JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE BROWN JA (AG)

APPLICATION NO COA2021APP00055

BETWEEN	**ROBERT EPSTEIN**	**APPLICANT**
AND	**NATIONAL HOUSING TRUST**	**1ST RESPONDENT**
AND	**MARKSMAN LIMITED**	**2ND RESPONDENT**

Dr Lloyd Barnett and Gillian Burgess instructed by Gillian Burgess for the applicant

W John Vassell QC, Mrs Trudy-Ann Dixon-Frith and Miss Danielle Reid instructed by DunnCox for the 1st respondent

Weiden Daley and Miss Melissa Mayne instructed by Hart Muirhead Fatta for the 2nd respondent

2 and 7 May 2021

MCDONALD-BISHOP JA

[1] This is an application brought by Mr Robert Epstein ('the applicant') for permission to appeal orders made by Barnaby J ('the learned judge') in the Revenue Court on 22 March 2021, and for stay of proceedings pending the determination of the appeal.

[2] At the commencement of the hearing, counsel for the applicant and counsel for the National Housing Trust ('the NHT'), the 1st respondent, applied for and was granted leave of the court for the hearing of the application for permission to appeal to be treated as the hearing of the appeal by consent.

[3] Marksman Limited ('Marksman'), the 2nd respondent, although present at the hearing through its counsel, took no active part in the application.

Background

[4] The background to the application for permission to appeal is as follows. By letter dated 12 December 2017, the NHT demanded from Marksman payment of outstanding employer's NHT contributions plus penalty for the financial years, 2000 – 2016, in respect of security guards employed to it ('the outstanding contributions'). The NHT demanded that payment of the outstanding contributions, which are payable by virtue of the National Housing Trust Act ('the NHT Act'), were to be made within seven days of the date of the letter, failing which, it would have no alternative but to pursue collection through the courts. The NHT also served on Marksman a certificate (Form No C6) dated 30 November 2017, pursuant to section 14(2) of the NHT Act.

[5] The outstanding contributions were not remitted to the NHT. As a result, on 21 December 2017, the NHT initiated proceedings against Marksman and the applicant in the Corporate Area Parish Court, Civil Division, for failure to pay the outstanding contributions.

[6] As a result of the issues of law that were raised on the case at the Corporate Area Parish Court by the response of Marksman and the applicant, on 21 May 2018, the NHT initiated proceedings against them in the Revenue Court ('the claim'). It seeks the following orders:

> "1. A declaration that [Marksman] is an employer and contributor within the meaning and designation of the provisions of the NHT Act.
>
> 2. A declaration that [Marksman] is liable to pay employers contributions pursuant to the provisions of the NHT Act.
>
> 3. An order that [Marksman] and the applicant do forthwith pay the sum of $477,980,257.77 for employer's contributions for financial years 2000 – 2016.

4. Alternatively, damages in the sum of $477,980,257.77.

5. Interest on such employer's contribution 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 NHT Act and the National Housing Trust (Rate of Interest and Surcharge) Regulations, 1999.

6. Penalty and/or surcharge on such employer's contribution and/or damages (along with the said statutory interest accrued thereon) at 10% of the sums due and payable pursuant to the NHT Act and the National Housing Trust (Rate of Interest and Surcharge) Regulations, 1999.

7. Costs and Attorney's Costs."

[7] The matter at the Corporate Area Parish Court was, reportedly, adjourned without a date, pending the determination of the claim in the Revenue Court.

[8] The applicant is joined as a party to the claim pursuant to section 37A of the NHT Act on the basis that by operation of law, he is the person who is responsible for the payment of the outstanding contributions to the NHT for the period to which the claim relates.

[9] The applicant and Marksman filed a joint defence in response to the claim. It is not clear when that defence was filed. However, on 24 June 2020, they filed an amended joint defence to which the applicant signed the certificate of truth. The NHT filed a reply on 20 July 2020.

[10] The trial of the claim was set for five days from 21 – 25 September 2020, but at the pre-trial review held on 19 June 2020, those dates were vacated, and the trial was set for seven days, 23 November 2020 – 1 December 2020. Those dates were then vacated when the matter came on for pre-trial review on 16 November 2020, and the trial was fixed for five days, 17– 21 May 2021. This hearing is, therefore, very close to the dates fixed for trial of the claim.

[11] On 12 March 2021, the applicant filed a notice of application for court orders with affidavit in support in the proceedings in the Revenue Court, seeking permission to file and serve a further amended defence and counterclaim, and for permission to be granted to the other parties to make consequential amendments to their statements of case.

[12] In his affidavit in support of the application, consisting of only four paragraphs, the applicant explains his reason for making the application at para. 3. He stated that, he had reflected on the matters raised in the proceedings and the different status and roles of Marksman and himself and so he sought separate legal advice. He was advised that it is in his best interest and in the interest of a fair and proper disposal of all the relevant issues in the case that he should be separately represented and should file a separate defence as well as a counterclaim.

[13] The applicant exhibited to his affidavit, a draft further amended defence and counterclaim ('the applicant's proposed amended statement of case'), which repeats the contents of the amended defence filed on 24 June 2020, save and except for the proposed amendments to para. 7(a), 7(j), 9, and 10 of the amended defence, and the addition of a counterclaim set out at paras. 20 – 25.

