IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 05733

BETWEEN NATIONAL HOUSING TRUST CLAIMANT

AND Y. P. SEATON & ASSOCIATES COMPANY LIMITED DEFENDANT

Mr Ransford Braham and Ms. Terri-Ann Gibbs instructed by Livingston Alexander & Levy for the Claimant. Ms. Kelly M. Greenaway instructed by Rattray Patterson Rattray for the Defendant.

IN CHAMBERS

March 7 and 31, 2011

Amendment of Statement of Claim after Case Management Conference – Extension of Time to file Affidavit outside of time stipulated by Case Management Order – Principles to be applied

FRASER J.

1. I wish at the outset to thank counsel for their very helpful submissions which provided valuable assistance to the court in deciding the issues raised in this application.

THE APPLICATION

2. On February 24, 2011 the claimant, National Housing Trust, filed a Notice of Application for Court Orders. In the application the claimant sought permission to (a) amend its Fixed Dated Claim Form dated and filed the 5th of November, 2009 (the 2009 FDCF), and (b) to file an affidavit sworn to by Robert Wan one of the arbitrators in arbitration proceedings concluded between the claimant and the defendant.

3. The application was heard at the pre-trial review on March 7, 2011. The pre-trial review was adjourned to March 31, 2011 pending the court's decision on the application.

BACKGROUND TO THE CLAIM

4. The Claimant, National Housing Trust, is a statutory corporation established pursuant to the National Housing Trust Act and having its principal place of business at 4 Park Boulevard, Kingston 5 in the parish of Saint Andrew. The Defendant, Y.P. Seaton & Associates Company Limited, is a company incorporated in Jamaica and having its principal place of business at 52c Molynes Road, Kingston 10 in the parish of Saint Andrew.

5. The claimant and defendant entered into an Agreement in writing dated August 28, 1995 (the Loan or Finance Agreement) whereby the claimant agreed to advance to the defendant, by way of loan, the sum of $187,316,603.00 for the defendant to construct 259 housing solutions comprising 210, 2-bedroom units and 49 serviced lots. The development was to be completed within twenty (20) months of the first advance, subject to any extension of time granted. The defendant was to repay the advances in accordance with the terms of the Loan Agreement.

6. The first advance was made on November 16, 1995. The development was therefore scheduled to be completed on or about July 16, 1997 subject to any extension of time granted.

7. In or about October 1997 it became apparent that the defendant would not be completing the development. The parties thereafter engaged in discussions over several months toward a settlement of the issues between them arising from the non-completion of the development. Pursuant to these discussions the claimant and the defendant arrived at a settlement ("the 1999 Settlement Agreement"), which was embodied in a letter dated July 27, 1999 from Rattray Patterson Rattray, Attorneys-at Law for the defendant to the claimant signed by Debra E. McDonald. This letter was also signed by the claimant and the defendant signifying agreement with its terms.

8. The 1999 Settlement Agreement however identified certain unresolved issues that were still to be determined either by further negotiations or by arbitration. Pursuant to Section 18 of the Loan Agreement the defendant gave the claimant written notice of arbitration and thereafter the defendant appointed Mr. Robert Evans as arbitrator and the claimant appointed Mr. Robert Wan as arbitrator. Mr. Wan and Mr. Evans then together appointed Dr. Hilton McDavid as umpire.

9. The arbitration process took some time to materialise. The claimant and the defendant eventually agreed Terms of Reference dated March 31, 2009 and further agreed that the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (as amended) were applicable to the arbitration proceedings.

10. Pleadings were exchanged between the parties and the arbitration proceedings commenced on the 12th May 2009 and lasted approximately nine (9) days after which the decision was reserved.

11. On October 7, 2009 the following arbitration award signed by all three arbitrators was handed down:

> The Award Amount shall be **$144,660,923.90** (One hundred and forty-four million six hundred and sixty thousand nine hundred and twenty-three dollars and ninety cents) PLUS Legal costs as described in 12.11 PLUS interest on the Award PLUS Interest on the attorney's costs and is payable by the Respondent to the Claimant and is disaggregated as follows:
>
> 1. Balance from Final Account ($14,067,408.32)
> 2. Interest to Date of Award ($91,957,001.37)
> 3. Devaluation ($31,408,403.71)
> 4. Costs (excluding Legal Fees, Table above) $7,228,110.65
> 5. **Award = (1+2+3+4 above) = Payment 1 (8.9.11) = $144,660,923.90**
> 6. **Attorneys Costs = Payment 2 (8.9.11)**
> 7. **Six months Interest[3] on Award Above = Payment 3 (8.9.11)**
> 8. **Six months Interest[2] on Attorneys Costs[4] = Payment 4 (8.9.11)**

The Agreement allows six months for payment and this period or any succeeding period shall attract interest as described. If payment is immediate there shall be no interest from the date of this award."

