THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2013-04801

BETWEEN

RAYMATIE MUNGROO

Claimant

AND

ANDY SEERATTAN

First Defendant

NAGICO INSURANCE
(Formerly GTM Insurance Company Limited)

First Co- Defendant

STEPHEN PERSAD

Second Defendant

COLONIAL FIRE & GENERAL INSURANCE COMPANY LIMITED

Second Co-Defendant

BEFORE THE HONOURABLE MR. JUSTICE ROBIN N. MOHAMMED

APPEARANCES:

Mr. Roger Kawalsingh instructed by Mr. Prakash Maharaj for the Claimant
Mr. Anand Singh instructed by Mr. Ramnarine Mungroo for the First Defendant and First Co-Defendant
Mr. Darren Bissoondatt instructed by Ms. Deisha Granger-Warrick for the Second Defendant and Second Co-Defendant

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DECISION

Introduction, Application and Procedural History

1. On 22 November 2013, the Claimant, Raymatie Mungroo, filed a Claim Form and Statement of Case against the Defendants for the following relief:
    a. Damages for personal injuries and consequential loss.
    b. A declaration and/or an Order that the First and Second Co-Defendants are liable to indemnify the First and Second Defendants and to pay to the Claimant any damages, interest and costs awarded against the First and Second Defendants respectively.
    c. Judgment against the Co-Defendants for any damages, interest and costs for which the Defendants are found liable.
    d. Interest.
    e. Costs.
    f. Such further and/or other relief as the court may deem fit.

2. The Second Co-Defendant filed its appearance on 11 February 2014, and the First Defendant and First Co-Defendant both filed their appearances on 18 February 2014. The Second Defendant filed his appearance on 28 February 2014.

3. The Second Defendant and Second Co-Defendant filed their joint defence on 11 April 2014. The First Defendant and First Co-Defendant filed a Notice of Application for an extension of time to file their Defence on 12 May 2014, which was granted by order dated 13 May 2014.

4. The Claimant then further amended her Statement of Case which was filed on 10 June 2014. The First Defendant and First Co-Defendant filed their joint Defence on 7 July 2014. The Second Defendant and Second Co-Defendant then amended their joint Defence which was filed on 7 July 2014. The First Defendant and First Co-Defendant then amended their joint Defence and filed on 11 July 2014.

5. By order dated on 25 July 2014, this Court consolidated this claim and one other, **CV2013-04801 ("The other claim")**. In the other claim, by claim form filed 26 November 2013 the Claimant, Andy Seerattan (the First Defendant in the present claim), claimed against the Defendant, Stephen Persad (the Second Defendant in this claim), relief in the following terms:
    a. Damages for loss and damage caused to the Claimant's vehicle
    b. Loss and damages for personal injuries and loss of earnings
    c. Interest
    d. Costs
    e. Such further and/ or other relief as the nature of the case may require.

6. The Claimant in the other claim amended his claim form and statement of case on 25 February 2014 after an application to do so filed on 21 January 2014 and granted on 17 February 2014. The Second Defendant in the other claim filed his appearance to amended claim form on 14 March 2014. The Defendants' defence was filed on 11 April 2014. Then, as aforementioned, the other matter was consolidated with this present claim.

7. After the matters were consolidated by order of the Court, the Claimant filed a Notice of Application on 5 August 2014 to file and serve a Reply to **paragraph 11.e** of the Amended Defence of the First Defendant and First Co-Defendant. A draft Reply was annexed to this Application. The Court by order dated 19 September 2014, granted permission to the Claimant to file and serve a Reply to paragraph 11.e of the Amended Defence in terms of the draft Reply annexed, which they did on 22 October 2014.

8. On 11 September 2014 the Second Defendant and Second Co-Defendant filed an affidavit in opposition to the Claimant's Application to file a Reply to the First Defendant and Co-Defendant's Amended Defence.

