

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV2019-00781**

IN THE MATTER OF THE WILLS AND PROBATE ACT CHAPTER 9:03

BETWEEN

**DANIEL PATRICK SOLOMON
INGRID PATRICIA SOLOMON**

Claimants

AND

MARGUERITA NECOLA SOLOMON
(in her personal capacity as the Legal Personal Representative of the Estate of Frank David Soloman)

Defendant

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Monday 10 February, 2020

Appearances:

Mr. Peter Knox QC and Mr. Reginald Armour SC leads Mr. Jonathan Walker, instructed by Ms. Nalini Balwant, Attorneys at Law for the Claimant.

Mrs. Deborah Peake SC leads Mr. Ravi Heffes-Doon instructed by Ms. Marcella A. Ferdinand, Attorneys at Law for the Defendant.

JUDGMENT

1. "Pleadings" are not witness statements. They are not affidavits. Nor are they skeleton submissions. Under the Civil Proceedings Rules 1998 (CPR) Statements of Case formerly known as pleadings¹ are to be confined to setting out the facts, the general nature of the

¹ See the definition of a Statement of Case which includes a claim, defence, counterclaim, ancillary claim form, defence to counterclaim and a reply to a defence (Rule 2.3 CPR)

party's case, making it clear to identify the issues and the extent of the dispute between the parties. Anything beyond this tends to make the pleading superfluous and possibly prolix.

2. Mr. Dick Greenslade in "**Judicial Sector Reform Project**" lamented on the verbosity of our local advocacy, our "oral flamboyance"². This unfortunately can be reflected in extensive pleadings³:

"Despite the clarity of the rule the forms of pleading that have developed in Trinidad as well as in most common law jurisdictions simply do not follow its requirements. Instead of stating the basic facts clearly the art of pleading has, deliberately or otherwise, tended to obscure facts. It may well be that a large part of the reason is that attorneys have not sufficiently identified the facts and issues on which their claim or defence is based at the time when those documents are drafted. The natural consequence of this is that pleadings are drafted in such a way that as many potential issues as possible are kept alive. From this flows that fact that particulars are frequently sought, amendments are required even up to and after the opening of the trial. However, it is not uncommon for the issues to be limited to just a few of those originally pleaded, in itself a good thing, but often this does not happen till immediately before the trial. As a consequence unnecessary work is frequently done."

3. The reform proposed by Greenslade and which underscores the new rules of pleadings is to ensure the Statement of Case and Defence clarify and not obfuscate issues. For his part:

"In many cases replies do nothing at all to assist in clarifying the issues. I accept that there are cases where such a document is justified but propose that no reply should be served without leave."⁴

4. The reforms of the new rules would be meaningless if the Court does not adopt a robust approach to managing the case at case management. To that extent Greenslade noted⁵:

"[W]here statements of case do not adequately disclose the nature of the issues, are

² See **Judicial Sector Reform Project, Dick Greenslade**, pages 57

³ See **Judicial Sector Reform Project, Dick Greenslade**, pages 57

⁴ See **Judicial Sector Reform Project, Dick Greenslade**, pages 61

⁵ See **Judicial Sector Reform Project, Dick Greenslade** pages 78-79

prolix or at fault in other ways the court must apply the sanction of striking out the statement of case and allowing a very limited time for the party at fault to file and serve a properly drawn statement.

Assuming the statements of case to appear broadly in accordance with the rules the judge will then wish to find out whether either party:

- wishes to amend a statement of case;
- wishes to ask 'further and better particulars' of the other party's statement of case; and
- wishes to join any further parties.

If so appropriate directions can be given provided that the judge considers the application to be justified.....

It is important that except where there has been a significant change in the circumstances any requests for leave to amend or to request further particulars should be made at the case management conference. Applications at a later stage should be refused unless exceptional circumstances can be shown."

5. Rules 8.5, 8.6, 8.9, 10.5, 10.6 and 10.10 CPR now encompasses the principles of economy and proportionality in the drafting of the party's respective statement of case.
6. Before the Court is the Claimants' application⁶ pursuant to Part 10.10 CPR to file and serve a Reply in these proceedings. The grounds for the application are for the Claimant to respond to matters raised in the Defence that could not have been addressed in the Claimant's Statement of Case and that the matters set out in the draft Reply could not have been properly dealt with in the Claimant's Re-Re Amended Statement of Case and narrows and defines the issues in dispute between the parties.
7. In these proceedings the Claimants have filed an extensive Statement of Case, amended it then re amended it and again re re amended it before the first Case Management Conference