[14] The amendments which were proposed by the applicant to the amended defence are highlighted in bold below:

> "7. The [applicant] will further say that:
>
> a) the [2nd respondent] 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 **which is long before the [applicant] became associated with [Marksman]**.
>
> j) the self-employed independent contractors have not in this court challenged their agreed contractual status as self-employed independent contractors **and are not parties to these proceedings in which a**

determination of their contractual status is being sought.

9. **(a) The [applicant] 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.**

(b) Neither the [NHT] nor the Collector of Taxes gave any notice to the [applicant] 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 [applicant] of his guaranteed constitutional right to equitable treatment and a fair hearing.

10. Paragraph 6 of the Particulars of Claim is denied. The [applicant] is not the Managing Director of [Marksman] and is not a proper party to this claim. The [Marksman's] Managing Director is Nicholas Benjamin. The [applicant and 2nd respondent] further state that any Responsible Officer of [Marksman] would not, in any event, be obliged to comply with the provisions of Section 37A in so far as it relates to the matters the subject of this claim. Section 37A imposes duties on an employer that is a body corporate and on that employer's designated officer as regards payment of contributions. [Marksman] is not an employer of the security guards in respect of which contribution is claimed in these proceedings **and the [applicant] is not and never was a designated officer**."

[15] As it relates to the proposed counterclaim, the applicant averred:

"COUNTER-CLAIM

20. The [applicant] in support of his counterclaim repeats paragraph 1-19 of his further amended defence.

21. The [applicant] states that he was never at any time the officer of Marksman with the responsibility to make or pay statutory deductions in respect of employees of the [2nd respondent] and was never designated as the responsible officer.

22. The [applicant] further says that he could not have been so designated as he did not have any responsibility for the computation or payment of the statutory contributions of the security guards in question.

23. The contractual arrangements between the [2nd respondent] and the security guards were determined and established before the [applicant] became associated with the [2nd respondent] and he had played no part in the establishment of the relationship or the making of the decision as to whether or not NHT payments were applicable.

24. The [applicant] states that he received no notice from the [NHT] or the Collector of Taxes of the intention to treat him as the responsible officer until he was served with a Summons issued out of the Parish Court.

25. In the result, the designation of the [applicant] as a responsible officer and the institution of proceedings against him by the [NHT] are in breach of the principles of fairness and his fundamental rights to equitable treatment guaranteed by section 13(3)(h) and to due process guaranteed by section 16(2) of the Constitution are irregular, irrational and therefore null and void.

AND the [applicant] therefore prays that -

(1) The said designation and the proceedings instituted against him be declared to be null and void; and

(2) The action herein be accordingly dismissed."

[16] The NHT stoutly resisted the application for the amendment.

[17] On 22 March 2021, after considering the application, the law and the arguments of counsel for the parties, the learned judge refused the application for amendment of

the applicant's statement of case with costs to the NHT. She also refused the applicant's application for permission to appeal.

The application for permission to appeal and stay of proceedings

[18] On 29 March 2021, the applicant filed this application with which these proceedings are concerned. His desire is to have the order of the learned judge set aside and that he be granted leave to amend his statement of case in keeping with the terms of the notice of application filed for that purpose, with costs both here and in the court below awarded to him.

[19] The application is supported by an affidavit of the applicant to which he has exhibited a draft notice of appeal (RE 2), which has been examined by the court.

[20] The NHT has opposed the application for leave to appeal and for stay of the proceedings in the Revenue Court. It relied on the affidavit of Trudy-Ann Dixon Frith.

Preliminary objection raised by the NHT

[21] Before proceeding to consider the substantive application for permission to appeal, it is necessary to point out that in the written submissions of the NHT, a preliminary objection was raised. Queen's Counsel, Mr Vassell, who made oral submissions on behalf of the NHT, did not allude to this objection in oral arguments, but he did indicate that reliance is being placed on the entire written submissions filed in the proceedings. Therefore, despite the consent of counsel for the NHT to treat the application as the hearing of the appeal, it is considered prudent, out of an abundance of caution and for completeness, to dispose of the preliminary objection.

[22] The contention of the NHT is that pursuant to section 10 of the Judicature (Revenue Court) Act, the learned judge's decision on a question of fact shall be final and that an appeal from the Revenue Court only arises for the consideration of the Court of Appeal on a "question of law". It was submitted that at the root of the application are matters of procedure as to whether an amendment to pleadings ought

to have been granted, which, inevitably, involves findings of fact by the learned judge. According to the argument, the applicant's proposed grounds of appeal, collectively, seek to challenge the findings of fact and do not amount to questions of law that can be properly considered by the Court of Appeal.

[23] Section 10(1) of the Judicature (Revenue Court) Act states that:

> "10. – (1) A decision of the [Revenue] Court shall be final on any question of fact, but, save as may be otherwise provided in, or in relation to, any enactment for the time being specified in the Schedule, an appeal shall lie on any question of law to the Court of Appeal."

