

REDACTED RULING PENDING APPEAL

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2021/CLE/gen/01043

IN THE MATTER of the trusts of the Declaration of Trust dated 23rd February 2001 and designated as the “X” Trust and of the trusts of the Declaration of Trust dated 23rd February 2001 and designated as The “Y” Trust.

AND IN THE MATTER OF an application under Section 3 of the Judicial Trustees Act and/or under the inherent jurisdiction of the Court.

BETWEEN:

CHERYL HAMERSMITH-STEWART

Plaintiff

- and -

CROMWELL TRUST COMPANY LIMITED

First Defendant

ADAM STEWART

(acting in his capacity as the Enforcer, a member of the Advisory Board and personal capacity)

Second Defendant

JAIME STEWART-McCONNELL

(acting in her capacity as a member of the Advisory Board and personal capacity)

Third Defendant

BRIAN JARDIM

Fourth Defendant

GORDON STEWART

Fifth Defendant

KELLY STEWART

Sixth Defendant

SABRINA STEWART

Seventh Defendant

(NAMES REDACTED)

Eighth Defendant

ROBERT STEWART

Ninth Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mr. John Wilson KC with him Mrs. Vanessa Smith of McKinney Bancroft & Hughes for the Plaintiff
Mr. Brian Simms KC with him Mr. Marco Turnquest and Mr. Wilfred P. Ferguson Jr. of Lennox Paton for the First Defendant
Mr. Richard Wilson KC with him Mr. Sean McWeeney KC and Mr. John Minns of Graham Thompson for the Second, Third and Fourth Defendants
Mr. Nicholas LePoidevin KC with him Mr. Terry North, Ms. Wynsome Carey and Mr. Darzhon Rolle of Alexiou Knowles for the Fifth, Sixth and Seventh Defendants
Mr. John Delaney KC with him Mrs. Lena Bonaby of Delaney Partners for the Eighth Defendant
Mrs. Courtney Pearce-Hanna with Ms. Raven Rolle of Callendars & Co. for the Ninth Defendant

Hearing Dates: Heard on written submissions submitted on 31 October and 1 November 2022

Practice and Procedure - Administration of Trusts – Striking Out of Defence or Unless Order- Whether co-defendants have “standing” to strike out the ‘holding’ defence of another co-defendant - Whether co-defendants can apply for other co-defendants to file their defence or counterclaim or be debarred from defending and participating in the proceedings - Whether co-defendants should await determination of ‘No Contest’ Application before hearing of ‘No Contest’ Application – Prejudice (if any)

By a Ruling delivered on 30 May 2022, the First through Fourth Defendants were ordered to file and serve their respective defences. They have all complied with the Order of the Court. By Order dated 20 July 2022, the Fifth through Seventh Defendants and the Ninth Defendant were ordered to file and serve their respective Defences by 5 September 2022. The Ninth Defendant has filed a ‘holding’ Defence and the Fifth through Seventh Defendants have not filed their Defence.

As a result, the Second through Fourth Defendants made an application seeking: (i) an order to strike out the Defence of the Ninth Defendant and/or an unless order requiring him to file and serve his amended Defence which pleads his full case and/or be debarred from pleading any allegation against any other Defendant and (ii) an order debaring the Fifth through Seventh Defendants from filing a Defence and Counterclaim or alternatively, an unless order requiring them to file any Defence or Counterclaim failing which they be debarred from participating in the proceedings.

The Fifth through Seventh Defendants opposed the application, contending that they were not non-compliant with the order dated 20 July 2022 since they were given leave to file their defence but they cannot be compelled to do so since they have no intention of doing so. They also argued that it would be unfair to bar them from participating in the proceedings.

The Ninth Defendant also opposed the application, contending that the Second through Fourth Defendants would not be prejudiced by reserving his true defence until after the determination of the 'No Contest' Application and as these Defendants are not opposing parties to the Ninth Defendant, they do not have the standing to complain about his Defence. The Ninth Defendant further alleged that only the Plaintiff can do so and she has not.

HELD: The Summons filed on 3 October 2022 by the Second to Fourth Defendants is dismissed with costs to the successful parties to be taxed if not agreed.

