



[2021] JMRC. 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

REVENUE COURT

CLAIM NO. 4 OF 2018

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

Dr. Lloyd Barnett and Gillian Burgess instructed by Gillian Burgess, Attorney-at-Law for the 2nd Defendant/Applicant.

W. John Vassell Q.C., Trudy-Ann Dixon Frith and Danielle Reid instructed by DunnCox, Attorneys-at-Law for the Claimant/Respondent.

Walter Scott Q.C., Weadon Daley, Oshane Vacciana and Deniece Beaumont Walters instructed by Hart Muirhead Fatta for the 1st Defendant/Respondent.

Heard: 22nd March 2021

Civil Procedure - Application to file amended defence and issue counterclaim after Case Management Conference - Facts supporting counterclaim are such that main relief is an administrative order to check the exercise of a statutory public duty - Knowledge of the result of the exercise of public duty for approximately 3 years - Adjourned trial imminent - Considerations.

C. BARNABY, J

INTRODUCTION

[1] On the 22nd March 2021 I heard the 2nd Defendant's Notice of Application for Court Orders to Further Amend the Defence of the Second Defendant which was filed on the 12th March 2021. He sought the court's permission to file and serve

within fourteen (14) days a Further Amended Defence and Counterclaim in the terms of the draft which is attached to the Affidavit of Robert Epstein in support of the application; that the other parties be permitted to make consequential amendments to their claim or defence as appropriate; and for such further and other relief the court deemed fit. Mr. Epstein's affidavit and a Notice of Change of Attorney for the 2nd Defendant was also filed on the 12th March 2021. The application was made pursuant to CPR rule 20.4 and on the further ground that the applicant had taken separate legal advice and believed that he should be separately represented and file a separate defence and counterclaim in the interest of having a fair and proper trial of all relevant issues in the case.

[2] While the 1st Defendant indicated that it had no objection to the application being granted, it was opposed by the Claimant. On conclusion of the submissions by Dr. Barnett for the 2nd Defendant and Mr. Vassell Q.C. for the Claimant, I refused the 2nd Defendant's application and the application by Dr. Barnett for leave to appeal. It was ordered that:

1. The 2nd Defendant's Notice of Application for Court Orders to Further Amend the Defence of the Second Defendant is refused.
2. Costs of the application to the Claimant to be taxed if not sooner agreed.
3. The Application for leave to appeal is refused.
4. The 2nd Defendant's Attorney-at-Law is to prepare, file and serve this order.

[3] I promised to reduce into writing my reasons for decision on the substantive application having presented them in brief orally. I now do so, more fully, in fulfilment of that promise.

BRIEF BACKGROUND TO THE CLAIM

- [4] In order to appreciate the significance or otherwise of the proposed amendments, it would perhaps be helpful to give a very brief background to the claim.
- [5] By letter dated 12th December 2017 the Claimant demanded payment of outstanding employer's NHT contributions said to be owed by the 1st Defendant in respect of security guards. Payment was to be made within seven (7) days. The Claimant also issued and served upon the 1st Defendant a Certificate (Form No. C6) dated 30th November 2017, pursuant to section 14 (2) of the *National Housing Trust Act* (the NHT Act). The sums claimed in the demand letter and on the certificate were not remitted to the Claimant. Proceedings were therefore issued out of the Parish Court by the NHT against the Defendants for recovery of the alleged outstanding contributions. The Defendants' contention is that the demand remains unsatisfied and the sums on the certificate unpaid because they were not lawfully made. This is on account that the 1st Defendant is not the employer of the security guards in question, so say the Defendants. The alleged outstanding contributions are for the years 2000 - 2016.
- [6] Although there are other aspects of the claim, whether or not security guards engaged by the 1st Defendant are employees or independent contractors is at its crux. The Claimant, among other things, seeks a declaration that they are employees. If this particular issue is determined in the Claimant's favour, the 1st Defendant as a body corporate could be liable for the claimed outstanding NHT contributions as an employer; if determined contra wise, there is no question of its liability.
- [7] Outside of the defence that security guards are not employees but independent contractors engaged on fixed term contracts, and others which are not immediately relevant to the disposition of the application, the 2nd Defendant has denied that he is a proper party to the claim. The 2nd Defendant was a managing

director of the 1st Defendant during most, but not all of the years for which monies are alleged to be owed to the NHT by the 1st Defendant.

APPLICABLE LAW

[8] The 2nd Defendant's application for leave to file and serve a further amended defence and counterclaim is made pursuant to CPR 20.4, paragraph (2) of which prescribes that statements of case may only be amended after a case management conference with the permission of the court. That is the position in which the 2nd Defendant finds himself as his application was filed a few days before the appointed Pre-Trial Review and was heard on that appointed date.