[24] It is, indeed, true that the applicant has framed several of the proposed grounds of appeal as errors made by the judge in "fact and law". An examination of the proposed grounds of appeal, however, shows that they all amount to a challenge to findings of law by the learned judge, even though those findings of law, inevitably, affect conclusions on questions of fact.

[25] The argument that the proposed grounds of appeal do not amount to questions of law that can be properly considered by this court cannot be accepted. Accordingly, the preliminary objection cannot be upheld.

The standard of review of the learned judge's decision

[26] The application for permission to appeal will now be considered within the framework of the applicable law, which includes that which governs an appellate court's review of the exercise of discretion of a judge, at first instance, in interlocutory proceedings.

[27] The law applicable to the consideration of these issues is well-settled and need not be recited in any great detail for present purposes. It suffices to say that the proposed grounds of appeal must be assessed to determine whether any of them stands a real chance of success in accordance with the general rule laid down in rule

1.8(7) of the Court of Appeal Rules ('CAR'). Therefore, even if one ground has a real chance of success, the threshold requirement for the grant of leave to appeal will have been met by the applicant.

[28] In addition, it is acknowledged that the court, in reviewing the learned judge's decision, must do so in accordance with the standard of review that is well settled on the seminal prescription of Lord Diplock in **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042, which has been adopted and repeatedly restated by this court in several cases (see, for instance **The Attorney General of Jamaica v John McKay** [2012] JMCA App 1). Therefore, the court is mindful that it must defer to the exercise of the learned judge's discretion and ought not to interfere with it merely on the ground that it would have exercised the discretion differently. The court is also cognizant of the caveat that it can only properly interfere with the exercise of the learned judge's discretion if it can be shown that she erred in her interpretation or application of the law, or was demonstrably wrong in her treatment of the evidence or facts, including inferences drawn from those facts, or where her decision is so aberrant that no judge regardful of her duty to act judicially could have reached it. The learned judge's decision and the challenge to it by the applicant have been evaluated with this caution in mind.

The key issues

[29] The applicant seeks to challenge numerous findings of fact and law made by the learned judge on 11 grounds, which overlap to a considerable extent. However, when the grounds of appeal are stripped of much of the details with which they have been formulated and compressed within manageable limits, they have given rise to the consideration of two broad issues, which, admittedly do lead to the consideration of some pertinent sub-issues.

[30] The two broad and overlapping questions for the ultimate resolution of this court are:

(1) whether the learned judge applied the wrong principles of law to the application for permission to file an amended statement of case (grounds 3.1, 3.2 and 3.6); and

(2) whether the learned judge erred in concluding that the amended statement of case reveals no prospect of success, having regard to the provisions of section 37A of the NHT Act and its application to the case being advanced by the parties (grounds 3.4, 3.9 and 3.10).

Issue (1)

Whether the learned judge applied the wrong principles of law to the application for permission to file an amended statement of case (grounds 3.1, 3.2 and 3.6)

[31] Having considered the applicant's complaint in his proposed grounds of appeal that have given rise to this issue, I conclude that there is not an iota of merit in it, which would afford him a realistic prospect of success on the appeal. These are the reasons for this conclusion.

[32] The learned judge, from para. [8] to [11] of her judgment (cited as [2021] JMRC 1), explicitly detailed the relevant law that she would apply to the application before her. Her starting point was rule 20.4(2) of the Civil Procedure Rules, 2002 ('the CPR'). While the rule confers power on the court to amend a party's statement of case, it has not indicated the principles to be applied by a judge in exercising the power. The learned judge, however, had regard to case law and concluded that the principles to be applied to the application are well known (para. [9] of the judgment). She cited two authorities from the Supreme Court, from which she extrapolated what she regarded as the relevant principles of law. They are **Index Communication Network Limited v Capital Solutions Limited and others** [2012] JMSC Civ 50 and **National Housing Development Corporation and Danwill Construction Limited and others** (unreported), Supreme Court, Jamaica, Claim No 2004 HCV 00036 and 2004 HCV

000362, judgment delivered 4 May 2007. Having been guided by the principles she had distilled from those authorities, which she described as "incontrovertible", she concluded that "in consequence a decision as to whether or not to permit amendments must be based on the overriding objective in dealing justly with cases".

[33] The learned judge expressly had regard to the overriding objective set out in rule 1.1(2) of the CPR (para. [10] of her judgment), which was, indeed, a pertinent, and ultimately, the overarching consideration of law. She then proceeded in para. [11] of the judgment to accurately delineate an amalgam of eight principles that she had extracted from the relevant authorities. The principles are:

> "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."

[34] Counsel for the applicant submitted that although the learned judge has outlined these eight factors, she failed to consider whether the amendment would enable the real matters in controversy to be determined (item v above), or whether an award of costs would compensate the NHT for any prejudice caused by a late application to amend (item viii above). Counsel submitted that on an application to amend pleadings,

this is the foremost consideration. He relied on the cases of **Caricom Investment Ltd and others v National Commercial Bank and another** [2020] JMCA Civ 15 ('**Caricom Investment v NCB**'), and **Cobbold v London Borough of Greenwich** [1999] EWCA 2074, in support of this submission.