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[3] Interest is calculated based on of the most recent BOJ weighted average rate from BOJ Economic Digest

[4] Six months interest is due on legal fees (because the date for payment is six months after the date of award) and shall be calculated in a similar manner to the interest on the final account amount. See Table

12. By way of the 2009 FDCF, the claimant sought to challenge the Arbitration proceedings on the basis *inter alia* that the Arbitrators and/or Umpire misconducted themselves. The claim has been brought based on the fact that under section 12 of the Arbitration Act the court has the power to set aside an arbitration award in circumstances where there has been such misconduct.

13. On May 6, 2010 at the first hearing of the 2009 FDCF Jones J. made orders including those outlined below:
    a. Defendant to file Particulars of Defence on or before 30th July 2010;
    b. Claimant to file a further affidavit by 30th June 2010;
    c. Enforcement of the Arbitration Award be stayed on condition that the Claimant pays the sum of One Hundred and Forty-four Million Six Hundred and Sixty Thousand Nine Hundred and Twenty-three dollars and Ninety Cents ($144,660,923.90) by the 31st May 2010 in an interest bearing account at Bank of Nova Scotia at the Corner of Duke and Port Royal Streets, Kingston in the names of Rattray, Patterson, Rattray and Livingston, Alexander & Levy until further ordered or until agreed by the parties;
    d. Pre-trial review set for the 7th March 2011 for 1 hour at 10:00 a.m.;
    e. Trial set for the 2nd May, 2011 for 5 days...

Orders 1, 2 and 3 have all been complied with.

14. The Notice of Application for Court Orders dated February 24, 2011 filed by the claimant and heard on the date set for the pre-trial review, sought permission (1) to amend the 2009 FDCF and (2) to file a further affidavit, that of Robert Wan. The defendant opposed both orders sought.

THE ISSUES RAISED BY THE APPLICATION

15. Two main issues are raised by the application:

   a. ***Issue 1**:* ***The Proposed Amendments and Attendant Costs***

      i. Should the court grant permission for some or all of the amendments sought;

      ii. What orders should the court make in relation to costs consequent on the grant or refusal of permission to amend;

   b. ***Issue 2**:* ***The Further Affidavit***

      i. Should the court grant permission for the filing of the affidavit of Robert Wan

I will address these issues in turn.

Issue 1: The Proposed Amendments and Attendant Costs

The Law

16. The Civil Procedure Code (2002) as amended in 2006 (the CPR) provides in rule 20.4(2) as follows:

> "Statements of case may only be amended after a case management conference with the permission of the court."

17. The rule in its current form is a result of the amendments made to the CPR in 2006 which have given the court wide powers. As Sykes J. observed in the case of **Peter Salmon v Master Blends Feeds Ltd** C.L. 1991/S163, (October 26, 2007) at paragraph 22 of his judgment:

> The amended rule 20.4 (amendments came into effect on September 18, 2006) confers powers of amendment on the court. Under the original rule 20.4 the court could not grant an amendment of a statement of case after the first case management conference unless it was necessary because of a change in

circumstances which became known after the date of that case management conference (see ***Campbell v National Fuels & Lubricants*** Claim No. C.L. 1999/ C 262 (delivered November 2, 2004)). The amended rule 20.4 has removed this restriction. The amended rule has not laid down any precondition or stated any criterion for the exercise of the discretion. This means that the application of the rule is governed exclusively by the overriding objective.