[9] The legal principles upon which the parties rely in advancing and opposing the application are well known. They are helpfully set out for example in the judgment of Mangatal, J. in **Index Communication Network Limited v Capital Solutions Limited et al** [2012] JMSC Civ 50. Although the facts of that case are distinguishable from the instant, I believe the principles applicable to the amendment of statements of case are incontrovertible and are capable of being applied here. In the course of her judgment Mangatal, J. cited with approval the judgment of Brooks, J. (as he then was) in **National Housing Development Corporation and Danwell Construction Limited et al** in Claim Nos. HCV 00036 and HCV 000362 of 2004 delivered 4th May 2007 where it was observed that apart from the overriding objectives, the CPR does not set out principles which should guide the court on an application for permission to amend. In consequence, a decision on whether or not to permit amendments must be based on the overriding objective of dealing justly with cases

[10] Rule 1.1 (2) sets out what is meant by dealing justly with cases.

(2) Dealing justly with a case includes –

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

- (b) saving expense;*
- (c) dealing with it in ways which take into consideration –*
 - (i) the amount of money involved;*
 - (ii) the importance of the case;*
 - (iii) the complexity of the issues; and*
 - (iv) the financial position of each party;*
- (d) ensuring that it is dealt with expeditiously and fairly; and*
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*

[11] It is demonstrated on the authorities that in determining whether to grant or refuse an application to amend statements of case, the following matters are open for consideration by the court.

- I. The stage at which the case has reached at the time the application for permission to amend is being sought;
- II. Whether there is an arguable factual basis for the proposed amendment;
- III. Where the amendment is proposed to be made late in the day, whether it has a prospect of success;
- IV. Whether the amendment is sought in good faith, as it is impermissible for a party to raise by amendment allegations which are unsupported by evidence and which are tantamount to a backtracking on allegations of fact;
- V. The court should permit an amendment where it would enable the real matters in controversy to be determined;
- VI. The effect of the amendment on the opposing party;
- VII. The allocation of court resources; and
- VIII. The extent to which costs would be an adequate remedy.

[12] It is with these principles in mind that I arrived at the decision to refuse the 2nd Defendant's application.

REASONS FOR DECISION

[13] It was Dr. Barnett's submission, consistent with a ground in the 2nd Defendant's application, that it is in the interest of justice and furthering the overriding objective that the application be granted to allow for the filing and service of the Further Amended Defence and Counterclaim in terms of the draft exhibited in Mr. Epstein's affidavit. He proposed a further modification during the course of oral submissions. While I am prepared to accept as presented on the evidence before me that the application is being made on the basis of legal advice the 2nd Defendant has now received, I do not agree with Dr. Barnett that the overriding objective to deal justly with cases would be advanced by granting the application.

A. Stage of the case, arguable factual basis for amendments, prospect of success of amendments in defending the claim, and bona fides of amendments raised

[14] The claim was issued out of this court in 2018 and since then, there has been a Case Management Conference in 2019 when a timetable was fixed and included a date for trial in September 2020. A number of interlocutory applications have also been heard and determined, including applications to vacate previously fixed trial dates; extend the time within which to comply with court orders; for leave to file amended statements of case; for specific disclosure; to direct a party to answer request for information; to abridge the time for compliance with court orders to enable documents filed and served out of time to stand as duly filed and served; and to strike out substantial portions of affidavit evidence which were filed for use at a previously scheduled trial of the claim. The upcoming trial which is scheduled to be heard over five (5) days commencing on the 17th May 2021 has been fixed since the 16th November 2020 when trial dates in that month were vacated to facilitate the hearing of the striking out applications. At the time of the

hearing of the instant application all the evidence and documents ordered to be filed and served had been complied with.

[15] The case is therefore at a very advanced stage which requires me to give consideration not only to whether there is an arguable factual basis for the amendment but whether it has a prospect of success. This was the main thrust of the objection of Mr. Vassell Q.C. to the grant of the application.

[16] The amendments which were proposed to be made by the Further Amended Defence and Counterclaim of the Second Defendant, which is exhibited in Mr. Epstein's affidavit, were not underlined or otherwise highlighted. On enquiry from Dr. Barnett it was indicated that the substantive amendments to the defence appeared at paragraph 9 and at paragraphs 20 to 25 where the counterclaim was proposed.