[35] On an examination of the relevant authorities cited by the learned judge, as well as those cited by the parties, including in particular, **Jamaica Redevelopment Foundation Inc v Clive Banton and another** [2019 JMCA Civ 12 (**'JRF v Banton'**), and **Caricom Investment v NCB**, it can simply be concluded that the learned judge's distillation of the relevant principles of law, which she found necessary to apply to the application before her, is unassailable.

[36] This court in **JRF v Banton**, after a comprehensive review of numerous authorities on the issue regarding the court's power to grant permission to amend, had established that there is no exhaustive list of factors that ought to be considered in dealing with the issue but that the jurisdiction is now governed by the overriding objective. The court stated in para. [26] vi. that:

> "Applications for permission to amend must necessarily turn on the particular facts and no hard and fast rules are possible. The outcome of an application to amend will, therefore, depend on a fact-based assessment of the various relevant considerations. Decided cases can only illustrate the way in which discretion is exercised."

[37] The ultimate question for this court, in reviewing the decision of the learned judge, is whether her findings are justified on the specific facts of the case, which was before her and upon the application of the overriding objective to deal with the case justly. The salient question for consideration, now then, is whether she applied wrong principles of law, and failed to apply relevant principles of law as contended by the applicant in his proposed grounds of appeal.

A. The lateness of the amendment

(i) Previous amendments

[38] One of the complaints of the applicant, in ground of appeal 3.2, is that the learned judge wrongly had regard to the fact that there had been previous amendments to the pleadings. This complaint is, however, unjustified.

[39] The learned judge found that the stage at which the proceedings had reached was a potent consideration. She is correct. It is a recognized principle of law that tolerance to late amendments may undermine the court's ability to manage the litigation process effectively and so the approach to applications for amendment must be seen as part of the court's case management powers (see **JRF v Banton** para. [26] iii). The learned judge, therefore, cannot be faulted in her approach in starting her deliberations on the premise that it was a late amendment being sought. She is justified in her approach in considering the procedural history of the case in determining whether the application should be granted. It was within that context that she took into account that there had been, among other matters, previous interlocutory applications, which involved applications to amend statements of case (including the defence) and to vacate trial dates that have been fixed.

[40] A pertinent consideration in considering a late amendment is the reason the particular fact had not been pleaded at an earlier stage of the proceedings. It was quite legitimate for the learned judge to take into account that there had been prior amendments to the statement of case and that the applicant had failed to fully state his case despite those earlier opportunities. There is nothing to suggest that the facts, which he sought to raise in the intended amendment, were not known to him from the very outset of his case. So, if the learned judge had formed the view that the applicant would have had an opportunity to plead those facts at an earlier stage of the proceedings, then that finding would have been open to her and this court should be slow to interfere with it. The mere fact that the applicant had changed legal representation, and that the new counsel was of a particular view regarding the

deployment of his defence, is not a sufficient basis for this court to find that the learned judge erred in her decision. The weight to be accorded to each factor was one for her, and unless it can be shown that her decision is erroneous in law or in fact or is, otherwise, aberrant or irrational, this court would have no good reason in law to disturb the exercise of her discretion. The applicant has failed to establish that any of these criteria exists to warrant interference with the decision. This complaint of the applicant has no realistic prospect of success on appeal.

(ii) Whether the trial date could have been kept

[41] Another complaint of the applicant that relates to the stage at which the amendment was sought is that the learned judge placed undue weight on the fact that the trial date was vacated on two previous occasions. His argument is that the learned judge failed to place sufficient weight on whether he was the cause of the previous adjournments, whether he would receive a fair trial, or whether it was still possible to retain the trial date, if the amendments were granted.

[42] At para. [75] of the judgment, the learned judge stated that:

> "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 [applicant'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."

[43] The question of whether the amendment would affect the trial date was a relevant consideration having regard to the overriding objective. Dr Barnett had suggested to the learned judge a timetable that he said would have ensured that the trial dates were kept. The learned judge at para. [71] – [73] considered the proposal put forward by counsel. She concluded that the proposal could not guarantee that the trial would not be jeopardized if the amendments were granted. She, therefore,

rejected the proposal and that was within her discretion and this court sees no basis in law to interfere with her assessment of the circumstances and her findings in that regard.

[44] In **JRF v Banton**, at para. [26] v., this court restated the principle that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court (see **Swain–Mason and others v Mills & Reeve (a firm)** [2011] EWCA Civ 14). A heavy burden lay on the applicant to establish that the late amendment he was seeking was in keeping with the overriding objective to deal with the case justly, bearing in mind all the elements that make up the overriding objective as set out in part 1 of the CPR.

[45] Having applied the standard of review to the learned judge's reasoning and conclusion, there is no basis on which this court could legitimately interfere with her ruling based on her reasonably held view that there was doubt that the trial date would have been kept if the amendments were granted. The fact that the applicant was not responsible for earlier adjournments, if that were established to be true, was of no moment in the scheme of things. It was exclusively within the purview of the learned judge to conduct her assessment of the stage at which the amendment was being sought against the background of the need to give effect to the overriding objective, to which she clearly had regard. There is no basis on which this court could properly conclude that the learned judge erred in treating with the question whether the trial date could have been retained with the amendment. However, even if the learned judge were wrong in this regard, that in and of itself would not assist the applicant. There were other considerations to be weighed in the balance, not least of which, was the prospect of success of the proposed amendment. The learned judge also took that into account, and it turned out to be a pivotal one in her resolution of the matter.

