate compensation for the defendants.

**Issue #3: Whether there is a real prospect of the applicant successfully arguing his case based on the proposed amendments**

[47] The court has not been presented with any case directly pertaining to the application of section 13(3)(h) of the Charter of Rights. I have, however, noted the case of **The Attorney General and the Minister of Home Affairs v Antigua Times Limited PC #9 of 1974** where the Privy Council showed that in certain cases, provisions of the constitution can be applicable to companies. The defendants argued that section 5 of the Antiguan Constitution is similar to section 13(3)(h) of Jamaica's Charter of Rights and therefore cannot apply to a company. There is some substance to this argument as I noted that the section speaks to equitable and humane treatment. I do not believe humane treatment applies to a company.

[48] Additionally, there are several issues CEAC will have to surmount:

- whether loss of investment is directly caused from the inaction of NEPA or is it simply a matter of risk that investors take in attempting to enter a market especially having regard to the fact that a public hospital will always be at liberty not to contract CEAC services
- whether damages can be quantified
- whether vindictory damages can be awarded
- whether inaction of a public body can properly be described as unequal treatment as the court may look at what NEPA has/had done in relation to profit making entities applying for permits and not necessarily compare CEAC to an antiquated public hospital struggling to discard its own waste
- whether a declaration of contravention of section 9 of the Natural Conservation Authority Act is a proper order for court to make as opposed to the application of section 9 (7) of said Act which speaks to a criminal matter
- whether section 2(2) of the Natural Resources (Prescribe Areas) (Prohibition of Categories of Enterprise, Construction and Development) Order, 1996 excludes the 3rd and 4th defendants from obtaining permits and if so, for what period

**[49]** Taking into account the numerous issues such a case would pose and the little evidence before me, I am constrained in determining whether there is a real prospect of success. Rather, I have found that these issues are arguable. Furthermore, such issues may lead to a better understanding and application of Jamaica's Charter of Rights. Regarding constitutional matters, I believe that in the interest of justice, it is prudent for these issues to be determined by the court.

**Issue #4: Whether the court should exercise discretion in accordance with the overriding objective and allow the amendments**

**[50]** Based on the above discussion, I conclude that:

- (1) The amendments raise a new cause of action but they will assist the court in determining the real issue/s in dispute. The claimant has not sought to change his story but relies on the same facts as put forward in the original claim. These amendments enhance particularity. The claimant has not acted in bad faith.
- (2) Any prejudice to the defendants can be remedied by awarding cost of the application to the defendants. The trial date fixed for 10<sup>th</sup> November 2021 will be vacated as the issues cannot be determine in one day.
- (3) The constitutional claim raises complex and novel issues of law that are best placed before a court to be determined on the merits. At this time, I am of the view that sufficient evidence has not been placed before the court to make a determination as to whether the claimant has a real prospect of success in this matter. It has, however, been determined that the issues raised by the amendments are arguable.

**[51]** I believe it is in accordance with the overriding objective that the court exercise its discretion and allow the amendments of the claimant.

## **ORDERS**

**[52]** The court will therefore make the following orders:

- (1) The claimant is at liberty to prepare, file and serve on or before the 30th day of April 2021 an amended Fixed Date Claim Form in terms of that appended to the affidavit of Christopher Burgess in support of the Notice of Application for Court Orders dated and filed September 7, 2020.
- (2) The defendants shall be at liberty to file and serve on or before the 29th day of October 2021 an amended Defence and/or an affidavit in response.

- (3) The trial date fixed for the 10<sup>th</sup> November 2021 is vacated. Order #1 of Mr. Justice E. Brown made on 21<sup>st</sup> May 2020 is hereby varied as follows: The matter is to be heard by the Full Court on May 8 and 9, 2023.
- (4) Any and all further affidavits are to be filed and served on or before 29<sup>th</sup> July 2022.
- (5) The parties shall file and exchange submissions with legal authorities on or before April 28, 2023.
- (6) The claimant is to file and serve a bundle containing pleadings, affidavits and orders on or before April 28, 2023.
- (7) Index to the bundle is to be filed and served on or before April 28, 2023.
- (8) Costs of the application and the costs occasioned by the amendments to the defendants to be agreed or taxed.
- (9) The claimant's attorneys-at-law shall prepare, file and serve these orders.