[2022] JMRC 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE REVENUE COURT

CLAIM NO. 4 of 2018

BETWEEN	**NATIONAL HOUSING TRUST**	**CLAIMANT**
AND	**MARKSMAN LIMITED**	**1ST DEFENDANT**
	ROBERT EPSTEIN	**2ND DEFENDANT**

National Housing Trust Act- National Housing Trust (Contributions) Regulations, 1979- Whether an employer-employee relationship exists between security guards and the 1st Defendant –Whether 1st Defendant liable to Claimant for employer's contributions- Whether the 2nd Defendant is a responsible officer within the meaning of the Act- Whether remedies barred due to laches, estoppel, waiver and/or acquiescence- Whether declaratory relief may be granted without retroactive effect.

W. John Vassell, K.C, Trudy-Ann Dixon-Frith and Samantha Grant instructed by DunnCox for the Claimant

Walter H. Scott, K.C, Weiden O. Daley and Deniece A. Beaumont Walters instructed by Hart Muirhead Fatta for the 1st Defendant

Dr. Lloyd Barnett and Gillian Burgess instructed by Gillian Burgess for the 2nd Defendant

HEARD: 28th – 31st March, 11th ,19th, 25th May and, 23rd September 2022.

IN OPEN COURT

COR: BATTS, J

INTRODUCTION AND BACKGROUND

[1] This claim, for unpaid employer's contributions, is brought pursuant to the National Housing Trust Act (hereinafter called "the Act"). Under the Act an employer is obliged to deduct its employee's contribution, from that employee's salary, and pay it over to the National Housing Trust, see section 12(1) of the Act. An employer is also obliged to pay to the National Housing Trust an employer's contribution (hereinafter called the "employer's contribution") in respect of each person employed by him, see section 11 of the Act and the schedule to regulation 2 of the National Housing Trust (Contributions) Regulations,1979. This claim is brought by the National Housing Trust (hereinafter called the NHT) which seeks to recover, from the Defendants, unpaid employer's contributions for the years 2000 to 2016. The Defendants deny liability.

[2] The NHT is a statutory body and body corporate established by the Act. Its functions are to add to and improve the existing supply of housing in Jamaica primarily by granting loans to contributors for the purchase of land or houses or, for the construction, maintenance, repair or, improvement of houses. The NHT is responsible for the collection of National Housing Trust contributions payable under the Act. The 1st Defendant (hereinafter called Marksman) is a limited liability company duly incorporated under the laws of Jamaica that provides various security services to third parties. It does so subject to the terms of a licence or licenses issued pursuant to the Private Security Regulation Authority Act. The 2nd Defendant, Robert Epstein, is a former Managing Director of Marksman and was its managing director for the period November 30, 2004 to April 1, 2018.

[3] As a consequence of outstanding employer's contributions, allegedly owed by Marksman, the NHT served upon Marksman a certificate (Form No C6) dated November 30, 2017, pursuant to section 14(2) of the Act. This certificate is at page 171 of the Amended Core Bundle of Documents. The NHT by letter

dated December 12, 2017 demanded from Marksman payment, of the alleged outstanding employer's contributions along with a penalty, for the financial years 2000- 2016. The NHT thereafter commenced an action, in the Corporate Area Parish Court Civil Division, against the Defendants. The matter before the Parish Court was adjourned sine die and the NHT commenced this claim in the Revenue Court. The NHT claims, from Marksman, outstanding employer's contributions payable under the Act in the sum of $477,980,257.77 for Financial Years 2000-2016. The NHT also claims interest and surcharge at prescribed rates. In respect of the 2nd Defendant the claim is that he is jointly and severally liable with Marksman by virtue of subsections (3) and (5) of section 37A of the Act.

[4] The outstanding employer's contributions are particularised at paragraph 10 of the Particulars of Claim filed on the 21st May 2018, see page 11 of the Amended Core Bundle of Documents, as follows:

PARTICULARS

Financial Year	**Unpaid Employer's Contribution (J$)**
2000	3,936,372.84
2001	5,606,438.79
2002	11,846,881.04
2003	12,928,174.37
2004	13,837,370.67
2005	17,729,456.17
2006	19,634,901.00
2007	26,205,451.39
2008	32,513,603.42
2009	37,359,302.55
2010	36,784,751.61
2011	36,314,557.64
2012	37,714,499.46
2013	39,967,951.02
2014	44,222,754.79
2015	49,227,486.75
2016	52,150,304.26
TOTAL	**477,980,257.77**

The NHT seeks the following declarations, reliefs and remedies:

a) *A Declaration that the 1st Defendant is an employer and contributor within the definition, meaning and designation of the provisions of the National Housing Trust Act.*
b) *A Declaration that the 1st Defendant is liable to pay employer's contributions pursuant to the provisions of the National Housing Trust Act.*
c) *An Order that the Defendants do forthwith pay the sum of $477,980,257.77 for employer's contributions for Financial Years 2000-2016.*
d) *Alternatively, damages in the sum of $477,980,257.77.*
e) *Interest on such employer's contributions and or damages at the rate of 40% per annum from the collections dates (namely, dates when the employer's contributions were due and payable) to the date of payment pursuant to the National Housing Trust and the National Housing Trust (Rate of Interest and Surcharge) Regulations 1999.*
f) *Penalty and or surcharge on such employer's contributions and or damages (along with the said statutory interest accrued thereon) at 10% of the sums due and payable pursuant to the National Housing Trust Act and the National Housing Trust (Rate of Interest and Surcharge) Regulations 1999.*
g) *Costs and Attorney's Costs.*
h) *Such further and/or other relief as this Honourable Court deems fit.*

[5] By an Amended Defence filed June 24, 2020, see page 17 of Amended Core Bundle of Documents, the Defendants dispute the claim on the grounds inter alia that:

i. Marksman is not an employer of security guards and other personnel whom it engages to perform its security services,
ii. Security guards that have provided, and who provide security services, do so pursuant to fixed term contracts for services entered into between themselves and Marksman and are all independent contractors;
iii. There has been waiver, acquiescence, misrepresentation resulting in such unfairness as to cause an estoppel to arise,
iv. The claim is barred by statutory limitation and/or by laches and,
v. The 2nd Defendant is not the managing director of Marksman and is not a proper party to the claim.

The Defendants pray that the court not grant the reliefs, sought by the NHT, as the NHT is not entitled to the relief or any relief at all.

[6] It is a matter of some concern that the security guards, whose employer's contributions are the subject of the claim, are not joined as parties either, in a representative capacity, as interested parties to the claim or, otherwise. Nor was the Attorney General's chambers present to represent the interest of the security guards or the public interest. There was no evidence before the court either, as to the impact a decision of this court may have on the security guards or, of any consequence for the public welfare. There was however evidence from individual security guards, called by both the NHT and the Defendants, as to their understanding, attitude towards and, manner of performing the contracts.

[7] I must thank all counsel for their detailed written and oral submissions. Counsel must rest assured that I considered the said submissions as well as the authorities cited. In this judgment I will however only discuss them to the extent necessary to explain my decision. I am also grateful for the bundles of affidavits, documents and, authorities provided and the great care obviously taken to ensure they were properly paginated and labelled. This has certainly

made the task of preparing this judgment much less onerous than it otherwise might have been.

THE CLAIMANT'S CASE

[8] On the first morning of trial Mr. John Vassell, King's Counsel representing the NHT, indicated that if the court finds that the security guards are employees the NHT is prepared to accept the Defendants' calculated amount of $469,428,317.95, see page 160 of Exhibit 1 (Bundle of Agreed Documents filed on the 15th September 2021), as the amount due and owing for unpaid employer's contribution for the period 2000 to 2016. This amount is the claimed sum less the employer's contribution for guards over 65 years old. The NHT agrees that the 2nd Defendant is liable to only $438,283,045.46 of that amount. These figures, as I understood it, were agreed between the parties, see paragraph 41 and schedules 1 and 2 to the Claimant's Bundle of Closing Submissions filed on the 2nd May 2022. King's Counsel also indicated that the primary claim is not at numbers 1 and 2 but, instead, it is at number 3 of the Claim, see page 1 of the Amended Core Bundle filed 21st May 2018. He submits that item number 3 is a statutory cause of action and is not dependent on the declarations being granted. This is because the Act provides a specific cause of action for unpaid employer's contribution.

[9] The NHT's two witnesses were Jennifer Staple-Gowdie and Nyron Baker. Mrs. Staple-Gowdie has been the compliance manager at the NHT since the year 2000. She was assigned as chairperson of an internal committee that examined the operations of security companies across Jamaica. Mrs. Staple-Gowdie, during examination-in-chief, corrected the year she was assigned as the chairperson from 2014 to 2012, see paragraph 24 of the affidavit of Jennifer Staple-Gowdie (page 9 Volume 1 of Bundle of Affidavits). In the same paragraph

she said that in or about the year 2015 the NHT observed that certain companies, within the private security industry, were not paying employers' contributions for their security guards. As such the NHT audited several of those companies, not including Marksman, and upon reviewing the documents (including contracts), concluded that the security guards were employees. This was because the security companies exercised direction and supervision over the security guards. Mrs. Staple-Gowdie at paragraph 25 of the said affidavit, which stood as her evidence in chief, said that in or about November 2017 the NHT imposed an assessment on Marksman and as a result arrived at its liability with respect to emoluments as per its annual returns for the period 2000 to 2016. She said, when the outstanding amount was demanded, the company replied in a letter dated December 13, 2017, inter alia, that "*The Security Industry operated under the Independent Contractor System since 1985".* Mrs. Staple-Gowdie was extensively cross-examined. The following discourse was instructive:

> *"Q: Would it be correct to say position taken by Marksman that the security guards are independent contractors is not unique to Marksman?*
> *A: Not unique to Marksman*
> *Q: Hawkeye taken similar position?*
> *A: No*
> *Q: Securicor taken similar position?*
> *A: Yes*
> *Q: Guardsman takes similar position?*
> *A: Yes, we have 19 out of a total of over 200 that takes a similar position. The 19 are all inter-connected*
> *Q: Do you agree the 19 companies represent the larger share of persons in industry as security guards?*
> *A: Yes"*

[10] Mrs. Staple-Gowdie was unable to deny that in the period 1986 to 2000 the security guards all paid 3% as self-employed contractors. Notably also she admitted that at no time in 2008 were the returns made by Marksman rejected in writing. The witness admitted that, prior to the filing of a claim in the Kingston and St Andrew Parish Court in 2018, the NHT had taken no action since 1985 against Marksman.