B. Whether the learned judge erred in failing to consider that the proposed amendments would enable the real matters in controversy to be determined and the NHT could have been compensated in costs

[46] The applicant's complaint that the learned judge failed to have regard to the question of whether the proposed amendment would enable the real matters in controversy to be determined, as the foremost consideration, is also regrettably without merit. Counsel for the applicant, in advancing this argument, relied on para. [121] of **Caricom Investments v NCB** (judgment of McDonald-Bishop JA). It should be noted, however, that at para. [126] of the same case, I proceeded to say, having considered several authorities, that:

> "It follows from the authorities that even though amendments should be allowed to enable the real matters in controversy between the parties to be determined, it is not, in and of itself, determinative of the matter since other factors have to be considered, including the stage of the proceedings. Nevertheless, it is an important consideration to be weighed in the balance with other relevant considerations in determining where justice lies."

[47] As already established, there can be no hard and fast rules to govern the question of when an amendment should be permitted by the court. The question is to be determined by an assessment of the relevant facts and circumstances of each case. At the end of the day, the determination of the question is the outcome of a balancing act, carried out amidst competing considerations, in the light of the facts. Therefore, it was for the learned judge to determine what was the foremost consideration in this case in order to deal with it justly. She, having concluded that the amendment had no prospect of success, would have been saying, implicitly, that it was not necessary for the resolution of the matters in controversy between the parties. There was then no reason for her to expressly consider whether the proposed amendments would enable the real matters in controversy to be determined. Equally, there would have been no need for the learned judge to consider whether an award of costs would have compensated the NHT for any prejudice caused by a late application to amend because of her decision that there was no merit in the proposed amendment.

[48] The applicant cannot succeed in advancing the foregoing arguments.

Issue (2)

Whether the learned judge erred in concluding that the amended statement of case reveals no prospect of success, having regard to the provisions of section 37A of the NHT Act, and the case being advanced by the parties (grounds 3.4, 3.9 and 3.10)

[49] The learned judge, in para. [11] iii of her judgment, identified that where the proposed amendment is to be made late in the day, the question of whether it has a prospect of success is open for consideration by the court. This is an accurate statement of the law.

[50] As already established, it is recognized that the jurisdiction to grant an amendment to a statement of case is governed by the overriding objective, which pays greater regard to all the circumstances of the case. The authorities have established that the interests of justice would not be advanced by amendments that are bound to fail on the merits, and so the court will allow an amendment only if it has a reasonable prospect of success (see **JRF v Banton** at para. [26] vii). The learned judge gave explicit consideration to this principle regarding the merit of the proposed amendment as demonstrated by her reasoning in para. [11] and from paras. [18] – [64] of her judgment. She concluded, after a comprehensive analysis of the facts within the ambit of the applicable law, that the applicant failed to establish that the proposed amendments had merit. This finding goes to the heart of the proposed appeal and has generated much heated debate between the parties to the application.

A. <u>The application of section 37A of the NHT Act</u>

[51] The learned judge correctly noted in para. [18] of her judgment, in so far as is directly relevant for present purposes, that two (of three) potentially material amendments are:

"I. ...

II. The [applicant] 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 Marksman for the outstanding NHT contributions alleged to be owed by Marksman."

[52] Central to the prospect of success of the application for permission to amend which was before the learned judge and, by extension, the application for permission to appeal, before this court, is section 37A of the NHT Act. It is the applicant's complaint that the learned judge, in concluding that there is no merit in the proposed amendment, erred in her interpretation and application of this statutory provision. It is, therefore, important for a clearer understanding of the issues in controversy between the parties and in evaluating the correctness of the finding of the learned judge that the relevant provisions of this section are reproduced.

[53] Section 37A of the NHT Act states:

"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)

(i) Whether the applicant is unlawfully designated as a 'responsible officer'

[54] The learned judge, at para. [27] of her judgment, referred to para. 5 of the NHT's particulars of claim where it is pleaded that Marksman, 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. It

is also pleaded in the same paragraph that Marksman was required to provide written notice of that designation to the Collector of Taxes but had failed to nominate a responsible officer and give the requisite notice in contravention of the NHT Act. The learned judge then made reference to para. 9 of the joint amended defence to which the applicant is a party and to which his certificate of truth is attached. In that paragraph, it was pleaded in response to the NHT averments that:

> "Paragraph 5 of the Particulars of Claim is not admitted. [Marksman] 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)

[55] The learned judge, after examining para. 5 of the NHT's particulars of claim and para. 9 of the joint amended defence, concluded at para. [28]:

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

[56] The applicant's complaint is that the learned judge erred when she found that he was lawfully regarded and designated as a responsible officer, pursuant to section 37A of the NHT Act. He maintained that she erred in her conclusion that the proposed amendments to his statements of case to aver he was never a designated responsible officer, and that his designation is null and void, does not have any real prospect of success.