[17] On my reading of the draft of the Further Amended Defence and Counter Claim for the Second Defendant, three (3) broad, potentially material amendments are raised. While other modifications were advanced, they were not material or capable of affecting the outcome of the claim against the 2nd Defendant in any way and would accordingly be refused.

[18] The three (3) potentially material amendments I have identified, which will each be addressed in turn, are that:

- I. The security guards whose status is to be determined are not parties to the proceedings;
- II. The 2nd Defendant was unlawfully regarded and designated as a responsible officer on account that he:
 - (a) was never designated as a responsible officer within the meaning of section 37A (1) of the NHT Act;
 - (b) was never designated as a responsible officer within the meaning of section 37A (3) of the NHT Act; and

(c) was never designated as a responsible officer within the meaning of section 37A (8) of the NHT Act;

- III. Has been unlawfully regarded as jointly and severally liable together with the 1st Defendant for the outstanding NHT contributions alleged to be owed by the 1st Defendant.

The security guards whose status is to be determined are not parties to the proceedings

[19] At paragraph 7 (j) of the Defendants' Amended Defence, the Defendants say that *"the self-employed independent contractors have not in this court challenged their agreed contractual status as self-employed independent contractors."* The 2nd Defendant proposes to modify this paragraph by adding the words *"and are not parties to these proceedings in which a determination of their contractual status is being sought."*

[20] The Claimant's failure to add the security guards as parties to the proceedings does not prevent the court from determining the claim against the 2nd Defendant and the amendment raised is not a defence with any prospect of success.

[21] One of the reliefs being sought on the claim is a declaration that the security guards engaged by the 1st Defendant are its employees contrary to the contention of both Defendants that they were engaged under fixed term contracts and are independent contractors. In resolving that dispute, the court will be required to determine whether the contracts between the 1st Defendant and the security guards were contracts for service or contracts of service. It is well settled that in determining that issue, the label that the parties attach to the contract is not conclusive.

[22] While there is a difference in the contributions which would be deductible from the salary of an independent contractor as opposed to an employee, which would have implications for accounting if the security guards are found to fall into the latter category, it does not require the addition of the security guards as parties

to the claim. In any event, the parties have filed affidavit evidence of security guards for use at trial.

- [23] For these reasons, leave to amend the 2nd Defendant's defence in the terms proposed at paragraph 7(j) is refused.

The 2nd Defendant was unlawfully regarded and designated as a responsible officer

- [24] The 2nd Defendant raises the following amendment at paragraph 9 (a) of the draft and modified orally by Dr. Barnett during the course of oral submissions thus.

*The 2nd Defendant avers and states that he was never a designated responsible officer within the meaning of section 37A (1) or section 37A (8) of the National Housing Trust Act **and accordingly could not lawfully be sued in accordance with section 37A (3) and (5) of the Act as alleged in paragraph 6 of the Particulars of Claim.** He became General Manager on or about October 1, 2002 and only became a director on or about November 30, 2004 when he became managing director which position he ceased to hold on March 31, 2018 when he was replaced by Mr. Nicholas Benjamin.*

[Proposed Amendment to Draft Further Amended Defence and Counterclaim Highlighted]

- [25] The 2nd Defendant also raises amendments at paragraphs 10 and 15 that he is not and was never a designated officer or responsible officer. He also advances at paragraphs 21 and 22 of the counterclaim that he was never the officer of the 1st Defendant with responsibility for computing, making or paying statutory deductions or contributions in respect of employees or the security guards in question, and in consequence was never and could never have been designated as the responsible officer.

[26] Pursuant to section 37A (1) of the NHT Act, where an employer is a body corporate it shall designate an officer known as the “responsible officer” who is answerable for doing all acts, matters and things required to be done by the Act or regulations for the payment of contributions. He is also responsible for making payments of contributions payable by the body corporate in accordance with the Act or regulations. Pursuant to section 37A (2), the designation of a responsible officer by the body corporate is done by notice in writing to the Collector of Taxes and if there is any change in designation, the said Collector shall be notified. I will refer to this designation hereafter as “the corporate designation”.

[27] At paragraph 5 of the Particulars of Claim, the Claimant contends that the 1st Defendant as a body corporate is obliged to designate a responsible officer who is to advise the Collector of Taxes of outstanding contributions in accordance with section 37A (1) and (2) of the NHT Act; and that the 1st Defendant was required to provide written notice of that designation to the Collector of Taxes but had failed to do so in contravention of the NHT Act. In paragraph 9 of the Amended Defence to which the 2nd Defendant is a party and to which his Certificate of Truth is attached, the answer is as follows.