9. On 19 January 2015 the parties attended a Case Management Conference before this Court. An order of the same date was made to set aside the Court's previous order dated 19 September 2014 which granted the Claimant permission to file a Reply to the

Amended Defence of the First Defendant and First Co-Defendant. The said Reply was ordered suspended until the determination of the Claimant's Application dated 5 August 2014 regarding permission to file the said Reply. Further, the Second Defendant and Second Co-Defendant's Application filed 11 September 2014 opposing the Application to Reply was withdrawn pursuant to said order. The First Defendant and Co-Defendant were ordered to pay the Second Defendant and Second Co-Defendant costs assessed at $8,000.00.

10. The Court in the same order adjourned hearing of the Claimant's Application to Reply to 16 March 2015. The hearing was then relisted to 8 May 2015, and then adjourned to and heard on 15 June 2015. Although the Second Defendant and Second Co-Defendant's Application in opposition to the Claimant's Application to Reply was withdrawn, it was referred to and relied upon by all relevant parties (the Claimant and the Second Defendant and Second Co-Defendant) at the hearing. In the circumstances, the Court elects to consider the arguments made in the hearing despite partial reliance on an affidavit that has been withdrawn.

11. The matter presently to be determined before the Court therefore is that of the Claimant's Application to Reply to the Amended Defence of the First Defendant and First Co-Defendant ("The Application").

Background

12. On or around 26 or 27 November 2009 the Claimant, First Defendant and Second Defendant were involved in a vehicular accident on Debe Trace, Debe when the two vehicles driven by the First Defendant (PCD 8815) and the Second Defendant (PAT 4111) collided. The Claimant was a passenger in the First Defendant's vehicle at the material point in time. The First Co-Defendant, NAGICO, is the insurer for the vehicle that the First Defendant was driving, while the Second Co-Defendant, COLFIRE, is the insurer for the vehicle that the Second Defendant was driving.

13. The Claimant accused both Defendants (separately and/or collectively) of negligence in their driving, management and/or control of their respective motor vehicles. The Claimant provided, as evidence of her claims, medical reports from various doctors allegedly disclosing her injuries, condition and treatment. The Claimant in her particulars of special damages claimed inter alia medical expenses in the sum of $345,505.84. The Claimant also made a claim for loss of earning capacity and future loss of earnings in relation to her present employment with Petrotrin. This was, however, the only mention of her employer in her Claim Form/Statement of Case.

14. The First Defendant and First Co-Defendant ("The First Defendants") denied negligence and contended in their defence that the accident was caused by the negligence of the Second Defendant, or alternatively, that the Second Defendant was contributorily negligent. The First Defendant, who as aforementioned is the husband of the Claimant, averred that some of the Claimant's injuries are pre-existing, some of her incapacity is exaggerated and that her loss of earning capacity is untrue. At paragraph 11(e) of their Amended Defence it was further alleged that a substantial proportion of the Claimant's claim for special damages was already covered by her employer's medical plan and services, as well as her insurance policy. The Defendants purported to rely upon Community Hospital Invoices addressed to Petrotrin Trinmar Operation in support of their claim of the Claimant being financially covered by her employer, Petrotrin. Paragraph 11(e) is set out in full below.

> *"e. A substantial proportion of the Claimant's claim for special damages has been covered by her employer's medical plan and services and her policy of insurance with Sagicor Life Incorporated. For the former averment, the First Named Defendant shall rely upon Community Hospital Invoices dated 4th December 2009, 5th October 2011 addressed to Petrotrin Trinmar Operation. The First Named Co Defendant shall rely upon the statement in the medical certificate of Dr. R Spann dated 20th December, 2012 for the latter averment."*

15. The Second Defendant and Second Co-Defendant ("The Second Defendants") denied negligence and contended in their defence that the accident, and consequent personal injuries, loss and damage suffered by the Claimant occurred due to the First Defendant's negligence. It is further contended by the Second Defendants that the Claimant failed to produce certain Medical Records from the San Fernando General Hospital, as well as documents from her employer to support her claim of her inability to perform work duties to the same standard, or documents supporting certain claims of medical expenses (receipts etc), transportation expenses, domestic assistance, nursing and personal care, loss of earnings as a procurement officer, radiation therapy services, the cost of the police report, and future domestic care, medical care and expenses.