18. The effect of this 2006 amendment is that the court now has a very wide discretion in relation to the granting of permission to amend statements of claim. Guidance on the exercise of this discretion is to be found in relevant case law. Counsel for the claimant relied in his submissions in support of the application, on the cases of **Cropper v Smith** (1884) 26 Ch. D 700; **The Attorney-General v. Maurice Francis** Unreported SCCA 13/95 (March 26, 1999)**;** and **Cobbold v London Borough of Greenwich** (Unreported August 9, 1999) (United Kingdom) Civil Procedure 2009 (the White Book), volume 1 at 17.3.5**.**

19. It was submitted by counsel for the claimant that although the first two cases were decided prior to the new CPR, those decisions are in line with the court's overriding objective of dealing with cases justly (CPR r 1.1(2)). Further he submitted that the power of the court in these cases in adjudicating on an application to amend is in line with the power of the court post 2006. The third unreported case was decided on the English rule which is in the same terms as the CPR r. 20.4.

20. In **Cropper v Smith** there were competing claims to patents. In the Court of Appeal, the court considered whether a party should be granted leave to amend when he had failed to make any application for amendment and maintained that no amendment was necessary. The court held that the amendment would not be granted because of that party's failure to ask for leave to amend and because he had maintained the view that an amendment was unnecessary. The dissenting opinion of Bowen L.J. has however been repeatedly cited with approval in numerous subsequent decisions.

21. At page 710 of the report Bowen L.J. opined,

Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right...

I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance, where a person has made a mistake in his pleadings which has put the other side to such a disadvantage as that it cannot be cured by the application of that healing medicine..." [Emphasis added]

22. The aforementioned dictum of Bowen L.J. was applied by the Jamaican Court of Appeal in the **Maurice Francis** case. The Court of Appeal affirmed the decision of the trial judge who granted an amendment to pleadings which was requested at the close of submissions. The decision was held to be proper even though the Defendant argued that the application was particularly prejudicial because of its exceptionally late timing and the fact that the costs of an adjournment could not remedy that prejudice.

23. At page 11, Langrin, J.A (Ag) (as he then was) observed:

It is settled law that at the trial of an action leave to amend may be granted when to do so will not cause injustice to the other side and on proper terms as to cost and the adjournment of the trial if necessary. The discretion of the Court is based on considerations of prejudice and injustice.

At page 12 the learned judge went on to state further that:

> It may be useful to point out that the facts on which the amendment is based were already in evidence and had not been challenged… That being so the appellant could not have been caught by surprise.

24. Counsel for the claimant also relied on the dicta of Peter Gibson L.J. in **Cobbold v London Borough of Greenwich**, where the learned judge said.

> The overriding objective is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed.

25. The claimant submitted the law outlined favoured the grant of the amendments sought as outlined below.

The Amendments Sought by the Claimant

26. In their submissions counsel for the claimant outlined with commendable clarity the nature of the amendments sought. I have therefore found it useful to adopt their outline with minor changes where necessary.

27. The Affidavit of Miguel Palmer sworn to and filed on the 24th of February 2011 exhibits the proposed Amended Fixed Date Claim Form (Exhibit "**MP-1**"). Amendments are sought at paragraphs 13, 14(1), 14(2), 14(3), 14(4), 14(5), 14(6), 14(8), 14(9), 14(10), 14(11), 14(12), 14(13)(b), 14(15), 14(18), 14(19), 14(20), 14(21, 14(22), 14(23), 14(25), 14(27), 14(28), 14(29), 14(31), 14(32), 14(33), 14(36), 14(38), 14(39), 14(41), 14(43), 14(44), 14(45), 14(46), 14(47), 14(49) and 14(50).

28. The proposed amendments can be grouped for convenience as follows:
    a. Draft Amendment Paragraphs – 13, 14(1), 14(2), 14(3) and 14(4).
    b. Draft Amendment Paragraph - 14(49)

c. Draft Amendment Paragraph - 14(50).

d. All other draft Amendment Paragraphs - 14(5), 14(6), 14(8), 14(9), 14(10), 14(11), 14(12), 14(13)(b), 14(15), 14(18), 14(19), 14(20), 14(21, 14(22), 14(23), 14(25), 14(27), 14(28), 14(29), 14(31), 14(32), 14(33), 14(36), 14(38), 14(39), 14(41), 14(43), 14(44), 14(45), 14(46) and 14(47).

29. Draft Amendment Paragraphs – 13, 14(1), 14(2), 14(3) and 14(4):

a. These amendments concern the allegation by the claimant that the very manner in which the reference and thus the award was manipulated by the Arbitrators and/or the Umpire was incorrect in law. This allegation is not new. It forms part of the existing FDCF and can be found at paragraph 45 of the document filed in 2009.