1. RSC O. 18 r. 2(1) is plain. The only party that could complain and seek relief against D9 for the filing of a 'holding' Defence is the Plaintiff. To make a defendant an 'opposite party' to a co-defendant such as to give him standing to complain about that defendant's defence, that defendant will have to make a claim against him. But a defendant can only do so by either making a counterclaim against him: RSC O. 15 r 3(1) or serving a notice on him under O. 16 r. 8(1)(b). D9 has done neither.
2. RSC O. 18 r. (8)(1) is also plain. It speaks to matters which must be specifically pleaded by a defendant so as not to take the 'opposite party' by surprise; that is, the Plaintiff.
3. The law is so long as a defendant files and serves a document which purports to be a defence within the requisite time limits, he will avoid judgment in default being entered against him. However, if justified, the **plaintiff** can apply for the defence to be struck out and for judgment to be entered or for summary judgment. Evidently, the court can also strike out a defence on its own initiative.
4. It is difficult to see how D2-D4 are being prejudiced by D9 not filing a fully formulated Defence before the hearing of the 'No Contest' Application.
5. Once the 'No Contest' Application is heard and determined, whichever way it goes, will bring certainty to these proceedings. Undoubtedly, a fully reasoned judgment will be issued which will clearly set out the legal metes and bounds of the 'No Contest' Clauses. At this stage, there is no substantive claim to be met. There is no real need for *case preparation* to begin until after the 'No Contest Application' has been resolved. In any

event, without D9's properly formulated Defence, D2-D4 are not prevented from their document gathering exercise.

6. As a matter of basic justice and fairness, it is more sensible to permit D9 to file his properly formulated Defence following the resolution of the 'No Contest' Application and no real prejudice is caused to D2-D4 by permitting that approach.
7. In accordance with RSC O. 18 r.2 (1), a defendant does not have to file a Defence and no Court could compel that defendant to do so but, as beneficiaries in a trust action, it would be extraordinary that since they have been joined by the Plaintiff in this action, that they would be debarred from participating in these proceedings because they have not filed a defence opposing the claim. I am not aware of any law which gives the Court the power to prevent a beneficiary from participating in the action, making legal submissions or stating a position concerning the administration of the Trusts. As Mr. John Wilson KC puts it "*it simply cannot be right that only beneficiaries who oppose the relief sought are permitted to be heard*".

RULING

Charles Snr. J:

Introduction

[1] By Summons filed on 3 October 2022 and supported by an affidavit of Gabriel K. Brown filed on 3 October 2022, the Second to Fourth Defendants ("D2-D4") seek an order:

1. to strike out the Defence dated 5 September 2022 of the Ninth Defendant ("D9's Defence") or, alternatively, to strike out the second and third paragraphs of D9's Defence and debar him from pleading any allegation against any other Defendant in these proceedings on the basis of facts and matters of which he is currently aware or could, upon reasonable enquiry, have found out; or, alternatively, an unless order requiring D9 to file and serve an amended Defence which pleads his full case, failing which his Defence be struck out and/or be debarred from pleading any allegation against any other Defendant in these proceedings on the basis of facts and matters of which he is currently aware or could, upon reasonable enquiry, have found out; and
2. to debar each of the Fifth to Seventh Defendants ("D5-D7") from filing any Defence or Counterclaim in these proceedings and debarring them from

participating in the proceedings, or alternatively; an unless order requiring them to file any Defence or Counterclaim, failing which they be debarred from defending and participating in the proceedings.

- [2] D2-D4 make this application pursuant to RSC O. 18 r.19(a), (b), (c) and/or (d), O. 31A, r.18(2)(j) and/or (s), and/or O. 31A, r. 20(1)(a), (b) and/or (d) and/or O. 31A, r.21(1) and/or the inherent jurisdiction of the Court.
- [3] The Plaintiff, D5-D7 and D9 oppose the application made by D2-D4. The First Defendant (“D1”) and the Eighth Defendant (“D8”) did not make submissions. However, on 1 November 2022, the Court received the Fifth Affidavit of Steven Carey for use in the hearing of the Strike Out application. D1 states that it remains neutral neither supporting nor opposing D2-D4’s application. At paragraph 35 of Mr. Carey’s affidavit, he emphasized D1’s neutrality as between competing beneficiaries.