16. As aforementioned, the Claimant sought to file a Reply to paragraph 11(e) of the First Defendant and First Co-Defendant's Amended Defence, which was vigorously opposed by the Second Defendant and Second Co-Defendant. On the other hand, the First Defendant and First Co-Defendant made no opposition to the Application to Reply- albeit a reply to their own Amended Defence. The Reply is set out in full as follows.

    1. *"The Claimant joins issue with the First Defendant and First Co-Defendant upon its Amended Defence save in so far as the same consists of admissions and save for any admissions contained therein.*

    2. *In Reply to paragraph 11.e. of the Amended Defence, the Claimant admits that a portion of her claim for Special Damages was covered on her behalf by virtue of certain benefits she was entitled to under a staff medical plan held with her employer. However, the monies paid on the Claimant's behalf by her employer, exceeded the medical plan limit of $200,000.00.*

3. *As a result thereof, the Claimant's employer deducts a portion of her salary each month towards the reimbursement of the monies paid beyond her medical plan limit of the said $200,000.00.*

4. *Nevertheless, by virtue of her contribution by way of premium the Claimant paid for several years towards her medical plan. The Claimant contends that she is entitled to claim all monies paid out from the plan on her behalf which was occasioned as a result of the Defendants' negligence.*

5. *The Claimant has requested from her employer, copies of her staff medical plan and other relevant documents pertaining to the above and same would be furnished on receipt or upon the relevant order for disclosure being made.* "

17. In this Reply, the Claimant first admitted that a portion of her claim was in fact covered by her employer under a staff medical plan. The Claimant argued, however, that she had reached her limit of expenditure under the plan. As such, portions of her salary were being regularly deducted so as to reimburse the employer for further medical expenses made by them on the Claimant's behalf. The Claimant further contended that she was entitled to all monies paid out by the employer under the plan, as a result of the premiums that she would have paid towards the plan over the years in order to entitle her to the payments currently being made on her behalf.

Issues, Submissions and Analyses

I. Whether the Second Defendants have locus to contend the Claimant's Application to Reply?

Claimant's Submissions

18. As aforesaid, the application by the Claimant for permission to file the Reply was heard on 15 June 2015. The First Defendants made no submissions, for as aforesaid they took no objections to the proposed Reply. An argument made by the Claimant was that the Second Defendants had no locus to object to the Reply as the Reply was made specifically in relation to the First Defendants' Amended Defence, not the Second Defendants' Defence. Further, the First Defendants themselves did not object to the inclusion of the Reply, despite it being to their Amended Defence. Counsel for the Claimant stated that the Reply was not "*relative to* [the Second Defendants'] *pleading*". Counsel further referred to the Second Defendants' affidavit made by Miss Deisha A. Granger-Warrick dated 11 September 2014 in opposition to the Claimant's Reply ("the Granger-Warrick affidavit") as proof of this, contending that even in the Second Defendants' own affidavit against the Reply it speaks only to the Defence of the First Defendants and not their own.

19. Counsel for the Claimant also contended that as it is a multi-party litigation, there may be several issues all of which may not be relevant to all the defendants. It is alleged that similarly in this case, there are some particulars of negligence specifically averred against one Defendant, while other particulars are made in relation to another Defendant. The Reply in question is one such scenario wherein the particulars referred to therein are solely in relation to the First Defendants.

20. Counsel for the Claimant further averred that the sum in damages claimed by the Claimant has not changed despite the "new" claim of the Claimant's need to reimburse her employer. It is averred that the sum of the claim for medical expenses remains **$345,000.00**, and that the Claimant remains entitled to payment of said sum in full. Further, that the figure calculating the overall claim as **$976,000.00** has also not changed.