[11] Mr. Nyron Baker, the NHT's second witness, worked with Marksman from 2005 to 2016 as an unarmed guard, driver of an armoured truck and, armed guard. His evidence is relevant to the issue whether the security guards are employees or independent contractors. He said at paragraphs 17, 18 and 19 of his affidavit dated 27th January 2021 and which stood as his evidence in chief:

> *"17. A duty officer and or supervisor of Marksman sets the schedule and locations for duties for the security guards. The schedule is given, in advance, to the security guards each week. It is Marksman that scheduled every minute/hour for us to work. If there were any changes to the place that the security guards were assigned, the supervisor advised us. We have no say in the location where we are posted by the company. If the schedule is not followed by the security guards, we are disciplined in some way, for example being reprimanded or suspended.*
>
> *18. Marksman can relocate a security guard at any time it wanted to. When the company decided that a security guard was to be reassigned, it simply notified the guard when it has been done and instruct the security guard to report to the new location. Customarily, if there was a change in schedule, I would be notified by the supervisor at least a day before the relocation took effect.*
>
> *19. Wherever security guards are posted, Marksman retained control over us. For example, for a period of approximately 2 years, I was assigned by Marksman to location of West Indies Alumina Company ("Windalco"). Windalco had their own internal security procedures that I had to follow, and it determined where on the grounds of Windalco I was posted. However, while at Windalco I was still supervised by Marksman. If I did not report for duty or did not properly complete the tasks assigned to me, I could be disciplined by Marksman. If there was any issue concerning my performance or behaviour while on site at Windalco, the security manager at Windalco could make a complaint to Marksman. If my actions were*

sufficiently serious, then Marksman could take disciplinary action against me, including warning, suspension or even firing me."

[12] Mr. Baker was also extensively cross-examined, from which, I extract the following exchange:

"Q: At Windalco, they had a security manager?
A: Yes
Q: Recall post orders?
A: Yes
Q: The Security Manager of Windalco interfaced with you from time to time?
A: Yes
Q: When at Acropolis, May Pen, recall supervisors having a security manager?
A: Yes Sir
Q: Mr. Andrew Bromley?
A: Yes
Q: He interfaced with you from time to time?
A: No, we had a security supervisor that worked at Acropolis
Q: Mr. Baker the Security Supervisor interfaced with you and gave directions?
A: Yes"
……
"Q: You got training from time to time from Marksman?
A: Yes
Q: In the beginning, before contracted as security guards?
A: Yes
Q: You subsequently got firearm training?
A: Yes Sir
Q: You recall the firearm training was required by FLA in order to get user's permit?
A: Yes"

[13] King's Counsel submitted that the NHT is entrusted by Parliament with a mandate to administer the Act and to ensure that its provisions are complied with. As a consequence of this duty, it brought this action due to Marksman's failure to comply with the provisions of the Act. The NHT he avers is an employer, of the security guards it engaged to provide security services and, is a contributor pursuant to the provisions of the Act. As a result of the employer-employee relationship Marksman is obliged under the Act to remit the

employer's contributions, with respect to the said security guards, to the NHT. Marksman's failure to remit such contributions to the NHT is in contravention of the Act. The said contributions amount to 5% of emoluments in respect of the security guards. If they are independent contractors they would be deemed to be "*self-employed persons*", and as such the guards themselves would be liable to pay to the NHT 3% of their emoluments. In that case, Marksman would not be liable in respect of any contribution for them or on their behalves.

[14] Mr. Vassell K.C beseeched the court to adopt the approach taken in the case of **Uber BV & Others v Aslam & Others** [2021] UKSC 5. He submitted that the terms of the contract are important but not decisive when considering whether or not the relationship is one of employer and employee. He referenced the general contract between Marksman and its security guards and submitted that the terms of the contract are internally inconsistent. He referenced, in particular, Clause 19 which provides:

> *"19. The parties hereto have entered into this Agreement for their mutual benefit and the subcontractor acknowledges that he is fully aware of the legal relationship employer and worker. However, the subcontractor has freely elected to have and maintain with the contractor a relationship of contractor and subcontractor and as further evidence by his or her signature hereto the subcontractor agrees and declares that he/she is not a worker of the contractor under any contract of service."*

Mr. Vassell K.C, submitted that this clause ought to be disregarded as other terms in the contract are inconsistent with the declaration expressed. He further submitted that the labelling of the legal relation as one of "*contractor and subcontractor"* is not decisive, or even particularly important, as the court will look at all the circumstances in order to decide the nature of the relationship.

[15] He, referenced several terms of the general contract and submitted that, the terms strongly suggest that, the security guards are employees and not independent contractors because they are:

a) *required to perform their duties personally and may not do so through a substitute;*
b) *required to be available to work if required unless ill in which case, they are required to present a medical certificate;*
c) *subject to the direction, supervision and control of the Defendant as to what, where, how, when and in what manner the work is to be done;*
d) *required to accept and use the firearms, guard dogs and equipment decided upon and supplied by the Defendant and they are further required to wear Marksman branded uniforms and badges while on duty;*
e) *required to submit to training designed by the Defendant;*
f) *eligible for life and health insurance coverage provided or arranged by the Defendant as well as assistance with legal expenses if certain types of work-related claims are made against them;*
g) *required to comply with detailed rules and regulations of the Defendant and are subject to disciplinary rules and sanctions for breaches.*

[16] Therefore, King's Counsel argued, the security guards are not persons operating businesses on their own account. They do not take risks and have no profits or losses. It is Marksman which is running a business and, although the security guards serve, they are not integrated into that business. The guards themselves provide their labour continuously to Marksman to enable it to operate its business, which business is to provide third parties with security services.

[17] King's Counsel also relied on the authorities of; **Lee Ting Sang v Chung Chi-Keung & Anor** [1990] 2 AC 374; **Autoclenz Ltd v Belcher & Ors** [2011] 4 All ER 45; **Market Investigations Limited v Minister of Social Security** [1969] 2 Q.B. 173; **Global Plant Ltd v Secretary of State for Health and Social Security** [1973] 1 WIR 74; **Jamaica Inn Ltd v The Commissioner General Tax Administration Jamaica** [2021] JMRC 5 and, **Clerk & Lindsell on Torts 20th ed, Sweet and Maxwell** paras. 6-04 to 6-16, to demonstrate that there is no universal or conclusive test for determining whether the worker is an employee or an independent contractor.

[18] In **Autoclenz Ltd v Belcher & Ors** (above) the written terms of the contract did not reflect the relationship between the parties. The court, it was submitted, must conduct an actual examination of the circumstances and realities of each case before deciding what is the true relation between the parties. In that case individual valeters provided car cleaning services to Autoclenz Ltd's customers. It was agreed by the parties that the valeters would perform the services for Autoclenz in a "*reasonable and good workmanlike manner*", be paid for the work done and, were expected to do the work given to them by Autoclenz. The work was done personally by the valeter as he could not get someone else, in his absence, to work for him. The UK Supreme Court upheld the findings of the courts below and decided that the valeters were employees under a contract of service.

[19] The NHT's counsel also said that consideration must be given to the contract, between Marksman and the client receiving the security service, when interpreting the contract between the security guards and Marksman. It was submitted that the obligations, undertaken by Marksman, make it necessary for Marksman to have a contract with the security guards in which a high degree of control is exerted. This is necessary if Marksman is to fulfil its obligations to its client and not be in breach thereof. Given the nature of the written contracts, the one between the security guards and Marksman and the other between

Marksman and its clients, it was submitted that the security guards are employees and not independent contractors.

[20] King's Counsel further submitted that The Minimum Wage (Industrial Security Guard) Order has been complied with by Marksman. Mr. George Overton, Marksman's managing director, and the 2nd Defendant both affirm that Marksman has been paying the security guards in accordance with that order. The order applies to industrial security guards and places a responsibility on employers of those security guards. He submits that if Marksman genuinely thought the guards were independent contractors it should not have complied with an order which applies only to employees.

[21] It was also submitted that the defence of the 2nd Defendant stands or falls with that of Marksman. The 2nd Defendant was at the material time the "*responsible person*" under the Act. He was the managing director. Furthermore, the court ought to apply the decision of the Court of Appeal in **Robert Epstein v National Housing Trust and Marksman Limited** [2021] JMCA App 12.

[22] In relation to the suggestion that this claim is time barred, King's Counsel submitted that, an action for sums recoverable under a statute is not subject to limitation periods unless the statute expressly states otherwise. Further that the limitation periods, of six or seven years under the Tax Collection Act and the Income Tax Act, are inapplicable to NHT contributions. This is because the NHT contributions are not taxes. King's Counsel maintains that Marksman's classification of the NHT contributions as taxes is untenable as, unlike income tax, education tax and, other taxes, the NHT contributions are not paid into the Consolidated Fund, which is controlled by the government. It was further submitted that by definition under the Financial Administration and Audit Act (FAAA) the said contributions are not "*revenue"* or "*public monies*", as Parliament has no power of appropriation. The contributions are not collected by the government instead they are collected by a body corporate established pursuant to Section 3 of the NHT Act, and refunded after seven years.

[23] In response to the defence of estoppel Mr. Vassell K.C. referred to the judgment of the Court of Appeal in **Digicel Jamaica Limited v Commissioner of Taxpayers Appeal (CA)** [2014] JMCA Civ 36. In that case Morrison JA, at paragraph 107 of the judgment, stated that a statutory power cannot be dispensed with by an erroneous representation. It is averred that the NHT is a statutory body and as such it performs a statutory duty. Therefore, if a duty arises under the Act, the duty is not subject to estoppel by representation or conduct. He also referenced the decision in **Maritime Electric Company Ltd. v General Dairies Ltd** [1937] AC 610 (Canada), a decision of the Judicial Committee of the Privy Council, to support the premise that a creature of statute cannot be prevented by estoppel from exercising a statutory power. Even if a statutory duty could be estopped, it is submitted that, no representation was made by the NHT that it would not pursue the outstanding employer's contributions. The letter dated December 27, 1985 from the Commissioner of Income Taxes, see exhibit "KSB 5 of the affidavit of Kenny Benjamin page 2244 of Bundle of Affidavits Volume IV, is not a representation binding on the NHT. Section 11(3) of the NHT Act expressly states that only the Minister has a power to make such a pronouncement in relation to NHT contributions.