*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]*

[28] When the Claimant’s averment and the Defendants’ answer are read together, there appears to me to be, as contended by Counsel for the Claimant, an admission that there was a corporate designation of the 2nd Defendant as a responsible officer by the 1st Defendant, for the purposes of section 37A (1) and (2) of the NHT Act.

- [29]** The amendments raised and the averment in the joint Amended Defence are both allegations of fact which are incapable of being reconciled, certainly in the circumstances of this case. While the court is permitted to allow a party to withdraw or amend an admission pursuant to Rule 14.1, there was no application before me in that regard and no evidence aimed at convincing me to adopt that course. One of the principles which govern applications for amendments to statements of case is that a party is not permitted to raise by amendment, allegations which are unsupported by evidence. Further in the face of the subsisting admission, on which the Claimant is permitted to rely, there is no real prospect of the 2nd Defendant succeeding in defending the claim on the basis that he was not designated a responsible officer within the meaning of section 37A (1) and (2) of the NHT Act.
- [30]** In any event, where there is no corporate designation, a “responsible officer” may nevertheless be designated pursuant to the deeming provision at section 37A (3) of the Act, to which I will refer as “the statutory designation”. A managing director of a body corporate, or the person who performs the duties which are normally carried out by a managing director, howsoever called, may be statutorily designated. If there is no such person, the person in Jamaica who appears to the Collector of Taxes to be primarily in charge of the affairs of the body corporate is “deemed” the responsible officer for purposes of section 37A.
- [31]** At paragraph 6 of its Particulars of Claim, the Claimant identifies the 2nd Defendant as Managing Director of the 1st Defendant Company and therefore its responsible officer under the NHT Act, in the absence of a designation by the 1st Defendant company. At paragraph 10 of the Amended Defence, the 2nd Defendant denies that he is the Managing Director of the 1st Defendant and it is further stated that a Nicholas Benjamin is the holder of that office. He raises the amendment at paragraph 9(a) that he became the managing director of the 1st Defendant on or about 30th November 2004 and so served until 31st March 2018 when he was succeeded by Mr. Benjamin.

[32] By statute, section 37A (8) in particular, a person who has been designated the responsible officer whether by way of corporate or statutory designation is not liable for contributions which became payable prior to his designation; or consequent on notification to the Collector of Taxes, for any period he is not the responsible officer. The Claimant's claim covers alleged outstanding contributions for the years 2000 - 2016. In the absence of a corporate designation, on the amendment raised by the 2nd Defendant, he was the Managing Director from the 30th November 2004 up to 2016 and therefore capable of being statutorily designated as the 1st Defendant's responsible officer for purposes of section 37A of the NHT Act for a substantial part of the period for which alleged outstanding contributions are claimed, and may therefore be regarded as liable for those contributions pursuant to the operation of section 37A (8).

[33] The 2nd Defendant also raises the following amendment at paragraph 9(b),

Neither the Claimant nor the Collector of Taxes gave any notice to the 2nd Defendant of an intention to designate him as the responsible officer prior to the taking of legal proceedings against him and they have thereby deprived the 2nd Defendant of his guaranteed constitutional right to equitable treatment and a fair hearing.

[34] He also goes on to advance at paragraphs 24 and 25, as part of the proposed counterclaim, that until he was served with a summons issued out of the Parish Court he received no notice from the Claimant or Collector of Taxes of their intention to treat him as a responsible officer; and that as a result, his designation as the responsible officer is in breach of the principles of fairness and of his constitutional rights to equitable treatment and due process guaranteed by sections 13(3)(h) and 16(2) of the constitution and is irregular, irrational and therefore null and void. The same challenge is raised in the same paragraphs in respect of the initiation of proceedings against him by the Claimant. That proposed challenge will be separately addressed in the context of whether the

2nd Defendant could lawfully be regarded as jointly and severally liable for contributions claimed to be owed by the 1st Defendant.

[35] I find that the 2nd Defendant does not have a real chance of defending or counterclaiming against the Claimant on the amendments which relate to the absence of notice prior to his being designated as a responsible officer. There is nothing in the legislation which requires the Claimant or the Collector of Taxes for that matter, to notify, hear from and consider the views of the managing director of a body corporate prior to his being designated a responsible officer under the NHT Act. Where the body corporate has a managing director, the activation of the statutory designation is not dependent on the exercise of any discretion by the NHT or the Collector of Taxes. This is in contrast to the treatment of liability of the responsible officer for the outstanding contributions of his body corporate. The statutory designation of the managing director as a responsible officer is simply the result where there is no corporate designation. In any event, there is an admission that he was a designated responsible officer of the 1st Defendant.