"*The Arbitrators having differed or not agreed on several issues ought to have given the entire reference to the Umpire but instead the Arbitrators have in fact ruled on some matters and given other matters to the Umpire. This is in fact wrong and in the circumstances the award ought to be set aside.*"

b. Paragraph 45 of the 2009 FDCF is now paragraph 14(2) of the draft amended FDCF. The Amendments at paragraphs 13, 14(1), 14(3) and 14(4) further particularise an allegation already raised in respect of the Arbitrators and the Umpire. No new facts or cause of action are raised by these insertions. The claimant contends that the purpose of the amendments is merely to provide the court and in turn, the defendant with greater clarity on the type of misconduct, error of law and excess of jurisdiction which is being alleged. This amendment the claimant submitted would cause no prejudice to the defendant and would in fact assist in the preparation of the defendant's case by enabling the defendant to meet the claimant's allegations with greater specificity.

30. Draft Amendment Paragraph - 14(49):

a. This proposed amendment addresses the complaint by the claimant that Arbitrators and the Umpire failed to give reasons and/or adequate reasons for

the Award as required by the Terms of Reference. The claimant submitted that this is also not a new allegation as it featured in the 2009 FDCF (for example at paragraphs 14(15)(a), 14(23), 14(25)(c), 14(27)(c) and 14(38)). Counsel for the claimant described the merger and re-statement in the draft amendment at paragraph 14(49) as "an omnibus averment of the specific legal consequence of illegality and/or nullity as a result of this failure to give reasons and/or adequate reasons for the Award."

b. The claimant further submitted that it could not be said in these circumstances that the defendant would be put to any additional effort by the inclusion of this paragraph as neither the basis for the allegation (i.e. the failure to give reasons and/or adequate reasons) nor the legal consequence alleged (i.e. illegality and/or nullity of the Award) are fresh on the pleadings.

c. The claimant maintained however that it is an amendment that is necessary to clarify the nature of the dispute between the parties.

31. Draft Amendment Paragraph - 14(50):

a. This amendment raises a different basis for the allegation of misconduct on the part of the arbitrators and/or the umpire i.e. lack of impartiality and/or actual or apparent bias. However the facts upon which these allegations are based were previously pleaded.

   1. Shifting of the burden of proof – see paragraphs 14(2)(b), 14(35)(b) and 14(43) of the 2009 FDCF.
   2. Making of findings without evidence or proper evidence – see paragraphs 14(5), 14(8), 14(15)(c), 14(22)(a), 14(29) and 14(35) of the 2009 FDCF.
   3. Failure to give reasons or adequate reasons – see paragraphs 14(15)(a), 14(23), 14(25)(c), 14(27)(c) and 14(38) of the 2009 FDCF.

4. Rejecting the claimant's counterclaim without giving reasons – see paragraph 14(27) especially sub-paragraph (c) of the 2009 FDCF.

b. Counsel for the claimant submitted that the proposed amendment at paragraph 14(50) is the only amendment which could be said to raise new issues (partiality and bias), albeit based on facts already pleaded. Counsel further submitted that any perceived prejudice to be suffered by the defendant if this amendment was granted is at best minimal given the fact that (at the time of hearing March 7, 2011) the trial date of May 2, 2011 was 7 weeks away. The submission continued that any consequential amendments to the Defence in respect of the proposed amendments could be made well in advance of the trial date and without endangering the trial date. Counsel for the claimants however further suggested that even if the trial date would be affected by the granting of permission to amend greater harm would result from not permitting the amendments. This harm would result from (a) the trial court being prevented from fully discerning the matters in controversy between the parties, (b) the public interest in the efficient administration of justice being frustrated and (c) the result being contrary to the overriding objectives of the CPR.