[24] It was also submitted that the defence of acquiescence/ laches is not applicable insofar as it purports to prevent the NHT from performing a statutory duty. **Western Vinegars Ltd. v Minister of National Revenue** (Exchequer Court of Canada) 1 DTC 390, **William Berrian Salter v Ministry of National Revenue** (Canada Tax Board) 52 DTC 148 and, **William Kennedy v Ministry of National Revenue** (Canada Tax Board) 52 DTC 148 were cited in support.

THE DEFENDANTS' CASE

[25] Both Defendants contend that the security guards are independent contractors. Marksman insists also that, if the court finds they are employees, the NHT is barred by estoppel, acquiescence, delay, laches and/ or misrepresentation from recovering the sum claimed. The 2nd Defendant says that he was not the "*responsible officer*" for the period claimed, hence, he is not a proper party to the claim.

[26] Mr. Walter Scott K.C, Marksman's counsel, urged the court to consider whether, in the absence of a complaint being filed in this court by a party to the contract, this court ought to grant the declarations sought. He suggested that the court should be mindful that the cases, the NHT's counsel cited, are those in which parties to the contracts challenged their status before various tribunals. This, he submits, makes a huge difference and therefore the court should approach the instant matter differently. Counsel says that the dicta in **Rolls-Royce PLC (appellant) v Unite the Union (respondent) [2009] EWCA Civ 387** is instructive on the point regarding the absence of input from the interested party. The question, he posed to the court, is how far is this court prepared to go in light of the aforementioned.

[27] The claim, he submits, is not about an impecunious NHT seeking to prop up its financial existence but rather an "*unprincipled quango*" seeking to extract money from a taxpayer. In the periods January 1st 1986 to 1999, January 1999 to 2007, 2007 to 2018, the NHT did not murmur and/ or complain about the approach taken by Marksman and the other companies who engaged security guards as independent contractors. There were, he states, 31 years between the "*1985 Christmas Letter"* and the date this action commenced.

[28] Marksman's counsel presented the court with a chronology, with which the NHT took no issue and, for which the court is grateful. It shows that a change in the relationship, between the private security companies and the

security guards, occurred in or around 1985, see letter dated 27th December 1985 Amended Core Bundle of Documents, page 72, (being the same exhibit KSB 5 referenced in paragraph 23 above). That letter, from the Commissioner of Income Tax, pronounced that the security guards were independent contractors and in consequence all entities of the Government of Jamaica accepted that these security guards were independent contractors. There was a new contract, between the security guards and the private security companies, in which the security guards were referred to as "subcontractors". Counsel submits that, upon receiving the letter from the Commissioner of Income Tax, Marksman stopped paying NHT contributions for the security guards. In the period 1989-1997 there was no complaint from the NHT. Counsel contends that between 2007 and 2018 the NHT raised various queries regarding the status of the guards but did nothing actively. It is this inaction that is relied on in support of the argument that, if the security guards are employees, the claim ought to be barred on the grounds of delay, estoppel and/ or, acquiescence.

[29] Mr. Scott K.C also referenced a series of meetings in or around 1998 and 1999 with the then Minister of Finance (the Honourable Dr Omar Davies), JSIS executive members, an accounting company representing the security guards and, other representatives from the Ministry of Finance. In or about January 1999 an agreement was reached between the Minister and the JSIS for the private security companies to deduct taxes from fees payable to the security guards, as self-employed individuals, and pay them over to the relevant statutory agencies on behalf of the guards. It is asserted that on this premise Marksman started paying over 3% of the guards' earnings as self-employed persons. The NHT concedes that it has since then been accepting payment of the 3% contribution. Furthermore, the NHT between 1986 to 2018 made a full refund of the 3% to the security guards pursuant to the NHT Act. It is submitted that acquiescence, waiver and/ or, estoppel therefore applies.

[30] It was also submitted that the issue, of whether the relation between the parties is that of principal and independent contractor or of employer and

employee, is a question of mixed fact and law and is dependent on the rights conferred and the duties imposed by the contract. King's Counsel relied on the cases **Urban Development Corporation v Jaitar (JA) Limited** [2017] JMCA Civ. 1 and **Hall (HM Inspector of Taxes) v Lorimer** [1994] 1 W.L.R. 209, to support an argument that the court must be cautious how it applies the various common law tests. There is, it is submitted, no one conclusive test which can be universally applied and the court should have regard to the total contractual relationship of the parties (**Dewdney Transport Group Ltd v Canada (Minister of National Revenue)** [2009] T.C.J. No.461).

[31] It was suggested that on the evidence the security guards see themselves as independent contractors. Reference was made to the evidence of Desmond Larmond, Christopher Goldson and, Clive Sheriffe being security guards who gave evidence on behalf of Marksman. Desmond Larmond has been a guard since 1988, Christopher Goldson for over 20 years and, Clive Sheriffe for approximately 22 years. In their re-sworn (amended) affidavits, contained in the Bundle of Affidavits Volume IV, which stood as each guard's evidence in chief, the following is stated:

> Desmond Larmond, (page 2117 of the bundle):
>
> *"3. I am a self-employed Security Contractor registered with the Private Security Regulation Authority ("PSRA") as an armed private security guard. I exhibit as DL 1 a copy of the licence the PSRA has issued to me. The PSRA issues a licence to me annually upon my applying and paying the required fee".*
>
> *"29. My lunch hours and any time off requested by me are determined by me. Whenever I require a day or days off (such as for unpaid time for vacation or unpaid paid* (sick*) due to illness, I inform Marksman and another Security Contractor engage (sic) by Marksman usually performs the security services I would have performed. I do not get paid for such time off from carrying out the security services. This is because as an independent contractor I am paid for work I actually do, and so on days that I am absent in order to look after my own personal and my family's affairs, and for other days that am absent from performing my work under my contract with*

Marksman, such as when I take vacation or when I am sick, I am not paid. I fully agree to and I do not at all mind this feature of the reality of my being an independent contractor because I am more in control of my days off providing security services than would be the case if I were an employee. I knew of this feature from before I first contracted with Marksman".

Christopher Goldson (page 1962 of the bundle):

"29. As an independent contractor, I am not paid for such time off providing security services or for the other days that I do not provide security services when I take vacation from time to time or occasionally when I am ill. I am comfortable with this as it allows me greater flexibility than if I were an employee and I knew and intended this before I first contracted with Marksman. I see all of this as an advantage to me in my being an independent contractor in providing security services".

Clive Sheriffe (page 2050 of the bundle):

"22. My shifts are usually at scheduled times from Monday to Friday. Whenever I need time off from providing security services, I inform Marksman of the day(s) I require off and the security manager arranges for another Security Contractor to provide the security services. I use such time off to do things for myself or for family, and to go to entertainment events such as birthday parties and go to funerals.
23. Before I first contracted with Marksman I knew and intended that, as an independent contractor, I would not be (and I am not) paid for such time off providing security services or for any days that I do not provide security service such as for my vacation or due to illness. I see this to be really to my advantage as I am better able to control the amount of time I do, and when I do not, provide security services. I would not have this advantage if I were an employee."

[32] Marksman's counsel also raised the defence of laches, to the declarations sought, and says that the court ought to consider the discretionary nature of the relief. After thirty-two years the court ought not to exercise its discretion to make the declarations.

[33] Dr Lloyd Barnett, for the 2nd Defendant, adopted the submissions filed on behalf of both Defendants and dated November 13, 2020. He refuted

the claim that the security guards are employees. He submitted further that the NHT only stated, in paragraph 6 of its Particulars of Claim, that the 2nd Defendant is the managing director of Marksman, and not that he was the managing director in the material years 2000-2016. He submitted that it is clear from the evidence that the 2nd Defendant was not the managing director during the first four years of the period claimed and for most of the 5th year. It is submitted that the 2nd Defendant cannot be held liable for the period (2000- to 2004) before he was Managing Director. It was submitted further that, as a consequence of the relevant contractual arrangements many years prior to the 2nd Defendant becoming managing director, the 2nd Defendant at no point played a role in the designation of the security guards. Moreover, the 2nd Defendant was not a party to discussions between the NHT and Marksman regarding the latter's liability for the employer's contribution.

[34] Dr Barnett argued also that the NHT has failed to plead, or prove, the quantum of its claim. He relied on the evidence of Marksman that during the period claimed there were security guards engaged who were over the retirement age of 60. Furthermore, there was no evidence before the court regarding the ages of the 3000 security guards engaged nor was there evidence given regarding the total number of guards at that age.

[35] On the question whether the guards are employees or independent contractors, counsel submitted that, one must have regard to the criteria which is applicable to the determination of the classification. Although there are various common law tests, a proper application of any one or more of these tests depends upon the facts of each case and the relevant statutory provisions.

[36] He opposed the position taken by the NHT that the Private Security Regulation Authority Act "contemplates" or requires that the security guards be employees. The term contract security organization was defined in section 2 of the Act and there is nothing in that statutory definition that requires the security guards to be employees. Although the draftsman may have contemplated that

the security guards would often be employees there is nothing to prevent them from being independent contractors.