[36] I am therefore in agreement with the submission of Mr. Vassell Q.C., that in the absence of any allegation that the provisions for the designation of a responsible officer are unconstitutional, there is no real chance of the 2nd Defendant succeeding on the amendments raised at paragraphs 9 (b), 24 and 25 of the draft Further Amended Defence and Counterclaim of the Second Defendant relative to his designation as a responsible officer by the Claimant or the Collector of Taxes.

[37] It is in all the foregoing circumstances that I find that there is no real prospect of the 2nd Defendant succeeding in defending or counterclaiming on the basis of the amendments raised, that he was not or ever designated the responsible officer within the meaning of section 37A (1), (3) and (8) of the NHT Act. Leave to make amendments in those regards is accordingly refused.

The 2nd Defendant has been unlawfully regarded as jointly and severally liable together with the 1st Defendant for the outstanding NHT contributions alleged to be owed by the 1st Defendant

[38] Sections 37A (5) and (6) of the NHT Act provides that

(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;

(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.

[39] As alluded to earlier in these reasons for decision, the 2nd Defendant at paragraphs 9 (a) and (b), 24 and 25 proposes to contend that:

- (i) he could not lawfully be sued in accordance with section 37A (5) of the NHT Act as alleged in paragraph 6 of the Particulars of Claim;
- (ii) that until he was served with a summons issued out of the Parish Court, he received no notice from the Claimant or Collector of Taxes of their intention to treat him as a responsible officer before issuing legal proceedings against him;
- (iii) that in failing to notify him the Claimant and the Collector of Taxes breached principles of fairness, his constitutional rights to equitable treatment and due process guaranteed by sections 13(3)(h) and 16(2) of the constitution;
- (iv) and that the taking out of the proceedings against him in those circumstances was irregular, irrational and therefore null and void.

[40] In paragraphs 21 and 22 the 2nd Defendant also raises that he was never the officer of the 1st Defendant with responsibility for computing, making or paying statutory deductions or contributions in respect of employees or the security guards in question, and in consequence was never and could never have been designated as the responsible officer. He goes on to advance at paragraph 23 that the contractual arrangements between security guards and the 1st Defendant were determined and established before he became associated with the 1st Defendant and that he had played no part in the establishment of those relationships and any decision on whether or not NHT payments were applicable.

[41] Additionally, at paragraph 7(a) of the Amended Defence filed by both Defendants, they say that

the 1st Defendant and its affiliated companies have in excess of 30 years entered into such contracts [fixed term contracts with security guards] and have been operating on this basis since late 1985 or early 1986.”

The amendment raised proposes to add these words after “1986”, *“which is long before the 2nd Defendant became associated with the 1st Defendant;”*.

- [42] When considered in isolation, this particular amendment and that advanced at paragraph 23, appear to be of little value. When viewed in the context of the amendments raised at paragraphs 9 (a) and (b), 21 to 25, and sections 37A (5) and (6) of the NHT Act however, its significance becomes apparent. It is being proposed to establish that he ought not to be treated as jointly and severally liable together with the 1st Defendant for the alleged outstanding NHT contributions as ahead of being so treated, he should have been notified and given an opportunity to be heard. This in on the ground that the 1st Defendant’s treatment of security guards as independent contractors, in respect of whom it says it was not required to pay employers’ contributions under the NHT Act was not determined by him.
- [43] It was Dr. Barnett’s submission before me that the 2nd Defendant should have been notified and given an opportunity to respond to the intention on the part of the Commissioner of Taxes about his being treated as jointly and severally liable before subjecting him to the onerous claim.
- [44] Unlike the proposed challenge to the designation of the 2nd Defendant as the responsible officer, which I have already found has no real prospect of succeeding in defending the claim and in counterclaiming, the amendments which propose to challenge the 2nd Defendant’s joint and several liabilities together with the 1st Defendant admits of argument.
- [45] While it may be easily argued that as the Managing Director of the 1st Defendant the 2nd Defendant ought to be aware that the Claimant had determined that it owed outstanding employers’ contributions, particularly in the face of the Claimant’s demand letter dated 12th December 2017 and the service upon the 1st Defendant of the section 14(2) certificate dated 30th November 2017; it is quite another thing to argue that this constituted notice or an indication that the 2nd

Defendant was advised that he would be treated as jointly and severally liable together with the 1st Defendant for the sums certified and demanded.