32. All other draft Amendment Paragraphs - 14(5), 14(6), 14(8), 14(9), 14(10), 14(11), 14(12), 14(13)(b), 14(15), 14(18), 14(19), 14(20), 14(21, 14(22), 14(23), 14(25), 14(27), 14(28), 14(29), 14(31), 14(32), 14(33), 14(36), 14(38), 14(39), 14(41), 14(43), 14(44), 14(45), 14(46) and 14(47):

a. Counsel for the claimant submitted that these are consequential amendments in light of the other amendments being prayed for by the claimant. They are concerned merely with, for the most part, replacing either the words "*Arbitrators*" or "*Umpire*" with the phrase "*Arbitrator and/or Umpire*" in keeping with the other amendments sought.

b. Counsel for the claimant also indicated that there were a few amendments to ensure grammatical correctness that would necessarily flow from the changes sought (see e.g. paragraph 14(25) of the draft FDCF).

33. Counsel for the claimant's summary submission was that the amendments ought to be allowed as they would promote a fair adjudication of the issues joined between the parties, little or no prejudice would be suffered by the defendant and the amendments sought would not prejudice the trial date.

The Challenge of the Defendant to the Amendments Sought

The Legal Challenge

34. The defendant took no issue with the general principles of law as stated by the claimant and outlined above. The defendant however relying on two specific legal principles sought to challenge the amendments. Counsel for the defendant submitted that the amendments should not be granted as **i)** there was no arguable factual basis for the amendments sought and **ii)** flowing from i) the defendants would be prejudiced if they were burdened at this late stage with responding to amendments which have no real prospect of being established at trial. Allowing the amendments the defendant submitted would be contrary to the overriding objective, could not be remedied by costs and prejudiced not just the defendants but the whole administration of justice as the trial dates may be affected if the amendments were granted.

35. Counsel for the defendant relied on two main authorities in mounting a spirited opposition to the application. Firstly the case of **National Housing Development Corporation (NHDC) v. Danwill Construction Limited, Warren Sibbles and Donovan Hill** 2004 HCV 361 & 362 (May 4, 2007), decided by Brooks J. was relied on for the proposition that there must be an arguable claim raised by a proposed amendment otherwise permission would be refused. The facts in this case were that there was an application to amend the defence in order to add details of certain contractual provisions material to the proceedings. The reason for the application was that the statement of defence had to be filed within a time limit which did not allow all the

relevant documentation to be sourced. Subsequently after the case management additional documents providing more details of the defence had been unearthed and hence the defendant then sought the amendments.

36. In the **NHDC** case counsel for the claimant/respondent relied on an extract from Blackstone's Civil Practice, 2005 at paragraph 31.4 which states:

> The Court has a general discretion to permit amendments where this is just and proportionate. If no arguable claim is raised by a proposed amendment permission will be refused (Collier v Blount Petre Kramer [2004] EWCA Civ 467, LTL 1/4/2004.

37. Brooks J. noted that Mr Powell counsel for the claimant/respondent interpreted the passage in Blackstone to mean that only amendments which raise new causes of action or grounds of defence would be allowed. Brooks J. reviewed the Collier case cited in Blackstone and then at page 10 of the judgment continued:

> My reading of the excerpt from Blackstone is that there must be an arguable factual basis for the proposed amendment. That interpretation, in my view, is more in keeping with the myriad cases in which amendments, minor and major, have been allowed over the years, without the addition of a cause of action or ground of defence.

38. The defendant's contention is that the application of the claimant does not satisfy the test outlined in the **NHDC** case. The defendant maintains that there is no arguable factual basis for the amendments as the doctrine of waiver applies, precluding the claimant from relying on certain facts on which the proposed amendments are based. Counsel for the defendant secondly cited the case of **National Water Commission v. Duffus** Unreported SCCA 91 of 2002 (December 20, 2004), to illustrate the application of the doctrine. Mr. Duffus who was compulsorily retired from National Water Commission alleged that he had been wrongfully dismissed from his employment and challenged the separation package which was provided to him. However, he only raised this challenge after accepting the retirement benefits provided to him.

39. In discussing the doctrine of waiver Harrison J.A. (Ag.) (as he then was) at page 7 said as follows:

> I wish to make some general observations about the doctrine of estoppels, waiver, election, approbation and reprobation. All share a common foundation in a simple instinct of fairness, and in particular, the perception that as between two parties to a transaction or a legal relationship it may be unfair for one party (A) to adopt inconsistent positions in his dealings with the other (B). As Lord Wilberforce said in Johnson v. Agnew [1979] 1 All E.R. 883 at 894: "Election, though the subject of much learning and refinement is in the end a doctrine based on simple considerations of common sense and equity." Equitable (or promissory) estoppels applies only where there is an unequivocal representation (in words or conduct) by A and it is relied on by B.