[37] Dr Barnett submitted that the parts of the contract on which the NHT focused, such as the requirement to undergo additional training, the provision for sanctions for breach of agreement or regulations and, the provision of equipment, firearms, and guard dogs by Marksman, are provisions that are not inconsistent with the relationship being a contract for services. He disapproved of the application of the **Autoclenz** case and suggests that the case is authority for the principle that an employment tribunal should consider whether the terms of a written contract represent what was actually agreed between the parties, not just at the commencement of the contract but, at any stage as the relationship and terms governing it may have changed. Based on the evidence in the case the control exercised by Autoclenz over the work of the valeters, in reality, was inconsistent with the terms of the contract. Dr Barnett relied on the cases of **Clyde & CP. Llp v. Bates van Winkelhof** [2014] U.K.S.C. 32, **Uber BV v. Aslam** [2021] UKSC 5, **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 1 ALL ER 433, **Brook Street Bureau (UK) Ltd v Dacas** [2004] EWCA Civ 217 and, **Atlantic Hardware Plumbing Co. Ltd v. Guardsman Ltd** Claim No. 2012 HCVO5409, to support the position that the security guards engaged to provide security services to third parties are independent contractors.

[38] He further submitted that no two witnesses had identical circumstances arising out of their contracts with Marksman. Hence, if the court finds for the NHT and grants the declarations and orders, it would have treated the sub-contracts entered into by Marksman and the almost 3000 guards as identical. It was also submitted that based on the conduct of NHT over the years, it is reasonable to conclude that the institution acquiesced in and lured, the 2nd Defendant, into believing that there was acceptance by NHT of the system Marksman and other security guard companies had been using for years. Dr Barnett submitted that the court ought not to grant the declarations because of

the delay in making the demand on the 2nd Defendant. It is further submitted that the court should refuse coercive relief, such as an order for payment of arrears and, decline to grant a declaration that has a retroactive effect, see **R v Dairy Products Tribunal, ex p. Caswell** [1990] 2 A.C. 738.

ISSUES

[39] The issues for my determination are:

1. Whether an employer-employee relationship exists between the security guards and Marksman;

2. If the guards are employees whether the NHT is statute-barred or, in the alternative, barred by laches, acquiescence, waiver and/or, estoppel from obtaining declaratory relief and/or from recovering the sums claimed.

3. Whether the 2nd Defendant is a responsible officer within the meaning of section 37A (1) (2) and (3), of the NHT Act; and

4. Whether if granted, the declaratory relief should be prospective only.

LAW AND ANALYSIS

[40] The private security industry is regulated by the Private Security Regulation Authority (hereinafter called the PSRA). Its functions pursuant to the Private Security Regulation Authority Act, 1992 ("PSRA Act") are to grant, refuse, suspend or cancel licenses or registration cards issued to the private security industry and to consider and determine applications made under the PSRA. All security companies and security guards, operating in this country, are required to be licensed by the PSRA in order to operate and carry out security services. Before 1985 guards, who were engaged by these private security companies, were generally speaking considered to be the employees of these companies. However, in or around 1985, some private security companies restructured operations. These companies attempted to change the relationship to one of principal and independent contractor. This change in the relationship, I must say, seems to have taken place unilaterally without influence and or encouragement from the security guards themselves. There is no evidence before me that the security guards had any input other than the execution of the relevant contracts at inception and on each renewal. The change was however sanctioned by the Ministry of Finance.

[41] The NHT is a creature of statute and is bound by the Act to carry out Parliament's mandate. Section 4 provides the functions and the powers of the NHT. The section reads:

> *"4.-(1) The functions of the Trust shall be:*
> *(a) to add to and improve the existing supply of housing by:*
> *(i) promoting housing projects to such extent as may from time to time be approved by the Minister,*
> *(ii) making available to such contributors as may be prescribed, in such manner and on such terms and conditions as may be prescribed, loans to assist in the purchase, building, maintenance, repair or improvement of houses; and*
> *(iii) encouraging and stimulating improved methods of production of houses;*
> *(b) to enhance the usefulness of the funds of the Trust by promoting greater efficiency in the housing sector.*

**(lA) In addition to the functions specified in subsection (I), the Trust may provide financing up to a maximum amount in the aggregate of five billion dollars for projects for the development of education.*[provision becomes spent on 25.8.2006]*

(2) In the exercise of its functions, the Trust shall have power-

(a) to provide finance for-

(i) development projects undertaken by the Trust pursuant to sub-paragraph (i) of paragraph (a) of subsection (1);

(ii) social services and physical infrastructure for communities developed under the projects;

(b) to administer and invest the moneys of the Trust;

(c) to enter into loan agreements with borrowers;

(d) to receive and administer funds entrusted to the Trust in accordance with the provisions of this Act;

(e) to make refunds and grants to contributors or any category thereof, on such terms and conditions as may be prescribed;

(f) to re-finance from time to time, subject to such restrictions and conditions as may be prescribed, mortgages held by members of any prescribed category of contributors; and

(g) to do such other things as may be advantageous, necessary or expedient for or in connection with the proper performance of its functions under this Act.

(3) The Trust may, on such terms and conditions as it may approve, provide to such organizations .and institutions as it thinks fit-

(a) services in connection with any mortgage granted by those organizations or institutions to any person, whether a contributor or not; and

(b) services in connection with any approved savings instruments."

[42] The resources that make up the NHT come from different sources of which "*contributions*" is one. Section 7 (1)(a) of the Act stipulates that:

7.-(1) The resources of the Trust shall comprise-

(a) moneys derived from contributions;

(b) moneys derived from loans raised by the Trust from time to time in accordance with the provisions of this Act;

(c) moneys earned by or arising from investments made on behalf of the Trust;

(d) such moneys as may from time to time be at the disposition of the Trust by Parliament;

(e) moneys recovered under this Act as costs or interest under section 32 or penalties under section 37;

(f) all moneys properly accruing to the Trust under this Act, including, without prejudice to the generality of the foregoing, the repayment of loans;

(g) such other moneys as may lawfully be paid to the Trust.

(2) The funds of the Trust, save in so far as they may be invested or utilised pursuant to this Act, shall be held by the Bank of Jamaica or any bank approved by the Board in which public finds may lawfully be deposited."

(Emphasis added)

The term "*contribution"* is defined in section 2 as contribution payable pursuant to the Act. The law makes it clear that contributions ought to be paid by the contributors. Part 3 of the Act, is headed "contributions", this part begins by outlining the different categories of contributors to the NHT.

11.- (1) For the purposes of this Act, contributors shall be divided into the following categories-

(a) employed persons;

(b) self-employed persons;

(c) voluntary contributors;

(d) employers.

(2) The Minister may by regulations modify the application of subsection (1) in relation to cases where it appears to him desirable to do so by reason of the nature or circumstances of a person's employment or otherwise, and, without prejudice to the generality of the foregoing such regulations may provide-

(a) for disregarding or for treating as not being employment either as a self-employed person or as an employed person-

(i)employment which in the opinion of the Minister is of a casual or subsidiary nature or in which the person concerned is engaged only to an inconsiderable extent;

(i) employment in the service, or for the purposes of the trade or business, or as a partner, of a relative of the person concerned;

(iii) such employment in the service of , or in the service of a person employed to, such international

organisations or countries (other than Jamaica), as may be specified in the regulations;

(b) for treating as employment as an employed person-

(i) such employment as a self-employed person as may be specified in the regulations;

(ii) such employment outside Jamaica in continuation of gainful employment in Jamaica as may be specified in the regulations;

(c) for treating as employment as a self-employed person-

(i) such employment as an employed person as may be specified in the regulations;

(ii) such employment outside Jamaica in continuation of gainful employment in Jamaica as may be specified in the regulations;

(d) for treating for the purposes of this Act, or for such provisions thereof as may be specified in the regulations, a person's employment either as an employed person or as a self-employed person as-

(i) continuing during periods of holiday, incapacity for work, or in such other circumstances as the Minister thinks appropriate;

(ii) ceasing in such circumstances as may be prescribed.

(3) Subject to the provisions of section 12, contributions shall be payable under this Act by contributors in accordance with the provisions of this section.

(4) Contributions shall be payable in such manner and on such terms and conditions as may be prescribed in regulations, so, however, that different rates of contribution, different methods of payment and different terms and conditions may be prescribed for different categories of contributors; and any regulations made pursuant to this subsection shall be subject to affirmative resolution of the House of Representatives.

(5)…. to…. (11).

[43] An employer is liable to pay contributions due from a person employed to him. Section 12(1) stipulates that:

> *Subject to the provisions of subsection (2) or where regulations otherwise prescribe, an employer who is liable to pay contributions in respect of a person employed by him shall, in the first instance, be liable to pay also on behalf and to the exclusion of that person any contribution payable by that person as an employed person for the same contribution week and for the purposes of this Act, the contributions paid by an employer on behalf of an employed person shall be deemed to be contributions paid by the employed person.*
>
> (Emphasis added)

[44] The National Housing Trust (Contributions) Regulations 1979, prescribes the rates of contribution for the different categories. Regulation 2 provides that an employee's contribution is 2% of his emoluments, employer's contribution is 3% of that employee's emoluments and a self-employed person's contribution is 3% of his earnings. As it relates to the employee's contribution, such should be paid to the NHT by the employer on behalf of the employee. The employer's contribution must also be paid to the NHT, by the employer, in respect of each employee. A self-employed person pays to the NHT his own contributions.

[45] Although bearing a name which suggests it is voluntary the payment, of the employer's "contribution," is mandatory. Where a contributor is non-compliant the NHT has power to prosecute and/ or seek recovery in accordance with the Act. In this regard I agree with the NHT that, notwithstanding its mandatory nature, the contributions are not taxes. Therefore, the Tax Collections Act and the Income Tax Act are not applicable. The Tax Collections Act in section 2 says tax *"includes quit rents, all taxes, rates, duties and fees payable under any enactment to the Collector or Assistant Collector of Taxes for any parish"*. Contributions, unlike taxes, are not paid to the Collector they are paid to the NHT. The Act describes the payments as "*contributions*" and these,

as we will see, are refunded after eight years. I pause to observe that the compulsory nature of this contribution, or forced loan, may have constitutional implications. Given that the contributions are refunded however, it is arguable, there is no wrongful deprivation of property. In this case the Defendants maintained it is a tax. I have found otherwise.