Salient facts

- [4] The facts are outlined in the previous Rulings of this Court. However, some salient facts are necessary for a better understanding of this Ruling.
- [5] The Plaintiff, who is the common law widow of the Founder of two Trusts, of which she is a beneficiary, seeks the replacement of D1 as the sole Trustee of the Trusts. She alleges various conflicts of interest against D1 and its failure to carry out the Founder’s wishes and that she has been wrongfully deprived of and prevented from using certain assets to which she claims to be entitled.
- [6] Both Trusts contain ‘No Contest’ Clauses empowering D1 to exclude any beneficiary and so deprive him/her of any benefits from the Trusts if that beneficiary brings any claim against the Trusts.
- [7] The Plaintiff denies that her claims engage the ‘No Contest’ Clauses but in order to avoid any risk that they do, she pleads that her substantive claim will only be

advanced if the declaration she has sought by way of preliminary relief does not engage the 'No Contest' Clauses.

- [8] Initially, the Plaintiff commenced these proceedings against D1. However, the Trusts are discretionary trusts and, by order dated 8 April 2022, the Court gave directions for the joinder to the proceedings of other interested parties. D2–D7 filed Notices and Memorandum of Appearance. D9 filed his Memorandum of Appearance on 16 May 2022.
- [9] By Order of the Court dated 20 July 2022, D5-D7 and D9 were ordered to file and serve their respective Defences by 5 September 2022. D9 has filed a Defence but D5-D7, the children of the Plaintiff, have not filed their Defence.
- [10] The Defence filed on behalf of D9 is a non-conventional defence but, to use the vernacular of his Counsel, it is in the form of a “holding defence” pending the determination of the preliminary issue, which if resolved in the Plaintiff’s favour, D9 may seek leave to amend his Defence to plead his further concerns.
- [11] As indicated a moment ago, D5-D7 have not filed their Defence. They argue that they are not in default because (i) there is no obligation under RSC O. 18 r.2 (1) to file a Defence and, in any event, they do not intend to defend the action and so, are under no obligation, to file a Defence; (ii) nothing in the 20 July 2022 Order required them to file a Defence and (iii) even if they intend to file a Defence, there is nothing debarring them from participating in the proceedings.

Discussion, analysis and conclusion
D2-D4’s application to strike out D9’s Defence

[12] In his Defence, D9 pleads that:

- (i) he shares the Plaintiff’s concerns as to the suitability of D1 continuing as Trustee of the Trusts and he has some concerns of his own;
- (ii) he does not specifically deny any of the allegations made by the Plaintiff in her Statement of Claim and is accordingly deemed to admit them;

(iii) he denies that the Plaintiff's claim to replace D1 as Trustee engages the 'No Contest' Clauses; and

(iv) he reserves his right to amend his Defence to address further concerns after the determination of the preliminary issue.

[13] D2-D4 are unhappy with D9's Defence and seek, among other things, an order to strike it out. The primary complaint is that, in its Ruling on 30 May 2022, the Court stated that "...*the filing of the Defences is required to mark the parameters of the case....The issues between the parties must be identified. This must be done by filing their respective Defences.*" The Court then ordered that the Defences of D1 and D2-D4 be filed by, respectively, 14 and 27 June 2022, rather than being allowed to await the outcome of the 'No Contest' Application.

[14] Mr. Richard Wilson KC, who appeared for D2-D4, submitted that the Court concluded that (i) active case management was required to progress the substantive litigation notwithstanding that the 'No Contest' Application was liable to bring the proceedings to an early conclusion; (ii) it was critical that the substantive issues be identified at an early stage and (iii) the issues were to be identified through filing of the parties' respective cases.

[15] Mr. Richard Wilson KC next submitted that, contrary to D9's assertions, D2-D4 are not trying to suppress D9 from putting forward his case: all that they desire is for all parties to be on a "*level playing field*" in that since they were ordered to file and serve their Defences, the same principle ought to apply to D9 and D5-D7. He further submitted that it is unfair and inequitable for D9 and D5-D7 to receive preferential treatment from the Court by not being required to plead their full case at this stage since, very substantial costs and delay are likely to result if they do not do so now. He submitted that, as matters stand, the Court will consider the 'No Contest' Application by reference to the issues raised in the Amended Statement of Claim in circumstances where none of the supporting defendants has yet added to those issues. Depending on the outcome, the 'No Contest' Application could

have a determinative effect on the proceedings. Further, and in any event, there is likely to be an appeal of the 'No Contest' Application and therefore it is critical that all issues relevant to the 'No Contest' Clauses arising out of the parties' pleaded cases be considered and determined at one single hearing.