- [46] Firstly, a responsible officer is jointly and severally liable for outstanding NHT contributions “**unless**” he is able to satisfy the Collector of Taxes “*(i) that there were **bona fide** reasons for [his] failure or neglect and that the payment of contributions could not have been made in the circumstances; or that he was overruled by the board of directors... or was otherwise prevented by the board or by any director thereof from carrying out his duties under [section 37A].*”
- [47] Second, it appears to me on my reading of section 37A (5) and (6) of the NHT Act, that notwithstanding the propriety of the designation as a responsible officer of a body corporate for the purposes of section 37A, there is a discretion reserved to the Collector of Taxes to determine whether or not that responsible officer should be held jointly and severally liable for the outstanding contributions of the body corporate. Joint and several liability of the designated responsible officer is therefore not “strict” or absolute.
- [48] Third, the preservation of a discretion to the Collector of Taxes seems to be a recognition of the hardship which a responsible officer may suffer if he is to be treated as jointly and severally liable for the contributions of the body cooperate in circumstances where he may have been prevented from deducting and remitting contributions under the Act or the regulations. A certificate or demand letter to the body corporate hardly assists a responsible officer who finds himself in that position. The 2nd Defendant’s amendment raises the allegation of fact that the treatment of security guards as independent contractors long predated his affiliation with the 1st Defendant and that he was not involved in making decisions in that regard and the applicability of NHT contributions.
- [49] Fourth, if proceedings are taken out against the responsible officer for outstanding contributions said to be owed by the body corporate, a decision must have already been made by the Collector of Taxes that he is jointly and severally

liable. It is my view that before such a decision is taken, the responsible officer should be given an opportunity to make representations to the Collector of Taxes as to whether any of the two (2) circumstances at section 37A (5) exist in respect of him which would permit the exercise of a discretion to exclude him from being jointly and severally liable together with the body corporate. In the same way that a pre-action demand is made on the body corporate, where it is proposed to make the responsible officer jointly and severally liable for any unsatisfied demand made on the body, it is my view that notice ought to be given and an opportunity presented for the responsible officer to be heard by the Collector of Taxes before an adverse decision is made. Having heard and considered the representation's, the decision must be communicated to the responsible officer in writing. In the interest of fairness, section 37A (5) appears to require no less.

- [50]** At this late stage of the claim however, mere arguability will not suffice, the amendment being advanced must have a real chance of succeeding in defending the claim or counterclaiming against the Claimant. Ahead of that particular enquiry, I pause to make some observations on the nature of the amendments now being considered and the relief proposed on the counterclaim.
- [51]** In addition to a declaration that his designation as the responsible officer should be declared null and void, which I have already determined has no real chance of success in defending the claim or in counterclaiming against the Claimant; the 2nd Defendant also proposes to pursue as part of his declaratory relief, that the proceedings instituted against him be declared null and void; and that the action against him be dismissed.
- [52]** The challenge and the grounds on which the relief are being sought appear to me to be in the nature of administrative law claims. In particular, the allegations of a failure to give notice and an opportunity be heard ahead of designation and the initiation of proceedings against the responsible officer on the basis of joint and several liabilities, in purported contravention of section 37A (5) of the NHT Act; in breach of the principles of fairness and the 2nd Defendant's fundamental

constitutional rights to equitable treatment, due process, and a fair hearing; and the allegation that the designation and initiation of proceedings by the Claimant are irregular, irrational and therefore null and void, suggest that the appropriate remedy lies in the realm of public law.

- [53]** Where a person is alleging that a body or person charged by Parliament to perform public duties has acted unlawfully in its exercise, judicial review is the appropriate remedy to check usurpation, insist on due performance and adherence to the relevant law. To pursue any of the judicial review remedies however, the 2nd Defendant would first have to obtain leave of the court. The court on such an application would be required to consider the lack of promptitude in making the application.
- [54]** Rule 56.6 of the CPR makes provision for delay and among other things, prescribes that an application for leave to pursue a judicial review claim is required to be made promptly and in any event within three (3) months from the date when the grounds for the application first arose. While the court may extend the time for making an application, it is on being satisfied that there is good reason for doing so. The application for leave may be refused on the basis of delay and where the court is considering that course, it must also consider whether the granting of leave or the relief would likely cause substantial hardship and prejudice to the rights of any person or be detrimental to good administration.
- [55]** I am mindful that where the facts supporting a claim are such that the only or main relief is an administrative order, the court is empowered by rule 56.7 to direct that a claim for damages or other relief is to proceed by way of an application for such an order; and where the appropriate administrative order is for judicial review, that it may give leave for the matter to proceed as if an application for leave was made under rule 56.3. It is my view that the powers at Rule 56.7 are only exercisable in respect of claims that have already been issued and would not avail the 2nd Defendant in his bid to issue the Further Amended Defence and Counterclaim.