[46] In **Lee Ting Sang v Chung Chi-Keung** [1990] 2 WLR 1173 the Judicial Committee of the Privy Council (JCPC), in an appeal from the Court of Appeal of Hong Kong, stated that the question of whether the applicant was an employee should be determined using English common law standards, as per Lord Griffiths, at 1176:

> *"Nevertheless, their Lordships cannot accede to a submission to adopt a different approach to the construction of a "contract of service" in this Ordinance from that adopted in the English Workmen's Compensation Acts upon which it is so clearly based and also, in those other statutes dealing with employment law in which the phrase often appears. The question is to be answered by applying English common law standards to determine whether the workman was working as an employee or as an independent contractor."*

The question of whether a contract is a contract of service or a contract for services is one of mixed law and fact. The cases support various approaches such as the control test, the organisational test and the multiple factor test. The law has moved past the sole application of the control test. That approach relies, as a decisive factor, on the control exercised as to how the work given is done. However, the exercise of a high degree of control is no longer conclusive. Courts nowadays take a broader approach and have begun to look at all the surrounding circumstances. This is called the multiple factor test see, **Selwyn's Law of Employment, Fourth Edition**, para.232. MacKenna J in a decision in which the multiple factor test was used stated, at paragraph 792 of his judgment in **Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National**

Insurance [1968] 2 WLR 775, that for a contract of service three conditions must be fulfilled. Firstly, the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. Secondly, he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. Thirdly, the other provisions of the contract are consistent with its being a contract of service. On the matter of control his Lordship opined that:

> *"Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted".*

[47] In the **Ready Mixed Concrete** case (cited above) the firm dismissed all its drivers, sold all the lorries to them and, re-engaged them under a different contract. The drivers under the new contract had to wear the company's uniforms, make available their lorries to the company for its personal disposal during set hours, only used the lorries for the company's business and, they had to obey the orders given by the company's foreman. However, they had to maintain the lorries at their own expense, foot all the costs pertaining to the lorries, employ a substitute driver on their own volition (if they were unavailable), could own more than one lorry, pay their own income tax and national insurance contributions, had no set hours for work or meal breaks, made their own decisions as to the driving styles or patterns and, decide what routes to take on each trip. MacKenna J decided that the drivers were independent contractors. He, at pages 8- 9, reasoned that:

"……..the rights conferred and the duties imposed by the contract between Latimer and the company are not such as to make it one of service. It is a contract of carriage.

I have shown earlier that Latimer must make the vehicle available throughout the contract period. He must maintain it (and also the mixing unit) in working order, repairing and replacing worn parts when necessary. He must hire a competent driver to take his place if he should be for any reason unable to drive at any time when the company requires the services of the vehicle. He must do whatever is needed to make the vehicle (with a driver) available throughout the contract period. He must do all this, at his own expense, being paid a rate per mile for the quantity which he delivers. These are obligations more consistent, I think, with a contract of carriage than with one of service. The ownership of the assets, the chance of profit and the risk of loss in the business of carriage are his and not the company's.

If (as I assume) it must be shown that he has freedom enough in the performance of these obligations to qualify as an independent contractor, I would say that he has enough. He is free to decide whether he will maintain the vehicle by his own labour or that of another, and, if he decides to use another's, he is free to choose whom he will employ and on what terms. He is free to use another's services to drive the vehicle when he is away because of sickness or holidays, or indeed at any other time when he has not been directed to drive himself. He is free again in his choice of a competent driver to take his place at these times, and whoever he appoints will be his servant and not the company's. He is free to choose where he will buy his fuel or any other of his requirements, subject to the company's control in the case of major repairs. This is enough. It is true that the company are given special powers to ensure that he runs his business efficiently, keeps proper accounts and pays his

bills. I find nothing in these or any other provisions of the contract inconsistent with the company's contention that he is running a business of his own. A man does not cease to run a business on his own account because he agrees to run it efficiently or to accept another's superintendence".

(Emphasis added)

[48] In **Market Investigations Ltd. v. Minister of Social Security** [1969] 2 WLR 1, the court determined whether Mrs. Irving was an employee of the appellant company, using an economic reality test. In that case Mrs. Irving, and other women, were employed on a part time basis by a series of contracts to do market research with the company. Certain questions were posed in order to determine the issue, such as "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes," then the contract is a contract for services. If the answer is "no," then the contract is a contract of service". In that light, Cooke J suggests, at page 8 of his judgment, that it is prudent that further tests be applied to determine whether the nature and provisions of the contract as a whole are consistent or inconsistent with its being a contract of service. At page 10 he states that:

"No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of

responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task".

And at page 13:

"……...in the circumstances of this case these factors are not in my view sufficient to lead to the conclusion that Mrs. Irving was in business on her own account. The opportunity to deploy individual skill and personality is frequently present in what is undoubtedly a contract of service. I have already said that the right to work for others is not inconsistent with the existence of a contract of service. Mrs. Irving did not provide her own tools or risk her capital, nor did her opportunity of profit depend in any significant degree on the way she managed her work".

[49] In **Lee Ting Sang v Chung Chi-Keung** (paragraph 46 above), the Privy Council was asked to determine whether the Court of Appeal had erred in upholding the decision of the judge that the appellant was not an employee but an independent contractor. The appellant worked as a mason for a building sub-contractor. He sustained injuries while working and claimed compensation under the employment law of Hong Kong. It was the view of the Board that the best test to apply was whether the appellant had engaged himself to perform his services as a person in business on his own account (sometimes called the organisational test). This test was also used by Cooke J in **Market Investigation Ltd** (paragraph 48 above)**.** In applying the test, the Board decided that the matters to be considered included the degree of control exercised over the appellant, whether he provided his own equipment and manpower, the extent of his financial and managerial involvement in the project, and how far he could profit from sound management in the performance of his task. Based on the findings of the trial court the Board was of the view that the appellant was a

skilled artisan working for more than one employer as an employee rather than an independent contractor.

[50] Another approach to the resolution of this issue has emerged in the common law world. Australian courts, at the highest level, have very recently paid primary emphasis on the terms of the agreement itself. In two recent cases the approach has led to differing results although the appeals of both cases were heard together. The first of the two is **Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd** [2022] HCA 1, which concerns a backpacker, who had sought work from a labour-hire company," Construct", and signed a contract in which he was described as a *'self-employed contractor'*. During the period, he performed labouring duties on construction sites. He was told to stop working. The backpacker and the Construction, Forestry, Maritime, Mining and Energy Union commenced proceedings against Construct seeking orders for compensation and penalties pursuant to the provisions of the Fair Work Act 2009. They argued that Construct had not paid the backpacker, according to his entitlement, as an employee. The judge at first instance, and the Full Court on appeal, held that the backpacker was an independent contractor of Construct. Both courts applied a 'multi-factorial test' by considering the terms of the contract between the backpacker and Construct and conduct that occurred after the formation of the contract. Upon appeal to the High Court, the majority held that he was an employee of Construct and that it was not necessary to adopt a multi-factorial approach in the case. Kiefel CJ, Keane and Edelman JJ said, at paragraph 33 of their joint judgment, regarding the multi-factorial test:

> *"Such a test is apt to generate considerable uncertainty, both for parties and for the courts. That uncertainty is exacerbated where it is contended that the test is to be applied in respect of the parties' conduct over the whole course of their dealings with each other".*

The proper approach, according to the majority, is to turn to the principles of contract law whenever the parties' rights and obligations are entirely stated in written contracts. It was expressed at paragraph 58, that:

> "*Where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of their relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under that contract. Where no party seeks to challenge the efficacy of the contract as the charter of the parties' rights and duties, on the basis that it is either a sham or otherwise ineffective under the general law or statute, there is no occasion to seek to determine the character of the parties' relationship by a wide ranging review of the entire history of the parties' dealings. Such a review is neither necessary nor appropriate because the task of the court is to enforce the parties' rights and obligations, not to form a view as to what a fair adjustment of the parties' rights might require.*"

[51] In the second Australian case, of recent vintage, **ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors** [2022] HCA 2, two truck drivers were previously employed to ZG but thereafter they entered into a contract with ZG to purchase its trucks and carry its goods. As a consequence of the new arrangement each driver set up a partnership with his wife. The partnerships purchased the trucks from the company and executed written agreements with ZG for the provision of delivery services. Each partnership was responsible for the maintenance of the trucks and other costs. Each partnership was paid by ZG for delivery services provided. Part of the revenue earned was used to meet the costs of operating the trucks. Net revenue was declared as part of partnership income and split between husband and wife. This arrangement was conventionally known as an 'owner-driver' arrangement. Upon the termination of the arrangement, the drivers commenced proceedings seeking declarations in respect of statutory entitlements alleged to be owed to them as employees of

ZG. At first instance, the judge concluded that the drivers were independent contractors. On appeal, the Full Court overturned this finding and concluded that they were employees of ZG. In overturning the decision, of the Full Court, the High Court unanimously found that the drivers were independent contractors and not employees. Kiefel CJ, Keane and Edelman JJ, postulate at paragraph 8 that:

> *"In these circumstances, and for the reasons given in CFMMEU v Personnel Contracting, the character of the relationship between the parties in this case was to be determined by reference to the rights and duties created by the written agreement which comprehensively regulated that relationship. The circumstance that entry into the contract between the company and the partnerships may have been brought about by the exercise of superior bargaining power by the company did not alter the meaning and effect of the contract".*

[52] The persuasive decisions of the Australian courts notwithstanding, it is my view that, the approach to be adopted and the one most appropriate for Jamaica is that found in **Market Investigation Ltd** and affirmed in **Lee Ting Sang v Chung Chi-Keung**. The words of the contract are always important but represent only the start of the enquiry. There are very good reasons for this. In the first place it is well established that parties to a contract cannot by calling it one thing cause it to be something other than it is in fact and law. So, for example, a lease does not become a licence because the parties describe it as such nor do fixtures become chattels, see **Melluish (Inspector of Taxes) v BMI (No.3) Ltd and related appeals** [1995] 4 All ER 453 at 460(h) and 461(c) per Lord Browne-Wilkinson : "…..*the terms expressly or impliedly agreed between the fixer of the chattel and the owner of the land cannot affect the determination of the question whether, in law, the chattel has become a fixture and therefore in law belongs to the owner of the soil…The terms of such agreement will regulate the contractual rights to sever the chattel from the land…But such agreement cannot prevent the chattel ,once fixed, becoming in law part of the*

land…" In the second place, where third party interests are directly impacted by the designation there is good reason not to have regard only to the words of the contract but its substance, reality and, operation. In this case the third party affected is the NHT. Finally, in the context of parties with unequal bargaining power, if not dependency or, maybe even fiduciary relations, a contra proferendum approach, or one which does not rely solely on the words of the contract, may be appropriate.