[16] Mr. Richard Wilson KC argued that the effect of D9's "holding Defence" is to hold back his true case until the scope of the 'No Contest' Application is determined so that he can determine what his case should be based on how the 'No Contest' Application is determined. According to him, D9's reasons are purely tactical: mindful of the risk of engaging the 'No Contest' Clauses by advancing a case whereby he seeks to remove D1 as Trustee and holding back his real case until the scope of that clause is determined. D2-D4 contends that D9 has not effectively complied with the order to file a Defence and they seek to have it struck out.

[17] Mrs. Pearce-Hanna, who appeared as Counsel for D9, conceded that D9's Defence is a "holding Defence" but asserted that the application to strike out by D2-D4 is misconceived and, in any event, D2-D4 want to put D9 in a position in which he is either forced to plead his concerns (as to the continuation of D1 as Trustee) ahead of the determination of the 'No Contest' Application and thereby risk falling afoul of the 'No Contest' Clauses or be forever debarred from voicing those concerns even if it is held by the Court that a claim by a beneficiary to replace D1 as trustee does not engage those clauses.

[18] Mrs. Pearce-Hanna then questioned (1) the standing of D2-D4 to seek to have D9's Defence struck out or to obtain any of the other relief against him which they seek and; (2) whether D2-D4 have any grounds to justify the Court striking out D9's Defence or granting any of the other relief.

Standing of D2-D4

[19] Mrs. Pearce-Hanna submitted that only a plaintiff is entitled to complain about and apply to strike out a defence and a defendant has no standing to complain or apply

to strike out the defence of a co-defendant unless that co-defendant makes a claim against him.

- [20] Mrs. Pearce-Hanna urged the Court to find that O. 18 r. 2(1) requires a defence to be served only on the plaintiff and it does not require where there is more than one defendant that their defences be served on each other (although as parties to the proceedings they would normally be entitled to be provided with copies of all the defences that have been served. However, D2-D4 as Defendants, cannot complain about another defendant's defence where no claims are made as between them.
- [21] Further, she relied on O.18 r. 8 (1) on which she says D2-D4 grounds its complaint of D9's Defence. In setting out what constitutes a proper pleading, the Rule states that the party must plead specifically any matter - (a) which he alleges makes any claim or defence of *the opposite party* unattainable; or (b) which, if not specifically pleaded, might take *the opposite party* by surprise; or (c) which raises issues of fact not arising out of the preceding pleading.
- [22] According to Mrs. Pearce-Hanna, D2-D4 are not 'opposite party' to D9; only the Plaintiff is and she has not complained about D9's Defence.
- [23] Learned Counsel for D5-D7, Mr. North makes the same point of lack of standing by D2-D4. In their letter to Mr. John Minns dated 13 October 2022, Mr. North stated that "...D2-D4 lack standing to complain. A Defence is designed to identify the factual issues between a plaintiff and a defendant. There is no claim, and no factual issue, between our clients and D2-D4."
- [24] Mr. Richard Wilson KC argued that D9 has missed the point when he asserted at paragraph 3 of his Second Affidavit that D2-D4 are not 'opposite' parties in the litigation and therefore are not entitled to complain about his pleaded case. He submitted that D9's assertion is wrong for the following reasons:

1. 'Opposite party' as defined in Stroud's Judicial Dictionary (10thed) for the purposes of the RSC extends to one which has "*an interest antagonistic to the applicant, even though ranged with him as a co-plaintiff or co-defendant*".
2. The issue in this case is should D1 be removed as trustee of the Trusts? There are two sides: those who want D1 to be removed and those who do not. D2-D4 oppose the claim to remove D1 and D9 has stated that he "*does not object to the substantive relief sought by the Plaintiff*" and he "*shares certain of the Plaintiff's concerns and has some of his own*". In doing so, D9 has clearly aligned himself with the Plaintiff and dissociate himself from D2-D4.
3. The idea that in such a situation, only the Plaintiff can complain about D9's pleading is not only wrong in law but leaves the Court powerless to deal with such a situation where the only party able to challenge it is one allied to that party because they happen to be plaintiff and defendant. This is contrary to the way in which cases are managed under RSC O. 31A.
4. In any event, the Court can make appropriate orders under its inherent jurisdiction and/or under RSC O. 31A.