⁶ 18th November 2019

(CMC). To it are annexed voluminous documents. To this the Defendant has comprehensively answered with its own pleading and documentation. The bundles of paper already generated would spark the ire of some environmentalists. The Court's task is now to supervise and regulate any further pleadings by way of a Reply. I must make it clear that pleadings do not supplant evidence required to prove pleaded facts nor are they submissions. It should be plainly obvious from reading the pleadings what facts are in issue and what legal issues arise from the disputed facts. The entire process of the new rules to deprive the Claimant of a **right** to Reply subjects the Claimant to the Court's supervision on whether a Reply is necessary and if so what areas of the defence should warrant a Reply. No doubt in the exercising of that discretion the Court mindful of the purpose of a Reply, will give effect to the overriding objective which placing parties on equal footing and deal with the matter economically and proportionally.

8. In response to the Claimants' application, the Defendant has objected to several paragraphs which will be dealt with below. Both parties have filed their written submissions which I have considered.

Permission to Reply

9. Rule 10.10 of the CPR states:

“(1) A claimant may not file or serve a reply to a defence without –

(a) the permission of the court; or

(b) if it is to be filed before a case management conference, the consent of the defendant.

(2) The court may only give permission at a case management conference.”

10. In **Blackstone's Civil Practice 2014**, the learned authors explains the function and purpose of a Reply at paragraph 27.2 as:

“Conventionally, a reply may respond to any matters raised in the defence which were not and which should not have been, dealt with in the particulars of claim, **and exists solely for the purpose of dealing disjunctively with matters which could not properly**

have been dealt with in the particulars of claim, but which require a response once they have been raised in the defence..... Once, however, a defence has been raised which requires a response so that the issues between the parties can be defined, a reply becomes necessary for the purpose of setting out the claimant's case on that point. The reply is, however, neither an opportunity to restate the claim, nor is it, nor should it be drafted as, a 'defence to the defence.'

Where the defence takes issues with a fact set out in the particulars of claim, and the claimant accepts that the fact is incorrect, the proper course should be for the claimant to amend his statement of case accordingly..and not to deal with the matter in a reply.....”

11. Permission to file a reply is an exercise of the judge's discretion. In **First Citizen's Bank v Shepboys Limited** Civil Appeal No: P231 of 2011, Mendonca JA noted:

“22. It may be that at the time of the hearing of the application for permission to file the reply that a draft reply was not before the court and there was no clear indication as to what the claimant intended to say in the reply. If that is so, then that is a practice that should not be allowed to develop. The grant of permission to file a reply is an exercise of the judge's discretion. The judge must have regard to all the relevant circumstances and must seek to give effect to the overriding objective. A relevant consideration must be whether what is sought to be included in the reply should have been included in the statement of case. The judge should therefore be clear as to what the claimant intends to say in the reply. If there is any objection to the contents of the reply it should be made at that point in time.”

12. In **Mayfair Knitting Mills (Trinidad) Limited v Mc Farlane's Design Studios Limited** CV2007-002865, Pemberton J (as she then was) observed that “the introduction of documentary evidence through a reply is frowned upon since to allow this would cause the court to fall into the trap of giving a claimant an opportunity to restate and in this case, to buttress or expand or clarify its claim.”⁷

⁷ **Mayfair Knitting Mills (Trinidad) Limited v Mc Farlane's Design Studios Limited** CV2007-002865 paragraph 21

13. Some general principles culled from these authorities should guide practitioners on the drafting of their reply:

- Generally, the Statement of Case and Defence must strike the right balance between the need to set out the grounds of the claim or addressing the claim in a comprehensive way with sufficient detail on the one hand and the need for clarity, brevity and proportionality on the other.
- The exchange of the Statement of Case and Defence in many cases should be sufficient to identify the disputes issues of fact and law so that no further exchange is necessary.
- The rules place no obligation on the Claimant to file a Reply as it is taken that a Claimant who does not Reply is not taken to admit that matters raised in the defence.
- The Claimant must however be wary of the effect of **M.I.5 Investigations Limited v Centurion Protective Agency Limited** Civil Appeal No. 244 of 2008 and should deal with new facts in support of a Defence. See Rules 10.5 and 10.6 CPR.
- The Reply, however, is not to be used as a vehicle to repeat allegations in the Statement of Case or bolster those allegations by challenging the Defendant's denials. It is not a "Defence to a Defence".
- The proper use of a Reply is to address those new matters raised in the Defence and those matters which could not have been addressed reasonably in the Statement of Case.
- The Reply must not be inconsistent with the Statement of Case.
- The Statement of Case can be amended with permission before the first CMC and if necessary the need to deal with new matters in a Defence can be suitably addressed by the Claimant in an Amended Statement of Case rather than in a Reply. Subsequent applications for an amendment after the first CMC, however, must pass the threshold set out in Rule 20.1 (3) and (3A) CPR.
- The Court will be guided in its discretion in giving effect to the overriding objective to

ensure whether a Reply is necessary, consistent with the principles of equality, proportionality and economy. The principle of fairness is no licence to relax the discipline of these rules.⁸