[53] I refer to the view expressed by Smith LJ in **Autoclenz Ltd v Belcher and others** [2009] EWCA 1046 (13th October 2009) at para. 69:,

> *"69. ……what Autoclenz wished to create was not material; what mattered was what Autoclenz did create, both by the drafting of its documents and by the requirements it imposed on the valeters. It matters not how many times an employer proclaims that he is engaging a man as a self-employed contractor; if he then imposes requirements on that man which are the obligations of an employee and the true nature of the contractual relationship is that of employer and employee……However, it seems to me that, even where the arrangement has been allowed to continue for many years without question on either side, once the courts are asked to determine the question of status, they must do so on the basis of the true legal position, regardless of what the parties had been content to accept over the years. In short I do not think that an employee should be estopped from contending that he is an employee merely because he has been content to accept self-employed status for some years."* (Emphasis added)

This view I accept as, although I start my assessment of the issue by looking at the contract, it matters not what Marksman and the security guards intended to create. What matters is what they did create. The important question to be answered is what relationship was created by the contract between the parties.

The contract, and what it calls itself, is not determinative. However, the terms are relevant as the relationship between the parties is generally born from the terms set out in the contract.

[54] Applying the preferred approach therefore the question for my determination is whether, when regard is had to the contractual terms and the surrounding circumstances, the security guards engaged themselves as persons in business on their own account. In this regard I consider:

i. what degree of control was exercised by Marksman over the security guards;

ii. whether the security guards provide their own equipment and manpower;

iii. the extent of the security guards' financial and managerial involvement in Marksman's business; and,

iv. how far the security guards could profit from sound management in the performance of their tasks?

These questions I will consider in relation to the contract put in evidence before me because it would be unreasonable to expect the Claimant to present copies of all contracts for the approximately 3000 security guards. The un-contradicted evidence is that the contracts were all very similar, see page 25 Amended Core Bundle of Documents. Although there are variations in standing orders, due primarily to peculiar requirements of the entities with whom Marksman contracted for the provision of security services, I accept that the general contract exhibited reflects the central terms of them all.

[55] The general contract, as mentioned in paragraph 14 above, refers to the security guard as "*subcontractor"* and the 1st Defendant as "*contractor*". Secondly, in Clause 19, it is expressed that "*the subcontractor acknowledges that he is fully aware of the legal relationship of employer and worker……..*

that he/she is not a worker of the contractor under any contract of service." There are however terms of the contract that suggest that the security guards have limited control over the services they provide. The security guards by the terms of the contract are under supervision whether directly or indirectly by Marksman. They are bound to avail themselves to Marksman in accordance with the roster/schedule which was sent to the guards before the commencement of the work week. They are not free to send someone else in the event of unavailability.

[56] Mr. Christopher Goldson, a security guard currently engaged by Marksman, during cross-examination, stated that the roster was sent every Wednesday to his mobile phone. He also said that though a guard could indicate his preference in location or site, the final decision was up to Marksman and its client. He said that he had asked to be placed at his current location. He said he had been a guard for over 15 years and has been assigned at that site since he started working for Marksman.

[57] Mr. Clive Sheriffe, another guard who gave evidence, said that he accepts that the contract means he is an independent contractor and never saw himself to be anything else. He stated in his affidavit and repeated at trial that he is assigned to Carib Cement and is given instructions by Carib Cement. He reports to Carib Cement's security chief, Mr. Webster, and also to a security manager engaged by Marksman. He said that Carib Cement issues post orders and standard operating procedures or standing orders that govern his conduct, responsibilities and duties while he carries out work there. He outlined the extent of the instructions he receives from both Carib Cement (the client) and Marksman. He said that he only reports to Marksman's security manager in relation to his performance under the contract. He stated that he, and the other security guards, wear the Marksman branded uniforms.

[58] Mr. Desmond Larmond was the third security guard who gave evidence for Marksman. During cross-examination he said that, as a location

supervisor at the Flour Mills location, he reports to a zone manager at Marksman. He said that he follows the standing orders and regulations of the third party client, Flour Mills and that Flour Mills directs him as to the time and date on which he should be present at that location. He also wore the Marksman uniform.

[59] I accept these witnesses to be honest and hard-working men. I regard them as loyal to Marksman but rather naïve about the nature of their legal relationship. None of the three referenced anything that would indicate they were in business on their own, for example profit and loss accounts, tax returns or profits earned in any period. Marksman had extensive control over them while they performed the services, where those services were performed and, how they were to be performed.

[60] Having considered all the evidence, I make the following findings of fact:

i. Marksman assigns the security guards to assigned posts and or locations; Marksman provides the security guards with the work schedules; (see paragraph 17 of the Affidavit of Nyron Baker filed March 2nd 2021).

ii. Security guards are instructed to advise Marksman in advance if they will be absent from work; (see paragraph 29 of Re-sworn (Amended) Affidavit of Desmond Larmond filed 28th January 2021).

iii. Marksman owns the firearms that armed guards are required to use in the execution of their duties; (see paragraph 18 of the Re-sworn (Amended) Affidavit of Christopher Goldson filed 28th January 2021).

iv. Dependent on the location of the site, Marksman sometimes drops off and picks up the guards from locations; (see evidence of George Overton in cross-examination on 29th March 2022).

v. Marksman provides certain equipment to guards, such as CUG phones, panic button, shoes, flashlight and radio at its own expense; (see paragraph 25 of the Affidavit of Nyron Baker filed March 2nd 2021).

vi. Security guards are disciplined by Marksman by way of warning, suspension and termination if they run afoul of the rules and regulations; (see paragraph 31 of the Affidavit of Nyron Baker filed March 2nd 2021)

vii. There is a chain of command within Marksman in which security guards are bound to report an issue; further to that security guards on locations are supervised whether directly by Marksman through the location supervisor and or indirectly by a client supervisor (see paragraph 19 of the Re-sworn (Amended) Affidavit of Christopher Goldson filed 28th January 2021).

[61] On these findings I conclude that the security guards are not in business on their own, they work for Marksman and are a part of its organisation. Marksman has the right to exercise direct control over the work done by the security guards. The security guards have nothing to gain from efficiently providing services and only receive the fees stipulated for the service performed. Just as in **Market Investigation Ltd**, the security guards engaged by Marksman do not provide their own tools for work or risk their own capital. They are not in business on their own account. On the facts of this case the security guards are employed by Marksman under contracts of service.

[62] It was submitted, as I understood it, that the terms of the contract between Marksman and its client were such that some control had to be maintained over the guards. Control should not be used as an indicia of employment as it was necessitated by Marksman's obligations. The point gave

me pause. However, it seems to me that, if the only way to fulfil the obligation to the client adequately is to employ rather than contract guards then so be it. The court cannot deny the legal consequence of the relationship entered into, which consequence flows from the terms and conditions of the arrangement, because Marksman was "forced" to entertain such terms. Therefore, I cannot find the relationship to be other than it is merely because it is induced by an obligation Marksman has to a third party.

[63] In considering the liability of the 2nd Defendant the relevant parts of section 37A of the NHT Act state:

> *"37A. – (1) Where an employer is a body corporate, such employer shall designate an officer of that body corporate (hereafter in this section referred to as the 'responsible officer') who shall be –*
>
> *(a) answerable for doing all such acts, matters and things as are required to be done by virtue of this Act or the regulations for the payment of contributions; and*
>
> *(b) responsible for making payment to the Trust of contributions payable by that body corporate in accordance with the provisions of this Act or the regulations relating to the payment of such contributions.*
>
> *(2) The employer shall give written notice to the Collector of Taxes of any designation made pursuant to subsection (1) and shall also notify the Collector of Taxes of any change in that designation.*
>
> *(3) In the absence of any designation pursuant to subsection (1) the person who is the managing director of the body corporate or, as the case may be, the person who (by whatever name called) performs the duties normally carried out by a managing director or, if there is no such person, the person in Jamaica appearing to the Collector of Taxes to be primarily in charge of the body corporate's affairs, shall for the purposes of this section be deemed to be the responsible officer.*

(4) A responsible officer shall, within fifteen days after the end of each month, notify the Collector of any outstanding balances of contributions payable to the Trust by the body corporate as at the end of that month and any responsible officer who fails to do so shall be guilty of an offence under this Act.

(5) A responsible officer who fails or neglects to carry out his duties in accordance with this section shall –

(a) in the event of failure or neglect to make payment of contributions as required by this section, be jointly and severally liable together with the body corporate for the contributions and any penalty in relation thereto;

(b) in any other case, be liable (together with the body corporate) for any penalties under this Act, unless he satisfies the Collector –

(i) that there were bona fide reasons for the failure or neglect and that the payment of contributions could not have been made in the circumstances; or

(ii) that he was overruled by the board of directors (hereinafter referred to as the board) or was otherwise prevented by the board or by any director thereof from carrying out his duties under this section.

(6) If the Collector is not satisfied as to the matters referred to in subsection (5)(b)(i) or (ii), as the case may be, he shall advise the responsible officer concerned of his decision in writing.

(7) .....

(8) A person who is designated a responsible officer shall not be liable in respect of contributions which became payable –

(a) prior to his designation; or

(b) during any period when, consequent on notification to the Collector, he is not the responsible officer.

(9) In this section – 'body corporate' means –

(a) a statutory body or authority; and

(b) a company; 'company' means a company incorporated or registered under the Companies Act."