[25] Attractive though the arguments advanced by Mr. Richard Wilson KC are, in my opinion, the only party that could complain and seek relief against D9 for the filing of a 'holding' Defence is the Plaintiff. RSC O. 18 r. 2(1) is plain. It provides that:

"...a defendant who enters an appearance in, and intends to defend, an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later."

[26] To make a defendant an 'opposite party' to a co-defendant such as to give him standing to complain about that defendant's defence, that defendant will have to make a claim against him. But a defendant can only do so by either making a

counterclaim against him: RSC O. 15 r 3(1) or serving a notice on him under O. 16 r. 8(1)(b). D9 has done neither.

[27] The only possible claim that D9 might seek is the removal of D1 as trustee if the 'No Contest' Application is decided in the Plaintiff's favour.

[28] RSC O. 18 r. (8)(1) is also plain. It speaks to matters which must be specifically pleaded by a defendant so as not to take the 'opposite party' by surprise; that is, the plaintiff. This should not take anyone particularly D2-D4 by surprise.

[29] The law is, so long as a defendant files and serves a document which purports to be a defence within the requisite time limits, he will avoid judgment in default being entered against him. However, if justified, the **plaintiff** can apply for the defence to be struck out and for judgment to be entered or for summary judgment. Evidently, the court can also strike out a defence on its own initiative.

[30] All in all, it seems to me that D2-D4 lack standing to strike out D9's Defence or even to seek an 'Unless Order' for D9 to amend his Defence to plead a properly formulated defence. On this issue alone, I will dismiss the Summons filed by D2-D4 on 3 October 2022 with costs to the successful parties.

[31] In the event that I am wrong to come to this conclusion, I shall carry on.

Application against D9

Striking Out or Unless Order

[32] D9's Defence, in its present form, pleads that "*he shares certain of the Plaintiff's concerns, and he has his own, about the action and conduct of the First Defendant in carrying out the wishes of the Founder and their legal and fiduciary (sic) duties*" and he "*reserves the right to amend his Defence to address such concerns, pending the determination of the preliminary relief application seeking a declaration regarding the No Contest Clauses, as set out at paragraphs 79-85 of the Statement of Claim.*"

- [33] According to D2-D4, this is a deliberate breach of the Court's Order requiring the parties to file their defences in order to '*mark the parameters of the case*' and a clear breach of RSC O. 18 r. 8(1) which requires a party to plead "*specifically any matter...which raises issues of fact nor arising out of the preceding pleading*".
- [34] Mr. Richard Wilson KC argued that D9 has deliberately chosen to keep the Court as well as the other parties 'in the dark' as to which of those concerns he purportedly shares. D9 also has other concerns which he wishes to hold back until a later stage in the proceedings.
- [35] D9 stated that his reason for doing so is that he wishes to avoid pleading a case which might be said to fall foul of the 'No Contest' clauses in the Trusts. According to Mr. Richard Wilson KC, this is a tactical decision on his part: he wishes to wait and see what the Court determines in relation to the Plaintiff's claim and the Court should not condone this since fairness between the parties would be eroded.
- [36] Mr. Richard Wilson KC further submitted that allowing D9 to proceed in the way he wishes has the potential to cause considerable procedural disruption. The Court is due to shortly consider the 'No Contest' Application and whether the clauses are engaged by the claim that the Plaintiff has pleaded. If subsequent to that determination, D9 is permitted to plead a substantive case, then the parties will effectively be 'back to square one' as it will then be necessary for the Court to consider the extent to which the matters raised by D9 engage the clauses before the case proceeds further.
- [37] Mr. Richard Wilson KC stated that D9's approach is all the more objectionable in circumstances where he has, in response to this application, set out additional matters (which go beyond those pleaded by the Plaintiff) in his Affidavit. If he wishes to rely on such matters in this claim, the time for him to do so is now, and the place is in his Defence, so that D2-D4 (and other Defendants) may respond to them properly and so all parties and the Court are made aware of the issues in dispute so that those issues can be case-managed appropriately. He also

submitted that to allow such a state of affairs would plainly amount to the Court failing to discharge the duty under RSC O. 31A r. 1.