40. Harrison J .A. also relied on the judgment of Lord Hailsham in **Banning v. Wright** [1972] 2 All E R 987 where Lord Hailsham at page 998c said:

> In my view the primary meaning of the word 'waiver' in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted.

41. Applying the principle of waiver to the facts of the case the Court of Appeal held that Mr. Duffus had by his actions and conduct induced the National Water Commission to provide financial benefits it would not have otherwise provided but for his retirement and had therefore waived any right to challenge that retirement as being actually wrongful termination.

42. Counsel for the defendant submitted that the principle of waiver was binding in the instant case as both the claimant and the defendant had agreed to be bound by the United Nations Commission on International Trade Law (UNCITRAL) Arbitrations Rules (as amended) Article 30 of which provides:

> A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration

without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

The Factual Challenge

43. Counsel for the defendant submitted that the claimant was at all material times aware of the procedure being adopted by the arbitrators and the umpire, it raised no objection to this procedure and has thereby waived any right it may have had to object to this procedure. The submission specifically alleged that the claimant was:

a. notified of and did not object to the appointment of two arbitrators and one umpire;
b. present at the meeting on February 18, 2009 which meeting resulted in Order for Direction No. 7 which stated the methodology for the use of the umpire's services which methodology the Claimant agreed with and which was the same as the methodology actually employed ; and
c. was present throughout the course of the proceedings and witnessed the agreed procedure being used by the arbitrators and the umpire and at no time did it object to this procedure.

The Combined Challenge: The Law Applied to the Facts

44. Relying on the doctrine of waiver outlined in the **National Water Commission** case and the terms of Article 30 of the UNCITRAL Arbitration Rules, counsel for the defendant maintained that the claimant's application did not pass the test outlined in the **NHDC** case as there was no arguable factual basis for the proposed amendment.

45. The court was further asked to take into account the fact that the matter was complex and voluminous. The preparation time for the defendant would be prejudiced by the granting of the amendments which have been applied for a mere 7-8 weeks prior to trial. It was therefore submitted that the strain and potential negative effect that the defendant would suffer, in what was very important commercial litigation, could not be fully compensated by an award of costs. A vacation of the trial dates to alleviate the strain would not lessen the injustice occasioned to the defendant as the stay currently in

place prevented the defendant from enforcing the substantial arbitration award. Such a vacation of trial dates would also be prejudicial to other litigants seeking to have their matters concluded expeditiously.

The Court's Decision on Issue 1: Proposed Amendments and Attendant Costs

46. The submission of counsel for the defendant in opposition to the application amounts in effect to this — on the facts "there is no arguable **legal** basis for the amendment." The test from the **NHDC** case earlier reviewed is however, whether or not "there is an arguable **factual** basis for the amendment." [Emphasis added].

47. With that in mind it is useful to cite further from the **NHDC** case. After outlining that the test requiring the existence of an arguable factual basis for the amendment could be satisfied without there being a new cause of action or ground of defence, Brooks J continued at page 10 of the judgment as follows:

> In applying the principles guiding the Court, to the instant application, I accept the submission by Miss Jordan that the amendments sought by paragraphs 8A, 16A, and 21A provide particularity to the original statement of defence. I agree with Mr. Powell that the proposed paragraph 18A introduces an element not raised in the particulars of claim. Paragraph 18A is nonetheless relevant in the context of the aspect of the defence, which alleges that the contracts were improperly terminated and that the agreed termination processes were ignored by the party purporting to terminate.
>
> In the circumstances I find that the amendments will assist the Court, "in determining the real questions in controversy between the parties". [Emphasis added]

48. There is marked similarity between the characterisation and effect of the amendments allowed in the **NHDC** case and the nature of the amendments sought in this case. A careful review of the proposed amendments of the claimant discloses the necessary arguable factual basis by virtue of which they should be granted. Relevant facts do exist to support the particulars which the claimants seek to include in their amended pleadings. They are the same facts which support the existing 2009 FDCF. The amendments generally enhance particularity. In the one instance where a new legal

basis for challenge has been included, (allegations of partiality and bias at draft paragraph 14(50)), that amendment has been foreshadowed by facts already pleaded. The essence of the claimant's challenge to the arbitration proceedings will therefore not be changed by the amendments sought. The clearest example of this is the amendment sought to move paragraph 45 of the 2009 FDCF to a new paragraph 14(2). That paragraph reads: *The Arbitrators having differed or not agreed on several issues ought to have given the entire reference to the Umpire but instead the Arbitrators have in fact ruled on some matters and given other matters to the Umpire. This is in fact wrong and in the circumstances the award ought to be set aside.*