14. A relevant factor of course in this case is the fact that the Claimants have already amended their Statement of Case on three occasions. Perhaps a style that was consistent in the filing of their submissions where the Claimants filed written submissions on 30th January 2020 and a “supplemental” submission on 31st January 2020 which appeared as an amendment of their first document.
15. For convenience the Court’s ruling on the Defendant’s objections to several paragraphs of the Claimants’ draft Reply is set out in the table below.

PARAGRAPHS	RULING
Paragraph 1(i)	Although not strictly necessary having regard to Rule 10.10 CPR, this pleading is permitted as a mere formality.
Paragraph 2(i)	The letters already exhibited to in the Re-Re-Amended Statement of Case speak for themselves. This paragraph is unnecessary.
Paragraph 2(ii)	This paragraph is argumentative and in the form of a submission and is not in response to any new matters in the Re-Amended Defence.
Paragraph 4	The letters speak for themselves and this paragraph is not responsive to any new matter contained in paragraph 3A of the Amended Defence.
Last sentence of paragraph 12 and the entirety of paragraph 13	The issue of the deceased’s dependency on the Defendant has already been raised by the existing pleading. This repetition takes the matter no further. It is a rehash of allegations already made in several paragraphs of the Re-Re Amended Statement of Case.

⁸ See also **Zuckerman on Civil Procedure** paragraphs 7.17-7.32

Paragraphs 17(1) and 17(2)	While I agree with the Defendant that these matters were already dealt with in the Re-Re-Amended Statement of Case, generally it will be permitted to clarify the Claimant's position on the Merrill Lynch account.
Paragraphs 18(1), 18(3) and 56	These paragraphs deal with the Claimants' alleged entitlement to funds in the Bank of America accounts which should have been set out in their Re-Re-Amended Statement of Case where the Claimants pleaded those accounts. This pleading is therefore unnecessary.
Paragraph 19(1)	This is a submission and not a permissible pleading.
Paragraphs 20 and 22	These are mere denials and are unnecessary.
Paragraph 25(1)	This is a restatement of paragraph 12(i) of the Re-Re-Amended Statement of Case and unnecessary.
Paragraph 25(3)	This is a rehash of matters dealt with in the Re-Re-Amended Statement of Case.
Paragraph 26(1) to (5)	This pleading is unnecessary. These matters are already in issue.
Paragraph 30	This pleading is unnecessary and is a restatement of paragraph 12 of the Re-Re-Amended Statement of Case.
Paragraph 31	This is a restatement of the alleged physical condition and health of the deceased which is dealt with in the Re-Re-Amended Statement of Case and is not permitted.
The last sentence of paragraph 34	This is a submission, not a pleading.
Paragraph 35	This is a repetition of the plea in paragraph 13 of the Re-Re-Amended Statement of Case.
Paragraph 40(1)	Some latitude will be given to the Claimants in this instance to deal with paragraph 40 of the Re-Amended Defence. This paragraph is permitted.

Paragraph 41(1) to (10) and paragraph 42	While these paragraphs strictly deal with matters which are already dealt with in the Re-Re-Amended Statement of Case, the Claimants will be given some latitude to make this plea to give advance notice of its position in relation to the events up to the deceased's admission.
Paragraph 43	This is evidence and not a pleading.
The last sentence of paragraph 44(4)	The Claimants will be permitted to repeat paragraphs 14-16 of the affidavit in this pleading.
Paragraph 47(4) and (5).	These paragraphs seek to rehash/add to and/or embellish the Claimants' plea at paragraph 18A of the Re-Re-Amended Statement of Case.
Paragraph 49	This is a submission, not a pleading.
Paragraph 60(3)	Although this should have been dealt with in the Statement of Case, it will be permitted as a critical aspect of pre-action conduct which will fall for further consideration by the Court.

16. The Claimants are permitted to file its Reply in terms of its draft annexed to its application save for those paragraphs for which no permission is granted and subjected to the Court's ruling as indicated above.
17. The Claimants would pay to the Defendant 50% of the costs of this application to be assessed in default of agreement.

**Vasheist Kokaram
Judge**