[38] Mrs. Pearce-Hanna urged the Court to find that D2-D4 would not suffer any prejudice by D9 reserving its true defence until later. She referenced the Affidavit of Gabriel Brown, where he stated that his clients would be prejudiced in the evidence and document gathering exercise by the reservation of D9's defence until the 'No Contest' Application. To that, Mrs. Pearce-Hanna argued that D2-D4 need not engage in this exercise having regard to their confidence that the no contest clause issue will be determined in their favour. If it is determined in their favour, then the Plaintiff will abandon her claim and the need to gather evidence and documents would fall away. I agree.

[39] Mrs. Pearce-Hanna intimated that even if D2-D4 are not successful in the 'No Contest' Application, they are not stifled in their gathering of evidence and documents because by the filing of D9's Affidavit, they are now aware of the matters that would be relied upon by D9 if the preliminary issue is determined in the Plaintiff's favour. According to Mrs. Pearce-Hanna, it matters not that those contents are not pleaded.

[40] Mr. John Wilson KC, who appeared as Counsel for the Plaintiff, submitted that the reason why D2-D4 wish to have D5-D7 and D9 file their respective defences before the 'No Contest' Application is heard is because they would like to locate something in those defences which they would say "breaches" the 'No Contest' Clauses. He next submitted that, throughout this matter, D2-D4 have adopted an aggressive approach to the application of the 'No Contest' Clauses. A primary example of that is D2-D4's submission that the Plaintiff's preliminary claim to determine whether a claim to replace D1 with an independent, professional trustee would breach the 'No Contest' Clauses, itself breaches the 'No Contest' Clauses. That is notwithstanding the fact that the learned authors of *Lewin on Trusts* at 6:012 expressly state that:

"Cautious beneficiaries, who are concerned that a "no contest" clause in a trust might conceivably be invoked against them if they commence

any kind of trust proceedings, have in the past sought, as the first claim for relief, a declaration that the substantive relief secondly claimed does not come within the “no contest” clause, and the substantive relief is claimed only if such declaration is granted. We consider that this is an effective procedure and is, perhaps, more prudent than before...”

- [41] Mr. John Wilson KC submitted that it is no more than common sense that an application for a declaration that a particular claim would not breach a “co contest” clause cannot itself constitute a claim that would breach that clause.
- [42] Counsel submitted that it would be manifestly unjust and oppressive to require D5-D7 and D9 to file Defences prior to the determination of the ‘No Contest’ Application because D2-D4 would then inevitably allege that their defences breach the ‘No Contest’ Clauses.
- [43] Mr. John Wilson KC argued that this is a trust action, by which (subject to the determination of the ‘No Contest’ Application) the Plaintiff will seek the removal and replacement of D1 as trustee of the Trusts.
- [44] He next argued that, in these kinds of proceedings, it is normal practice that the named beneficiaries of a trust be joined to the proceedings and be permitted the opportunity to make submissions on the relief sought. He further stated, that while RSC O. 85 r. 3(2) [UK] does not specifically require the joinder of all beneficiaries, it does permit the plaintiff to make such of those persons, whether all or any one or more of them, parties as, having regard to the nature of the relief or remedy claimed in the action, as he (she) thinks fit. On the assumption that this matter proceeds to deal with the substantive question of D1’s removal from office, the Plaintiff has properly joined all named beneficiaries to the action (D9’s children and issue are beneficiaries of the Trusts as a class and this may be addressed in due course) since the identity of the trustee is an issue of importance for the entire class of beneficiaries. This, in my opinion, represents the state of the law.
- [45] Mr. John Wilson KC further argued that it would be inconceivable for beneficiaries who have been joined to the proceedings for the purposes of giving their views on

such an issue to be debarred from participating in the proceedings because they have not filed a properly formulated defence or in the case of D5-D7, a defence at all. In other words, that would mean that beneficiaries who oppose the relief sought can be heard but those who do not, be debarred.

[46] According to Mr. John Wilson KC, the alligator jaws of D2-D4 are waiting to bite D9 because, at paragraph 27 of the Fourth Affidavit of Mr. Brown filed on 3 October 2022 in support of the Summons, he alleged that, *“it seems likely that the full Defence of the Ninth Defendant would raise an arguable question as to whether it engaged the No Contest Clause.”* As Mr. John Wilson KC correctly posited and it seems patently clear to me, it is D2-D4’s hope that D9’s concern that setting out his knowledge of D1’s conduct relevant to the issue of removal might engage the ‘No Contest’ Clauses will prevent him from doing so. Thus, D2-D4 seek to use concern about the ‘No Contest’ Clauses to shut out D9 from participating in these proceedings.