[57] Counsel for the applicant, in their written submissions, also submitted that the learned judge erred, in law, in drawing the inference that the Board of Marksman designated the applicant as the responsible officer for the purposes of the NHT Act for the period 2000 – 2016. Counsel argued that the inference hinged solely on the interaction between the pleadings as there is no affidavit evidence or documentary

evidence to support the inference that there was a designation of a responsible officer by Marksman. Counsel further argued that the pleadings are vague as para. 9 of the amended defence names eight persons but does not say when these persons were designated, by whom and by what method, or if they all shared the responsibility at the same time or different time periods. It is counsel's argument that the proposed further amendment to the applicant's defence will particularize the period during which the applicant was associated with the company and that a clarification of the pleadings would save time at trial by enabling the court and the parties to concentrate on the real issues in controversy and not get bogged down in seeking to interpret the pleadings.

[58] Having examined para. 5 of the NHT's particulars of claim and para. 9 of the joint amended defence, I have observed that the averment of the NHT is that Marksman has failed to nominate a responsible officer and give the requisite notice. Paragraph 9 of the joint amended defence denies this averment and states the names of eight individuals, including the name of the applicant, who are the designated responsible officers. While para. 9 of the joint amended defence was, therefore, not an admission of para. 5 of the particulars of claim, the effect of the pleadings is that Marksman had designated the applicant as a responsible officer, for the purposes of section 37A(1) and (2) of the NHT Act. The applicant certified that fact to be true as evidenced by his certificate of truth attached to the defence. He would, therefore, have adopted Marksman pleadings in relation to him being a designated "responsible officer".

[59] There can be no realistic challenge to the learned judge's conclusion that the corporate designation of the applicant as a responsible officer was admitted on the joint amended defence.

[60] I note, however, the further submissions by counsel for the applicant, that the applicant has an arguable appeal with a real prospect of success on the basis that the learned judge drew an inference that at all material times the Board of Marksman designated the applicant to be the responsible officer for the purposes of section 37A of the NHT Act. There is no point in the reasoning of the learned judge, where she drew

an inference that the applicant was "at all material times" the responsible officer. At para. 32 of her judgment, the learned judge clearly states that:

> "32. The [NHT] claim covers alleged outstanding contributions for the years 2000 – 2016. In the absence of a corporate designation, on the amendment raised by the [applicant], he was the Managing Director from 30th November 2004 up to 2016 and therefore capable of being statutorily designated as [Marksman's] responsible officer for the purposes of section 37A of the NHT Act **for a substantial part of the period** for which the alleged outstanding contributions are claimed, and may therefore be regarded as liable for those contributions pursuant to the operation of section 37A (8)." (Emphasis added)

[61] It is, therefore, clear that the learned judge did not infer that the applicant was the responsible officer for the entire period claimed but, rather, that the applicant may be regarded as the responsible officer for a substantial period in which he was managing director in the absence of a corporate designation. There is absolutely no fault in this as the period for which he was managing director is a matter to be established on the evidence. The NHT Act is clear that he cannot be held liable for any period when he was not the responsible officer. The fact that he was not the managing director for some portions of the relevant period does not warrant any amendment to the pleadings. That fact can easily and fairly be established on the evidence, given the parties' pleaded cases.

[62] Furthermore, and even more importantly, the learned judge found at para. [30] of her judgment that in any event, even if the applicant was not designated a responsible officer by Marksman pursuant to section 37A(1) of the NHT Act, he would still be deemed a responsible officer, pursuant to section 37A(3), by virtue of him being the managing director of Marksman at some point during the relevant period. The applicant's contention is that the learned judge erred in that aspect of her reasoning and conclusion. He has taken issue with the judge's treatment of the deeming provision of section 37A(3) on several grounds, which will be examined in turn.

[63] The complaints of the applicant as contained in grounds 3.4, 3.9 and 3.10 are that:

> "3.4 The learned judge erred in law in holding that by reason of the deeming provision of section 37A of the NHT Act, there was no reasonable prospect of the proposed further amended statement of case succeeding, since a deeming provision as a general principle should not be applied so far as to produce unjust, absurd or unconstitutional results unless the court is compelled to do so by its language;
>
> 3.9 The learned judge erred in fact and law when she failed to hold that the deeming provision of section 37A should be qualified having regard to the importance of safeguarding constitutional rights to fair and equitable treatment and/or hardship that joint and severally liability present to persons in the provision of the applicant.
>
> 3.10 The learned judge erred in fact and law in failing to find that the constitutionality of deeming the applicant as a responsible officer could not be maintained without offering him the opportunity to satisfy the NHT or the Collector of Taxes that he was not the responsible officer."

[64] Counsel for the applicant has submitted that the correct and proper approach in interpreting a deeming provision is to look not only at the text of the statute but also at the consequences flowing from the provision to determine whether the interpretation is consistent with the policy of the Act. In support of this submission, counsel relied on **Marshall (Inspector of Taxes) v Kerr** [1995] 1 AC 148, in which Lord Browne-Wilkinson stated:

> "I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that, because one must treat as real that which is only deemed to be so, one must treat as real the

> consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

[65] Counsel relied on several authorities in advancing this point that the deeming provision must not be taken to be applicable on the face of it.