- [56] While I am of the view that in an appropriate case it would be possible for the court to allow a party to amend a statement of case and counter claim for administrative relief including for remedies available on judicial review, the circumstances of this case do not recommend the exercise of such a discretion.
- [57] The instant claim is approximately two (2) months shy of the third anniversary of its filing. It was preceded by proceedings in the Parish Court, in respect of which a summons was served on the 2nd Defendant. The 2nd Defendant, whether by inadvertence or design does not indicate the date on which he was served with the summons issued out of the Parish Court. At minimum then, the 2nd Defendant has known for almost three (3) years that there was a decision to treat him as a responsible officer who is jointly and severally liable together with the 1st Defendant for the sums alleged to be owed to the NHT.
- [58] That the 2nd Defendant, who has always been represented by Counsel would seek to challenge the exercise of a public duty imposed by statute almost three (3) years after he was certain that the ground for challenge had arisen, only two (2) months before a twice adjourned trial of the claim, and after evidence and skeleton submissions have been filed, causes me to harbour genuine concern about the *bona fides* of the amendments and request for leave to issue a counterclaim. In the affidavit in support of the application, other than saying that he is represented by new Counsel who advises him that he should be separately represented and file a further amended defence and counterclaim, there is nothing further by way of explanation to account for the belated application to amend and issue a counterclaim. More was required by way of explanation given the particular circumstances of this case.
- [59] This brings me to the question of whether the amendments raised have a real chance of success in the defending the claim or counterclaiming. I do not believe that there is a real chance of either.

- [60] The statutory position is that unless a responsible officer is able to satisfy the Collector of Taxes “(i) that there were **bona fide** reasons for [his] failure or neglect and that the payment of contributions could not have been made in the circumstances; or that he was overruled by the board of directors... or was otherwise prevented by the board or by any director thereof from carrying out his duties under [section 37A]” he is jointly and severally liable together with the body corporate for the contributions.
- [61] The 2nd Defendant is now separately represented and although he is seeking to challenge the exercise of a public statutory duty which could only be determined in his favour if any of the two circumstances in the preceding paragraph exist in respect of him, he does not in any way distance himself from the position of the 1st Defendant as it relates to the alleged failure to remit the sums claimed by the NHT.
- [62] In the draft Further Amended Defence and Counterclaim of the Second Defendant, he repeats in substantial and material respects the defence of the 1st Defendant: that it is not an employer of security guards and in consequence, that it does not owe the alleged outstanding sums. On the draft Further Amended Defence and Counterclaim, the 2nd Defendant’s position in these regards is consistent with the position of the body corporate. Although he raises by amendment that he could not have been designated the responsible officer by corporate designation, even in the face of the 1st Defendant’s averment that he is a designated responsible officer, the 2nd Defendant does not apply to withdraw the admission. He is a party to the defence in which it was made and he does not propose to issue an ancillary claim against the 1st Defendant. That the practice which is said to inform the 1st Defendant’s position as to liability predated his association with the company and he played no part in the making of the decision on whether or not NHT payments were applicable rings incredible when the 2nd Defendant repeats the very position in his defence of the claim and proposed counterclaim; and where he raises by amendment that he was in fact the managing director of the 1st Defendant on or about the 30th November 2004

to 31st March 2018. That was approximately ten (10) of the sixteen (16) years for which the alleged outstanding sums are being claimed.

[63] It is difficult to see how the Collector of Taxes, armed with the allegations the 2nd Defendant now advances could have determined that he was not to be treated as jointly and severally liable together with the body corporate in exercising his public duty under section 37A (5) of the NHT Act. While it is arguable that it would be open to the court to declare a defect in procedure which is not among the relief sought on the counterclaim, the same court would be hard pressed to conclude that any of the exclusionary circumstances at section 37A (5) would have operated to exclude the 2nd Defendant from being regarded as jointly and severally liable together with the 1st Defendant. Similarly, the court would be hard pressed to conclude that the determination and initiation of proceedings against him was irrational and could not have been lawfully made if the 2nd Defendant had been notified and given an opportunity to be heard.

[64] In all the foregoing premises, the 2nd Defendant's application for leave to further amend his defence and issue a counterclaim so as to obtain a declaration that the designation and initiation of proceedings against him are null and void, warranting a dismissal of the proceedings against him has no real chance of succeeding and will not be permitted.