49. In summary therefore the amendments seek only to give greater particularity to and clear legal definition of the claimant's assertions concerning the procedural irregularities, errors of law and excess of jurisdiction which the claimant alleges occurred in the conduct of the arbitration proceedings. The factual substratum to the claim will not be changed in any way by the amendments. With the exception of the allegations of partiality and bias which have now been expressly averred, the legal bases of the claimant's challenge also remain the same.

50. In those circumstances for the court to refuse the application for amendment on the ground that the doctrine of waiver applies, would be tantamount to the court holding that the defendant could have successfully applied to strike out the claim and have judgment entered in its favour. Put another way, if the defendant is correct, with or without the amendments there is such a high probability that the overall claim will fail that it perhaps should not proceed to trial. However a perusal of the Defence filed on August 9, 2009 discloses that the doctrine of waiver has not been specifically pleaded. Further, it also does not appear to have been raised in any submissions prior to those in response to the application to amend, though the facts relied on by the claimant have not changed. The court has been made aware that the pleadings and evidence in this matter are voluminous. The matter has proceeded through case management, the making of various orders, exchange of pleadings and evidence through to the pre-trial

review date, at which time the application under consideration was made. To date however the defendant has not sought to move the court by any application to have the matter resolved without a trial. Therefore whether or not this application for amendment is granted, all present indications are that the parties are set to proceed to trial.

51. The trial court will be best placed to address the question of whether the doctrine of waiver provides a safe harbour within which the defendant can shelter from the waves generated by the claim. Counsel for the claimant in reply to the cases cited on behalf of the defendant, firmly joined issue with the application of the doctrine. He maintained it could not be prayed in aid in circumstances where the arbitrators had acted in breach of the Arbitration Act by virtue of which the arbitration proceedings were constituted. The question whether or not the doctrine of waiver is available to the defendant as an answer to the claim or parts of it, therefore goes to the heart of the issues to be resolved between the parties. These are issues for the trial court. The defendant will of course be granted the opportunity to amend its Defence as deemed necessary to meet the amended Claim. In so doing the defendant will be able to deploy the doctrine of waiver in as much detail and specificity as desired.

52. The decision of the court to grant permission for the amendments sought is also in keeping with the judgment in the case of **Charlesworth v Relay Roads Limited** [1999] 4 All ER 397, reviewed with approval by Brooks J. in the **NHDC** matter. In the **Charlesworth** case Neuberger J at page 401 highlighted that on an application to amend a statement of case or to call evidence for which permission is required, assessment of the justice of the case involved two competing factors. Firstly, that it is desirable that a party is allowed to advance every point he reasonably desires to put forward, so that he does not believe he has suffered injustice especially if the decision goes against him. If any damage suffered by the opposing party may be compensated by costs a powerful case would normally be made out for the amendment to be allowed. Secondly, the court had to consider whether the success of an application to amend or to call new

evidence would interfere with the administration of justice and the interests of other litigants who had cases waiting to be heard.

53. In this case as the amendments, though somewhat late:

a. mainly seek to further particularise the claim;

b. will enable the defendant to more specifically meet the claim brought; and

c. are such that an appropriate consequential order in relation to costs can compensate the defendants for any prejudice occasioned,

in keeping with the considerations highlighted in **Charlesworth,** balancing the competing interests appropriately, dictates that the application for the amendments should be granted.

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

<u>The Appropriate Order as to Costs</u>

55. It follows to be determined what costs should be ordered as "healing medicine" in the words of Bowen L.J. in **Cropper v Smith**. Counsel for the claimant submitted that as the application was made at the pre-trial review which the parties would have had to attend in any event costs should be costs in the claim. Counsel for the defendant however responded noting that the extent of preparation required to meet the application and the hardship that would be caused to the defendant if the application were granted required that costs be awarded against the claimant. Counsel for the defendant also cited the case of **Robert Cartade, Jack Koonce, Shirley Shakespeare, Western Cement Company Limited (In Receivership) v Pan Caribbean Financial Services Limited, National Investment Bank of Jamaica and Jamaican Redevelopment Foundation Inc**

2006HCV2956 (October 15, 2008) in which costs were awarded against the claimants even though the application to amend was made at the first case management conference.