[66] Counsel for the NHT, in response, submitted that the court must look to see whether the interpretation given to the deeming provision would lead to any unjust, anomalous or absurd result. They relied on the case of **Inland Revenue Commissioners v Metrolands (Property Finance) Ltd** [1981] 2 All ER 166. It was held in that case that since the purposes for which the statutory fiction created by the deeming provision in section 181(2) of the Town and Country Planning Act 1971 (which was under consideration) were either general or, at the lowest, not clear, and because its application for the purposes of section 45(4) of the Act would not lead to any unjust, anomalous or absurd result and was not clearly outside the purposes for which it had been created, it followed that the deeming provision in section 181(2) was to be applied to s 45(4). Counsel submitted that, in their view, the deeming provision is to be given its ordinary and natural meaning consistent with the policy and object of the Act. Furthermore, its application to the applicant will not produce any absurd or unconstitutional results as the applicant is not without recourse as the learned judge opined.

[67] The arguments of counsel for the NHT are accepted. There is absolutely no need to apply the golden rule of statutory interpretation to the provisions in question. The words used are clear and unambiguous on a literal reading of the NHT Act, having regard to the object of the legislation to ensure that where a body corporate is concerned, one of its officers must be responsible for the payment of the government's revenue. There is nothing in the application of the words in their ordinary and grammatical sense, given the policy that undergirds the NHT Act, that could lead to absurdity, injustice or unfairness. Therefore, the application of section 37A(3) of the NHT Act to the applicant does not lead to any unjust, anomalous, absurd or

unconstitutional result. Accordingly, there is no need to limit the application of the statutory fiction that would operate to designate the applicant a responsible person for the purposes of the NHT Act. The applicant faces an insurmountable challenge in his effort to convince this court that the learned judge erred when she found that he had no real prospect of success in arguing in his defence that is designation as a responsible officer is unlawful.

[68] In ground 3.8, in continuation of the contention that the deeming provision was applied unfairly to him, the applicant complained that he was not notified of his designation as a "responsible officer" by the NHT or the Collector of Taxes before proceedings were initiated against him. The learned judge did not accept that argument. At para. 35 of the judgment, she found that the applicant did not require any notice of him being deemed a responsible officer, pursuant to section 37A(3) of the NHT Act. She noted that the designation of the managing director as a responsible officer is simply the result of the operation of the statute where there is no assigned designation by the body corporate. The learned judge is correct. The statutory designation comes from the statute itself as an expression of the will and intendment of Parliament. The designation is a pure matter of law and is clear for all to see. The applicant and Marksman ought to have been aware of this designation as ignorance of the law is no excuse. In such circumstances, he was not entitled to any notice from the NHT or the Collector of Taxes. Therefore, the learned judge's reasoning that the activation of the statutory designation is not dependent on the exercise of any discretion by the NHT or the Collector of Taxes is unimpeachable.

[69] Furthermore, counsel for the NHT submitted that the applicant's contention that he was not notified that he was being treated as a responsible officer is incorrect. Counsel noted that the applicant was given notice by virtue of the following:

> "(a) A Summons for Failure to Pay Contributions was issued on behalf of the NHT by the Parish Court for the Corporate Area on 21 December 2017.

(b) Prior to that the NHT issued a demand letter dated 12 December 2017 addressed to Marksman and its then directors, including the applicant, as responsible officers for Marksman. The demand letter enclosed the certificate issued pursuant to section 14 of the NHT Act ("Form (C6"). The Form C6 specifically named the applicant as one of the responsible officers of Marksman.

(c) The applicant replied under cover letter dated 13 December 2017 and in his reply he did not deny that he was a responsible officer for Marksman, but instead was content to aver that the security guards for whom NHT contributions were claimed were independent contractors and that security companies were not responsible for deducting their statutory deductions."

[70] Counsel for the NHT further submitted that in light of the fact that the applicant had received notice that he was being treated as the responsible officer for Marksman, his contention in the proposed amendment, which underpins the proposed claim for breaches of the Constitution, is without foundation and is not true. Counsel submitted that on this sole basis, the proposed amendment ought not to have been allowed and the application for permission to appeal and stay of proceedings ought to be refused.

[71] Counsel further submitted that the circumstances complained of by the applicant are not caught by section 13(3)(h) of the Constitution, which deals with the right to equitable and humane treatment by a public authority. Also, section 16(2) of the Constitution, which guarantees the right to a fair hearing within a reasonable time, is not engaged by the actions of the NHT. Counsel submitted that the contention of the applicant that his rights under section 16(2) of the Constitution is breached is "fallacious and circuitous as in the proceedings in the court below, the applicant is being granted due process and a fair hearing to ventilate his defence to the claim".

[72] I accept the submissions of counsel for the NHT. The affidavit evidence does show that prior to the initiation of proceedings in the Parish Court, the applicant was notified that he was being treated as a responsible officer along with other directors of Marksman on the basis of the statutory designation. It is clear that he got notification

from the NHT that he was being treated as a responsible officer. He raised no objection to that designation, but challenged the case on the basis that Marksman is not an employer of the security guards in question and is, therefore, not liable to pay the outstanding contributions as alleged.