[47] At paragraph 23 of Mr. Brown’s Affidavit, he alleged that the position which D9 has chosen to adopt in clear and deliberate breach of the Rules is liable to cause very substantial prejudice to D2-D4 for a number of reasons, firstly, insofar as D9 seeks to introduce new substantive allegations at a later date, D2-D4 would be prejudiced in the evidence and document gathering exercise which they have heavily been engaged in. Mr. Brown did not explain why D2-D4 should be engaging in such exercise since, as Mrs. Pearce-Hanna correctly alluded to, they are confident that the ‘No Contest’ Application will be resolved in their favour and if it is, the Plaintiff will be abandoning her claim.

[48] The hearing of the ‘No Contest’ Application has already begun. It is scheduled to continue tomorrow. I fail to see how D2-D4 are being prejudiced by D9 not filing a fully formulated Defence before that hearing.

[49] In my opinion, once the ‘No Contest’ Application is determined, whichever way it goes, it will bring certainty to these proceedings. Undoubtedly, a fully reasoned

judgment will be issued which will clearly set out the legal metes and bounds of the 'No Contest' Clauses. I agree with Mr. John Wilson KC that rather than multiplying proceedings, awaiting the determination of the 'No Contest' Application would simplify the process moving forward. If the application is resolved in D2-D4's favour, then the matter is at an end. If it is resolved in the Plaintiff's favour, the Court will then actively begin the case management process. At this stage, there is no substantive claim to be met. There is no real need for *case preparation* to begin until after the 'No Contest' Application has been resolved. In any event, without D9's properly formulated Defence, D2-D4 are not prevented from their document gathering exercise.

[50] In paragraph 25, Mr. Brown alleged that the prejudice which D2-D4 are liable to suffer goes well beyond the additional costs. He stated that D2-D4's lawyers would have to re-approach witnesses and/or approach new witnesses. In that regard, any significant delay is likely to result in the memories of witnesses fading. As D9 stated, D2-D4 are aware of the matters potentially to be relied upon by D9 so there is no reason not to approach those witnesses. There are ample means of capturing the evidence of witnesses.

[51] As a matter of basic justice and fairness, it is more sensible to permit D9 to file his properly formulated Defence following the resolution of the 'No Contest' Application and, indeed, no real prejudice is caused to D2-D4 by permitting that approach.

Application against D5-D7

[52] The application against D5-D7 seeks the following alternative relief namely:

1. An Order debarring D5-D7 from filing any Defence or Counterclaim in these proceedings; or
2. An Unless Order requiring D5-D7 to file and serve any Defence or Counterclaim in these proceedings, failing which D5-D7 be debarred from defending, and participating in, the proceedings.

[53] D5-D7 have not filed any Defence.

[54] Learned Counsel Mr. North who appeared on behalf of D5-D7 submitted that D5-D7 are not in default since the Order made on 20 July 2022 directing that any Defence to be filed by 5 September 2022, did not oblige them to file a Defence. According to Mr. North, it is not the intention of D5-D7 to defend the action and so they are under no obligation to file a Defence.

[55] In accordance with RSC O. 18 r.2 (1), a defendant does not have to file a Defence and no Court could compel that defendant to do so but, as beneficiaries in a trust action, it would be extraordinary that since they have been joined by the Plaintiff in this action, they would be debarred from participating in these proceedings because they have not filed a defence opposing the claim. I am not aware of any law which gives the Court the power to prevent a beneficiary from participating in the action, making legal submissions or stating a position concerning the administration of the Trusts. As Mr. John Wilson KC puts it "*it simply cannot be right that only beneficiaries who oppose the relief sought are permitted to be heard*".

Conclusion

[56] For all of the reasons stated above, I will dismiss the Summons filed on 3 October 2022 by D2-D4 with costs to the successful parties to be taxed if not agreed. If D2-D4 disagree and are of the view that a successful party is not entitled to costs, they should email written submissions not later than 5 December 2022. That party is at liberty to respond by 12 December 2022.

Dated this 23rd day of November 2022

**Indra H. Charles
Senior Justice**