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

Issue 2: The Further Affidavit

57. In this application the Claimant also seeks permission to add a further Affidavit of Mr Robert Wan. In the draft affidavit exhibited to the affidavit of Miguel Palmer as **MP-2**, Mr Wan states that he was one of the two arbitrators in the arbitration proceedings and goes on to state the manner in which the reference was conducted. The information provided in this affidavit is the evidence upon which the claimant is seeking to support the allegations embodied in its 2009 FDCF (as well as its proposed amended FDCF). That is to say the evidence that the arbitrators and the umpire misconducted themselves in embarking upon the reference jointly. These allegations are made at paragraph 45 of the 2009 FDCF and presently comprise paragraphs 13, 14(1), 14(2), 14(3) and 14(4) of the draft Amended FDCF.

58. At the first hearing in these proceedings held on May 6, 2010, Jones J. ordered that the claimant was to file a further affidavit by June 30, 2010. The claimant complied with this order by the filing of the second affidavit of Judith Larmond Henry on June 30, 2010. This affidavit exhibited the transcripts of the Arbitration proceedings. In order for the claimant to be able to file this affidavit of Mr Wan, the court would have to extend the time for compliance with the order of Jones J. made at the first hearing.

59. The court in its case management powers has the discretion to:

> Extend or shorten the time for compliance with any ... order or direction of the Court even if an application for extension is made after the time for compliance has passed (CPR r. 26.1(c)).
>
> Take any other, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective. (CPR r. 26.1(v)).

60. The CPR also allows a party to apply to the court for a variation of the case Management timetable. This is provided for at CPR r. 27.11.

61. As in the case of the power to grant permission to amend statements of case, no guidance is laid down by the CPR concerning how the court is to exercise this discretion when considering amendments to a case management timetable. The claimant submitted and the court accepts that in the court's excise of its discretion the court always has to bear in mind the overriding objective of dealing with cases justly.

62. The two orders sought in the application brought by the claimant are closely intertwined. The same factors which informed the decision of the court in relation to the application for permission to amend the 2009 FDCF obtain in relation to the application for permission to file the affidavit. The short two page draft affidavit contains requisite evidence to support both the facts pleaded in the 2009 FDCF and the amendments to that claim form which have now been granted. The court having found that the amendments should be allowed to facilitate the issues between the parties being fairly and justly determined, it is therefore necessary that the claimants be allowed to file this further affidavit that seeks to provide the proof for what has been pleaded. The court will allow the defendant time to file an affidavit in reply if deemed necessary. It is a possibility but by no means a certainty that the permission granted by the court for the claimant to file the further affidavit of Mr. Robert Wan will affect the trial date. Even if that were to occur the justice of the case requires the granting of the permission sought.

CONCLUSION

63. Mindful of the overriding objective and guided by the jurisprudence that has developed concerning the appropriate exercise of the wide discretion vested in the court, the permission sought to amend has been granted. Permission has also been granted for the filing of the affidavit containing evidence in relation to the original and amended pleadings. Consequential orders as to costs will address any prejudice to the defendants occasioned by the claimant's successful application. At the adjourned pre-trial review on March 31, 2011 further orders will be made to facilitate as far as possible the readiness of the matter for trial.

64. The court will therefore make the following orders:

    a. The claimant is at liberty to prepare, file and serve on or before the 4th day of April 2011 an amended Fixed Date Claim Form in terms of that appended to the affidavit of Miguel Palmer in support of the Notice of Application for Court Orders dated and filed February 24, 2011;
    b. Time is extended for the filing and service by the claimant of the affidavit of Robert Wan on or before the 4th day of April 2011;
    c. The defendant shall be at liberty to file and serve on or before the 18th day of April 2011 an amended Defence and an affidavit in response to the affidavit of Robert Wan;
    d. Costs of the application and the costs of and occasioned by the amendments and the filing of the affidavit of Robert Wan to the defendant.