(Emphasis added)

[64] The NHT Act placed an obligation on Marksman to assign a representative of the company to deal with matters arising under the Act and also to regulate the payment of contributions to the NHT. This assigned person the Act refers to as the "*responsible officer*". The Act provides at subsection 5 of section 37A that where the employer has not assigned a person to the role of responsible officer, the managing director of the company will be deemed the responsible officer. It is quite clear on the evidence before the court that the 2nd Defendant was the managing director for the period November 2004 to 2016. The Defendants by their Amended Defence at paragraph 9, aver that:

> *"Paragraph 5 of the Particulars of Claim is not admitted. The 1st Defendant avers and states that the designated responsible officers are Kenneth Benjamin, Valerie Juggan-Brown, Vinay Walia, Sheila Benjamin McNeil, George Overton, Nicholas Kenneth Benjamin, Robert Epstein and John Masterton."* (Emphasis added)

The 2nd Defendant therefore accepts that he was at some point a designated responsible officer. The period for which the 2nd Defendant was a responsible officer was not stated in the pleadings but was elicited during the cross-examination. I hold that the statutory provisions mean that the 2nd Defendant, having been the managing director for the period November 2004 to 2016, is jointly and severally liable with Marksman for the failure and or neglect to pay contributions to the NHT as well as for any penalty which follows as a result. However, the 2nd Defendant is not liable for the period prior to that as he was not the designated responsible officer at that time.

[65] I do not agree, with the 2nd Defendant's counsel, that there is a statutory duty on the NHT to refer the matter to the Collector of Taxes. It is the responsible officer who must seek out the Collector in light of his, or the company's, non-compliance under the Act. I do accept that subsection (5)(b) of section 37A offers a safeguard to responsible officers, who are given a chance to explain to the Collector the reasons for their failure and/ or omission. The 2nd Defendant would have to raise one of the two defences under subsection (5)(b), and the Collector would have to be so satisfied before absolving him of liability. Given the defences stated in this action it is unlikely that the 2nd Defendant would have satisfied the Collector in relation to either defence provided for in sub section (5)(b). There is no evidence, in any event, that the 2nd Defendant or Marksman made any attempt to approach the Collector of Taxes pursuant to section37A (4) (5) or (6).

[66] The limitation period of 6 years prescribed by section 72(4) of the Income Tax Act does not apply because the NHT contributions are not taxes, see paragraph 45 above. For similar reasons the limitation period of seven years under section 21 of the Tax Collection Act does not apply.

[67] The equitable doctrine of laches may defeat a claim, for declaratory relief, as a claimant might be barred by his unconscionable delay. The maxim "delay defeats equities" or "equity aids the vigilant and not the indolent", may apply, see **Snell's Equity**, 20th Edition, Sweet & Maxwell 1990, in Chapter 3, page 33. The authors there referred to the words of Lord Camden L.C, in **Smith v Clay [1767] 3 Bro, C.C. 639n. at 640n.**, who said " *…..a court of equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time …..".* In **Chevron Caribbean v The Attorney General** [2013] JMSC Civ. 93, at paragraphs 35 and 36, I said:

> *"[35.]…..Equity has long recognized the effect of laches……..."*

"[36] Where a wronged party sits on his rights and does not pursue them, it lulls the party in the wrong into a false sense of security. It impacts their ability to prove their case; it means they must have taken decisions which impact their ability to account for the wrong done, in financial terms. I may add to this an overriding public interest in having cases and in particular cases involving public administration, determined speedily…."

[68] The learned authors of **Halsbury Laws of England (4th Ed,) Vol 16**, in their description of the defence of laches at paragraphs 910 state that "*a claimant in equity is bound to prosecute his claim without undue delay…*". The authors at paragraph 911, further state that though equity does not fix a specific time limit, each case is considered on its own merit.

Paragraph 911, continues*:*

"In determining whether there has been such delay as to amount to laches the chief points to be considered are (1) acquiescence on the plaintiff's part and (2) any change of position that has occurred on the defendant's part. Acquiescence in this sense does not mean standing by while the violation of the right is in progress, but assent, after the violation has been completed and the plaintiff has become aware of it. It is unjust to give the plaintiff a remedy where he has by his conduct done what might fairly be regarded as equivalent to a waiver of it; or where the conduct done has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches".

And paragraph 912:

"912…….The chief element in laches is acquiescence, and sometimes this has been described as the sole ground for creating a bar in equity by the lapse of time. Acquiescence implies that the

person acquiescing is aware of his rights and is in a position to complain of an infringement of them. Hence acquiescence depends on knowledge, capacity and freedom".

[69] The NHT is a body corporate pursuant to the NHT Act. It is not the Crown. Hence the position that money recoverable by the Crown is not subject to the defence of laches or acquiescence is not applicable in the instant matter. I do not, for my part, accept that those pleas are not available against the state. However, it does not arise for my determination since the contributions are not a tax and the NHT is not the Crown nor is it a department of the Crown.

[70] The high authority of the **Maritime Electric Company Ltd** case (cited at paragraph 23 above) is relied on by the NHT's counsel to support a submission that an estoppel, due to waiver acquiescence or misrepresentation, cannot arise. This is because the Claimant is undertaking a statutory duty. In that case a public utility company had by mistake, for twenty-eight months, miscalculated amounts due from its customer. It was decided that, where a statute imposed a duty of a positive kind, an estoppel would not arise, see per Lord Maugham at page 620 to 621 of the report. Since 1937, when that case was decided, the law referable to judicial and constitutional review has advanced considerably. Their lordships would not, for example, have had the benefit of a Constitution which guaranteed a right to "' ..*equitable and humane treatment by any public authority in the exercise of any function,"* as does section 13 (3) (h) of ours. That constitutional guarantee is no doubt an effort to induce fair and just treatment by public administrators. In 1937 that court regarded an estoppel as *"..only a rule of evidence*" and said as much, see page 620 of the report. The court regarded the question as "*very difficult*" and, also at page 620, limited the applicability of its decision to a *"..statute which imposes a duty of a positive kind, not avoidable by the performance of any formality,*". There is every reason therefore, when regard is had to developments in the law related to estoppel and judicial review of administrative action, to apply that decision of the Judicial Committee of the Privy Council with caution.

[71] The Master of the Rolls lead the way in **Lever (Finance) Ltd v Westminster Corporation** [1970] 3 All ER 496 when his court estopped a statutory body from issuing an enforcement notice because there had been a representation made as to the procedure to be followed. In a judgment, with which Megaw LJ agreed, Lord Denning stated at page 500h:

> *"If the planning officer tells the developer that a proposed variation is not material, and the developer acts on it, then the planning authority cannot go back on it. I know that there are authorities which say that a public authority cannot be estopped by any representations made by its officers. It cannot be estopped from doing its public duty. See, for instance, the recent decision of the Divisional Court in Southend-on-Sea Corpn v Hodgson (Wickford) Ltd. <u>But those statements must now be taken with considerable reserve. There are many matters which public authorities can now delegate to their officers. If an officer, acting within the scope of his ostensible authority, makes a representation on which another acts, then a public authority may be bound by it, just as much as a private concern would be.</u> A good instance is the recent decision of this court in Wells v Minister of Housing and Local Government [1967] 2 All ER 1041,[1967] 1 WLR 1000……. So here it has been the practice of the planning authority and of many others, to allow their planning officers to tell applicants whether a variation is material or not. Are they now to be allowed to say that that practice was all wrong? I do not think so. It was a matter within the ostensible authority of the planning officer; and, being acted on, it is binding on the planning authority".*
>
> (Emphasis added)

The Honourable Dennis Morrison JA (as he then was) also indicated that unfairness, and therefore inequity, could provide an exception to the general principle. In the matter of **Digicel Jamaica Limited v The Commissioner of Taxpayer Appeals** [2014] JMCA Civ 36 (unreported judgment dated 24th

October 2014), after refusing to bar the Revenue from exercising its statutory duty on the basis of an alleged legitimate expectation, Morrison JA said at paragraph 109:

> *"Nor was there any evidence of a history of previous dealings between the department and Digicel, such as in ex parte Unilever, so as to give rise to any question of unfairness. In these circumstances, the 1999 letter cannot be treated, in my view, as an unequivocal statement that the Act would be applied otherwise than in accordance with its terms"*

[72] The **Unilever** case, to which Morrison JA referred, is one in which the court prevented the revenue authorities pursuing the tax payer, for interest and late charges, because on 30 occasions over 20 years they accepted a late filing without demur. That, and other circumstances of the case, rendered the statutory bodies' conduct very unfair, see **R v Inland Revenue Commissioners ex parte Unilever plc and related applications** [1996] STC 681 at 691 c – g. In **HTV v Price Commission** [1976] ICR 170 the English Court of Appeal restrained a statutory body from departing from an approach, to a certain calculation, because the commission had acted "*inconsistently and unfairly*," see page 185E to 186 C of the report. In, **Preston v IRC** [1985] 2 All ER 327, **R(on the application of Phoenix Life Holdings Ltd and others) v Revenue and Customs Commissioners** [2019] STC 1829, and**, Aspin v Estill (Inspector of Taxes)** [1987] STC 723, the possibility of restraining the exercise of statutory duties was recognised in the context of judicial review. The authorities, taken as a whole, demonstrate that today the court may restrain a statutory authority where it is just and equitable so to do and will do so where the conduct amounts to an abuse of power.

[73] In the case before me there is, in any event, a most relevant distinction between this case and the **Maritime Electric Company** case discussed above. First, the collection of "contributions" is not made a primary

duty or function of the NHT and is not listed in section four of the Act. The Act places a duty on contributors to pay and, if they do not, provides for penal sanctions and/or civil claims, see sections 32 and 37. The amount to be paid is contained in schedules located in the regulations. The Minister has power to issue regulations which determine in which category a contributor falls, see section 11(4) and the regulations made thereunder. The Act envisions some discretion in what is paid, by whom and, the steps to be taken in case of non-compliance. There are formalities and procedures involved before action is taken such as the issuing of a certificate, see sections 14 and 18 of the Act. Therefore, unlike other situations where there is an expressed statutory duty to act in a particular way, this case concerns a collateral power to institute a claim. It is a power the NHT chose, in its discretion, not to exercise for almost 30 years. As there is no statutory duty to commence a lawsuit an estoppel will offend no established legal principle. Secondly, this case is distinguishable because unlike **Maritime Electric Company** (cited above) the action of the NHT was deliberate and not the result of a mistake or error. The NHT knowingly accepted payments at the contractor's rate, even making refunds to the security guards and, deliberately refrained from taking legal action for an extended period. The decision of the Judicial Committee, being distinguishable on the facts, does not preclude an estoppel in the case at bar.