[73] I can find no merit in the complaint that the learned judge erred in rejecting the applicant's complaint of a need to be notified by the NHT and the Collector of Taxes of the statutory designation before the initiation of proceedings against him.

[74] I, therefore, find that the applicant has not managed to convince this court that the learned judge erred in the interpretation and application of section 37A(1) and (3) of the NHT Act when she found that he had no real prospect of success in advancing a case that he was unlawfully designated as a responsible officer within the meaning of the statute and that the proceedings brought against him are null and void for those reasons.

(ii) The initiation of proceedings against the applicant as a designated responsible officer

[75] The applicant has contended in several of his grounds of appeal that the NHT cannot initiate legal proceedings against a responsible officer, pursuant to section 37A(5) of the NHT Act, without a hearing having first been conducted before the Collector of Taxes. Counsel for the applicant maintained that on a true construction of section 37A(5), the correct approach is to commence the proceedings before the Collector of Taxes and not before the court as was done in this case. Counsel submitted that it is arguable that "on a textual, contextual and constitutional interpretation" of the relevant sections of the NHT Act, the applicant was denied his right to a hearing before the proceedings were initiated and that the proceedings, which flow from the breach of the applicant's constitutional rights, are null and void.

[76] I find that this contention has no legal basis to support it. The construction of section 37A(5) of the NHT Act does not reveal a requirement for a hearing to be first

conducted before the Collector of Taxes as a matter of course or at all before proceedings may be initiated in court for failure to make NHT contributions and, particularly so in the circumstances of this case. The applicant was the managing director at the time the demand was made by the NHT in December 2017 for the outstanding contributions to be paid. He took no objection to be named then as a responsible officer and he did not make any representations to the Collector of Taxes or the NHT regarding his status or alleged failure to pay the outstanding contributions on the basis that he was not a responsible officer. He, therefore, did not invoke any mechanism for the conduct of any hearing by the Collector of Taxes as to his status and liability. Instead, he responded to the demand of the NHT by asserting matters outside those provided by section 37A(5)(b). His contention was that Marksman was not liable to pay the outstanding contributions because of the status of the security guards who were involved as independent contractors and not employees. That was a question of law to be decided by the court. There is nothing in the NHT Act that can be taken as ousting the jurisdiction of the court over the dispute between the parties.

[77] In my view, the learned judge was correct in the interpretation and application of section 37A of the NHT Act, when she found that there is nothing in the statutory regime to prevent the applicant from being lawfully regarded as jointly and severally liable together with Marksman for the outstanding contributions.

[78] In addition, having examined the circumstances giving rise to the case before the Parish Court and the initiation of the proceedings in the Revenue Court, there is no basis on which this court could find that the learned judge erred in not accepting that the initiation of proceedings against the applicant was a breach of the principles of fairness and a breach of the applicant's constitutional rights to equitable and humane treatment and due process. I have had regard to all the authorities cited by counsel on behalf of the NHT on the constitutionality of the proceedings and found them to have established, beyond debate, that the claim of unconstitutionality could not survive even the most cursory scrutiny of any court. There was, therefore, no basis on which the

learned judge could have found that the proposed counterclaim, to declare the proceedings against the applicant as being null and void, has a real prospect of success.

[79] Accordingly, I conclude that the proposed grounds of appeal, which relates to the learned judge's application of section 37A of the NHT Act, do not have any real chance of success on appeal.

Conclusion

[80] In light of the conclusion that the learned judge did not err in finding that there was no prospect of success in the applicant's proposed amended statement of case, I think it is unnecessary for the court to state its views on other matters raised by the applicant as those matters are irrelevant and, therefore, inconsequential for the purposes of these proceedings. This relates, in particular, to the learned judge's assertions that the proceedings that should have been pursued on the applicant's proposed counterclaim are in the nature of an administrative claim, which ought to have been by way of judicial review. Even if this court were to find that the learned judge erred in that regard, it would have had no meaningful impact on the critical aspects of the proposed appeal, which would have been decided against the applicant.

[81] With that said, this court will not be in a position to set aside the learned judge's decision in circumstances where it is not shown that the exercise of her discretion is demonstrably wrong, or that the decision is one that no judge regardful of her duty to act judicially could have reached on the critical aspects of the case. In my view, there is no real chance of the appeal succeeding on any of the material grounds raised by the applicant (that are those which are directly referable to the proposed amendment).

[82] Accordingly, there is no basis in law to grant the application for permission to appeal or for stay of proceedings. I would refuse the application with costs to the NHT to be agreed or taxed.

STRAW JA

[83] I agree.

BROWN JA (AG)

[84] I agree.

MCDONALD-BISHOP JA

ORDER

1. The application for permission to appeal the decision of Barnaby J made in the Revenue Court on 22 March 2021 on Claim No 4 of 2018 and for a stay of those proceedings pending appeal is refused.

2. Costs of the application to the NHT to be agreed or taxed.