Second Defendants' Submissions

21. Counsel for the Second Defendants stated in response to this argument that because the matter is a multi-party proceedings, the Reply, despite being directed to the First

Defendants' Amended Defence, can ultimately affect the Second Defendants as it also affects their potential liability. Counsel also sought to remind the Court that the Claimant and the First Defendant were husband and wife, perhaps in an attempt to create suspicion regarding the validity or intention of the claim and pleadings/decisions by said parties made therein, perhaps specifically the First Defendants' silence by way of their lack of objection to the Claimant's Reply. The Court takes this opportunity to note however that unfortunately, husbands and wives as opposing parties in litigation is not a situation that is at all unheard of, and the court does not necessarily have any evidence before it to suspect anything inappropriate or unlawful in this instance.

22. Counsel continued to give support to the Second Defendants' case for locus in the present proceedings by examining the **Particulars of Damage** listed in the Claimant's Amended Statement of Case. Counsel observed that the Claimant calculated her medical expenses and continuing to be in the sum of **$345,000.00** or thereabouts. Further observations were made in relation to the sums claimed for transportation, domestic assistance, loss of earnings, radiation therapy etc. Counsel rounded off all these sums as amounting to close to **a million dollars in damages** (about **$971,000.00**). It is counsel's argument that in light of such potential exposure to what may result as being a million dollar liability, it is in the Second Defendants' interest to guard themselves and take interest in all pleadings being made in this matter.

23. Another submission made by the Second Defendants on locus was that the First Defendants' Amended Defence reveals the possibility that a "*substantial portion*" of the Claimant's claim may have already been paid for by the Claimant's employer (paragraph 11(e) of Amended Defence). Counsel for the Second Defendants states that they are unaware of what part of the claim the "*substantial portion*" refers to, for instance, if the radiation expenses listed separately by the Claimant in her particulars of special damage were also covered by Petrotrin and are therefore also to be considered as part of the sum of medical expenses that the Claimant is claiming entitlement to through Petrotrin's coverage. It is consequently in the Second Defendants' interest to know whether this affects the overall amount claimed by the Claimant, in what way and to what extent.

24. It was further contended by counsel for the Second Defendants that the Claimant's alleged entitlement to claim the money covered by her employer is not even known to be a fact to the Second Defendants. There is no documentary evidence that provides the Second Defendants with any such knowledge. This exposes the Second Defendants to even more uncertainty regarding their position in the matter.

The Court's Analysis

25. The Court finds that the Second Defendant does in fact have locus to oppose the Claimant's Application for leave to Reply to the First Defendants' Amended Defence. The court considers with approval the considerations raised by the Second Defendants in this regard. The Reply seeks to identify the basis for a claim for damages made by the Claimant. As the said claim for damages is not just being made against the First Defendants but also against the Second Defendants, it would be unjust to prevent the Second Defendants from objecting or commenting on the Reply should they so desire.

26. Regarding the Claimant's claim that the sum of damages has not changed despite Petrotrin's coverage of a portion of her claim, the court considers the following. First, whether or not the sum of the claim has changed remains to be proven. Such a statement cannot be said with any certainty until the relevant documentary proof from Petrotrin as the Claimant's employer is seen and examined. At this point, all that the Defendants and the court itself have to go on is the Claimant's word that the sum of damages has not changed. One's word is not sufficient. Evidence must be placed before the court before such a pronouncement can be upheld by the court.

27. Secondly, even if the court does accept what the Claimant has attested to at face value and this resolves any need by the Second Defendants to amend financial reserves and calculations, the Claimant's averment still leaves unanswered the issue of proving the basis for the relevant portion of her claim. Even if the damages claimed remain the same, with a previously unexplored "new" reasoning behind the Claimant's entitlement to be granted damages there is an effect nonetheless on the kind of case each party can put

forward in relation to the damages that they are owed (Claimant) or expected to pay (Defendants), dependent of course on how liability is decided.