B. Effect of Amendments on opposing party, allocation of the court's resources and the adequacy of costs as a remedy

[65] It was submitted by Mr. Vassell Q.C. that it would be unfair to the Claimant if the 2nd Defendant was permitted to amend his defence and issue a counterclaim to now contend that he was not designated a responsible officer when the Amended Defence filed on 24th June 2020 states that he was designated a responsible officer by the 1st Defendant. The 2nd Defendant is a party to that defence and certified the facts therein to be true.

- [66]** It was also submitted that the claim had been filed since 2018 and was in respect of a substantial sum and that the trial was now a mere two (2) months away, following the hearing of applications to strike out substantial portions of affidavit evidence over the course of three (3) days from the 23rd to 25th November 2020.
- [67]** I have already determined that whilst the admission as to designation subsists, the Claimant is permitted to rely on it and that there is no real prospect of the 2nd Defendant succeeding in defending or counterclaiming relative to his designation as a responsible officer. Affidavit evidence has been filed on behalf of each party to the litigation and have been settled in accordance with the orders of the court. The Claimant would undoubtedly have relied on the admission and to deprive it of its benefit at this late stage is likely to affect its preparation for trial.
- [68]** While there was no affidavit filed in opposition to the application, having regard to the statutory mandate of the NHT, to be out of the substantial contributions said to be owed for the years 2000-2016 is likely to have financial implications for the Trust and contributors who would wish to benefit from the fund.
- [69]** There is also value to be had from a determination on the question as to whether the security guards are independent contractors or employees without further delay. Additionally, it cannot be good for public administration, in which the NHT must have an interest having regard to its statutory remit, that a claim to check the exercise of a statutory duty is only now being raised after almost three (3) years since the initiation of the claim which would have given rise to the ground for the proposed challenge.
- [70]** Dr. Barnett, in expressing his full appreciation for the court's concern about the stage of the proceedings at which the application was being made; the implications that would likely have for the trial set to commence on the 17th May 2021 for five (5) days; and the number of trial fixtures which were already missed, submitted that the trial dates could still be met. In that regard, the following timetable was suggested:

- I. The Further Amended Defence and Counterclaim is to be filed and served on the 23rd March 2021;
- II. Supplemental affidavits filed by the 2nd Defendant within seven (7) days of the 23rd March 2021;
- III. The Claimant and 1st Defendant be given liberty to file and replies and defence to the counter claim by 12th April 2021;
- IV. Any further affidavits to be filed by any party by the 26th April 2021;
and
- V. Supplemental submissions to be filed and served by the 10th May 2021.

[71] I note in particular that the window for filing replies and a defence to the counterclaim which amounts to some twenty (20) days, many of which coincide with the court's vacation period is narrow; and that all additional affidavits are to be filed by 26th April, 2021. While I have every faith in the industry of counsel, having regard to the procedural history of the claim, there is no assurance that the trial date will be met if the court's timetable is disrupted beyond permitting the 2nd Defendant's Attorneys-at-Law to put in submissions based on the claim, defences and evidence in their current form. An order to that effect was made on the Pre-Trial Review.

[72] The upcoming trial for five (5) days was fixed on the 16th November 2020 when the previous trial period of seven (7) days, set to commence on the 23rd November 2020 was vacated in order that applications for the striking out of portions of affidavits could be heard. The hearing of those applications lasted for three (3) days being the 23rd to the 25th November 2020. This follows a number of interlocutory applications since the filing of the claim and the adjournment of two (2) trial fixtures, with the latter fixtures alone amounting to Twelve (12) days of court time.

[73] It was within the context of that procedural history that a Pre-Trial Review was considered necessary and the instant date fixed to ensure that the upcoming trial

period, which is now only two (2) months away would be met. An order had been made for the filing of modified affidavits and any further affidavits following the striking out applications. At the time of the hearing of the 2nd Defendant's application, those matters had been settled and the trial on track. All affiants are required to attend for cross examination.

[74] I am not unsympathetic to the hardship that joint and severally liability might present for persons in the position of the 2nd Defendant. However, I am also of the view that there is relief which he may pursue if he is desirous of reducing or removing the hardship, in the event that it is determined that the 1st Defendant is an employer of security guards and therefore liable to the Claimant under the NHT Act for contributions and penalties found to be payable.

[75] On a final analysis, there is in my view a very real possibility that this third upcoming trial fixture could be disrupted and missed altogether if the 2nd Defendant's application was allowed, even if I had determined that the amendments raised and the counterclaim had any real prospect of success. It is in these premises that I found that the overriding objective of dealing justly with the case does not favour the granting of leave to amend the defence and issue the counterclaim at this stage of the claim and proceedings. Accordingly, the 2nd Defendant's application was refused.

**Carole Barnaby
Puisne Judge**