[74] I agree with Marksman that the NHT acquiesced in their treatment of the security guards as independent contractors, not by the conduct of the then Minister of Finance but, by the conduct of the NHT itself. In the period 2000-2016 the NHT accepted, without demur, payments of 3% of gross emoluments from Marksman concerning its security guards, see paragraph 44 of the affidavit of Jennifer Staple-Gowdie page 1 Volume 1 Bundle of Affidavits. Moreover, I agree with Marksman that the NHT slept on its rights from the mid-1980s and failed, until the claim was filed in 2017, to take action to recover employer's contributions. I find it would be unjust to give the NHT a remedy since its consistent conduct over 30 years may be considered as a waiver of its

entitlement to employer's contribution and/ or a representation to Marksman that the guards could safely be treated as independent contractors. The NHT would have placed Marksman in an impossible, egregious, unjust, unfair, and unreasonable position by bringing a claim for $477,980,257.77, plus interest, surcharge and penalties after all that time.

[75] The next question is whether the various letters, written by the NHT in the period, are such as to ameliorate the injustice. The evidence suggests that the first such communication occurred in August 2007. That letter was not put in evidence but it is referenced in the reply from the Jamaica Society For Industrial Security dated 12th September 2007, see exhibit GO7 to the affidavit of George Overton filed on the 26th April 2021 (pages 1848 and 2256 of the Bundle of Affidavits Volume IV).The reply stated in part, *"As the Trust is well aware we have been in discussion with the Ministry of Finance (sic) and Planning on the status of Security Contractors and no decision/ agreement has yet been arrived at."*

By letter dated the 15th May 2008 the NHT stated:

"Further to your letter of September 9, 2007 (copy of which is enclosed for ease of reference), this is to confirm that the Trust has decided to await the decision of the Ministry of Finance on the status of Security Contractors. As such, we will continue to offer full service to security companies as we did in the past pending further discussions and a final decision."

[76] This letter, although addressed to the Jamaica Society for Industrial Security, was copied to Marksman and other companies, see Exhibit KSB 19, the affidavit of Kenneth Benjamin filed on the 28th January 2021 (page 2262 Bundle of Affidavits Volume IV). The NHT's next letter was dated 22nd October 2013, see exhibit KSB 22 to the affidavit of Kenneth Benjamin (page 2268 Bundle of Affidavits Volume IV). That letter made reference to a meeting with the Minister, at which neither Marksman nor its representative association was present, and stated that the Minister agreed with the NHT that the security

guards were employees. The letter put forward a proposal as to how the debt was to be settled. Marksman's response was to indicate that their representative association was still in dialogue with the Minister about the *"framework of the security industry",* see exhibit KSB 25 to the affidavit of Kenneth Benjamin (page 2273 of Bundle of Affidavits Volume IV).

[77] Marksman it is clear had, either by itself or through its representative association, repeatedly sought and obtained audience with the Minister and/ or his officials, see for example letters, dated 28th November 2018, 2nd August 2015, 24th October 2013 and, 31st October 2013, exhibits: WB 6 to the affidavit of Winston Barnes filed 28th January 2021 (page 2207 Bundle of Affidavits Volume IV); KSB 30; KSB 23 and; KSB 24 to the affidavit of Kenneth Benjamin (pages 2271, 2269 and, 2282 Bundle of Affidavits Volume IV). It seems the Minister was unwilling to, either resile expressly from or, reaffirm the position taken in his Ministry's letter of the 27th December 1985. I accept that there were several meetings with the Minister and prefer the Defendants' witnesses' version of those meetings wherever there has been disagreement about what transpired.

[78] I also considered the letters passing between Marksman's attorneys-at-law and the Ministry of Social Security and Consumer Affairs, see exhibits KSB 6, KSB 7, KSB 8, KSB 9, KSB 11, KSB 12, KSB 13 and KSB 14. These exchanges do not impact my findings. In the first place they took place in the year 1988 a long time ago. In the second place they concerned legislation related to National Insurance. The Ministry of Finance took a contrary view in 1985. I accept the evidence of Mr Kenneth Benjamin when cross-examined that the contrary views, expressed by the Ministries of Labour and of Social Security, did not shake his confidence because: *"Sir, in year I went to Commissioner of Income Tax he was in charge of collecting all tax. He was man at the helm"*. It was therefore not unreasonable for Marksman to believe that the NHT also shared that view. More so because the Ministry of Social Security was unambiguous in its pursuit whereas the NHT was not. Finally, in the same way

correspondence from the Ministry of Finance cannot bind the NHT, the correspondence from the Ministry of Social Security will not advance its cause.

[79] Having considered the correspondence, and the evidence touching the entirety of communications between the parties in the period, I do not think it negates the NHT's abuse of power. This is because the correspondence was indecisive and indicated that the NHT was prepared to abide the result of Marksman's dialogue with the Minister of Finance. Which, of course, the NHT did not do. The NHT had, instead, private and direct dialogue with the Minister. An unequivocal reversal of the NHT's position was not communicated until in or around June 2014. Its letter of demand followed three years later. It seems to me that, with the letter of 27th December 1985 in its possession, Marksman was entitled to expect the Ministry to remonstrate in its favour when the issue with the NHT arose. The NHT's failure to institute a claim and its retention, without protest, of the contractor's rate is less easy to understand.

[80] Similarly, I fail to see how reference to the decision of this Supreme Court in **Easton Marsh v Guardsman Limited** 2006 HCV 01819 (unreported judgment of Edwards J, as she then was, dated 28th October 2011), can assist the NHT on this matter of estoppel. In that case the claimant stated he was a security guard employed to Guardsman on a one-year contract. Guardsman did not, in its defence, allege otherwise and instead successfully proved it had a safe system of work. The court was not called upon to decide the issue now before me. Furthermore, the equity in the case at bar arises precisely because the NHT, had a legal right it did not enforce and, acted in a manner which induced Marksman to think it would not in fact enforce. Arguably the existence of the decision strengthens rather than weakens Marksman's position as the NHT ought to have been aware of its right. The decision in **Atlantic Hardware Plumbing Company Limited v Guardsman Limited** [2018] JMSC Civ 194 (unreported judgment of Palmer Hamilton J (Ag) dated 20th July 2018) is more in point. That court decided, having considered the contract and the relevant authorities, that the security guard was not an employee. I can only say that I

respectfully disagree with that conclusion, albeit, there does not appear to have been the detailed evidential material before my sister as was placed before me.

[81] Declaratory relief is discretionary but the court ought to exercise its jurisdiction to grant same in accordance with general principles. **Zamir and Woolf** in **The Declaratory Judgment, Second Edition**, at paragraph 4.001, state that a declaratory order is flexible and discretionary in nature and enables the court to exercise precise control over the circumstances and terms on which relief is granted. Before granting a declaration the court should take into account the justice to the Claimant, justice to the Defendant, the public interest where necessary, whether the declaration would serve a useful purpose and, whether there are any special reasons why the court should or should not grant the declaration, see **Financial Services Authority v Rourke** [2001] EWHC 704 (Ch) and **Rohan James and Nigel Murphy(on behalf of The Members of the Jamaica Police Federation) et al v Minister of Finance & Anor** [2022] JMFC Comm 13, in which the Full Court examined the nature of Declaratory relief. In **Mossell (Jamaica) Limited (T/A Digicel) v The Office of Utilities Regulation, Cable and Wireless JA Limited and Centennial JA Limited** [2010] UKPC 1, their Lordship's Board stated at paragraph 44: *"….there may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others".*

[82] Having regard to the egregious circumstances of this case, the delay, the act of collecting at the rate applicable to independent contractors and, the possible direct and indirect effects declaratory relief may have on other interested parties not before the court, I am not minded to grant the declarations in the form sought. The overarching purpose of equity is to do justice. In the instant matter justice will not be done if the declarations are granted, with retroactive effect, as prayed by the Claimant. Justice is better served for all the parties if the declaration has a prospective effect only. The bar of laches I do not apply, to prevent the grant of a declaration, first, because the industry needs the legal issue resolved and it is in the public interest to have the court

pronounce on it. Secondly, there is no prejudice to the Defendants as the declaration will not require them to pay past amounts due.

DECISION

[83] Therefore, the Claimant succeeds on its claim for a declaration that the security guards are employees and not independent contractors. However, the claim, for the sum of $477,980,257.77 for employer's contributions for financial years 2000-2016, plus interest, penalty and surcharge, is refused.

[84] The claim fails because, the NHT sat on its rights for far too long and received, without demur, payment on the basis that the guards were not employees. This lead Marksman reasonably to believe that the NHT, like the tax authorities, was satisfied and to act accordingly. If the NHT is allowed to recover the employer's contributions, interest, surcharge, and penalties for the period claimed or part thereof, it would be unfair to the Defendants. Marksman was encouraged, by the Claimant's conduct, to arrange its affairs on the basis that the Claimant was satisfied to accept 3% contractor's contribution. An estoppel therefore arises due to waiver, representation by conduct, acquiescence and/ or laches to prevent pursuit of the money claim. However, a declaration, with prospective effect only, will be granted as the security guards are employees of Marksman.

[85] The parties will pardon me if I use this medium to express gratitude to Mrs. Jamie Brown-Bailey, a judicial clerk. Whilst I take full responsibility for the contents of this judgment I would not have been able to complete it in time for delivery without her indefatigable assistance.

[86] My orders and declarations are therefore as follows:

i. It is hereby declared, with prospective effect, that the security guards engaged by the 1st Defendant to provide third parties with security services, are employees.

ii. It is further declared that the 1st Defendant is liable, under the National Housing Trust Act, to pay employer's contribution to the National Housing Trust in respect of the said security guards from the date of this judgment and continuing;

iii. The claim against the Defendants for an order to pay $477,980,257.77, interest, surcharge and penalties and/or for damages is dismissed.

iv. Three fourths of the costs of this claim will go to the Claimant to be taxed if not agreed. Costs are apportioned in this manner because, although the Defendants have been relieved from the claimed sum, interest, penalty and surcharge, most of the time was spent on the primary issue on which the Claimant has succeeded.

David Batts
Puisne Judge