28. The Court has also made the observation that in the last line of paragraph 4 of the Claimant's intended Reply, the Claimant states that she is "*entitled to all monies paid out from the plan... occasioned as a result of the Defendants' negligence*". It is quite clear that the Claimant is referring here to both the First Defendants and the Second Defendants in this sentence. The Second Defendants, in therefore also being considered culpable for the accident, is also being called upon by the Claimant to compensate her, specifically in the context of the monies paid out from the plan to which she claims entitlement. The Second Defendants are therefore directly affected by this Reply as evidenced even by the wording alone. The general effect is also clear, in that this claim for reimbursement of monies is also made against the Second Defendants, affecting the amount of damages they may have to pay to the Claimant should they be found liable. One may go so far as to say that this issue revolves around whether a defendant has a right to defend himself. Naturally, the answer is yes. The Second Defendants therefore clearly have locus to contend the Claimant's Application to Reply.

II. Whether the issues raised in Reply should have been raised in the Statement of Case?

Claimant's Submissions

29. Counsel for the Claimant submitted that the Reply did not constitute a new claim, and as such it could not be raised in the Statement of Case. The Claimant began his submissions by first referring to this Court's judgment in the case of **Central Bank of Trinidad and Tobago and Colonial Life Insurance Company (Trinidad) Limited v Lawrence Duprey & Others CV2011-02140** (date of delivery 2014/06/18). Counsel for the Claimant noted that in said judgment, the Court stated that a reply answers new questions that are raised by the defence. Counsel used this to make the point that while a statement of case must set out the case and a defence must answer it, the purpose of the reply is to answer new issues and matters that could not have been in the statement of case. This is

what the Claimant claims to have done in the proposed Reply. Counsel for the Claimant re-emphasized this contention in stating that the proper application of the case **Mayfair Knitting (Trinidad) Ltd v McFarlane's Design Studio Ltd CV2007-002865**, referred to by the Second Defendants below, does not state that the Reply raises a new claim, but simply that it answers issues.

30. Counsel for the Claimant also submitted at the hearing that the Second Defendants' argument that the issues raised in the Reply could have been raised in the Statement of Case constitutes an admission that it is a new issue raised in paragraph 11(e) of the First Defendants' Amended Defence and therefore is properly addressed in the Reply as opposed to the Statement of Case.

31. It was contended by counsel for the Claimant that the Claimant did not know that the issue would be raised in the Amended Defence and therefore could not have prematurely raised it in her Statement of Case.

32. Counsel for the Claimant also denied that the issue could have been included or identified in the Amended Statement of Case filed 10 June 2014 as permission granted on the 19 May 2014 to amend the Statement of Case was very specific to the inclusion of three medical reports: that was the range and extent of the Court's order. It could not have been answered up front because it does not fall within the particulars of special damage. Instead, it is averred that the arising issue is a matter of proof for the Claimant, on which the Defendants can cross- examine. It must be noted here that a perusal of the Court's order of the 19 May 2014 shows that permission to amend was granted ***"inter alia to include three (3) medical reports in relation to the Claimant's condition on or before the 10th June, 2014"***. In this regard it is not totally correct for the Claimant to contend that the ***"range and extent of the order"*** granting permission to amend was restricted to the inclusion of the three medical reports.

Second Defendants' Submissions

33. It is the case for the Second Defendants that the information included by the Claimant in the draft Reply should have been put in with her particulars of special damages in her Statement of Case. Counsel for the Second Defendants referred to **Blackstone's Civil Practice**[1] in passing so as to underscore the well-known and understood legal principle that a Reply to a Defence responds to new matters raised; it does not deal with what could have already been dealt with. Counsel also referred to the case of **Mayfair Knitting** (supra) to make the point that the introduction of documentary evidence allows a claimant to expand his or her claim. Counsel contends that in this case, the Claimant is trying to bring in such documentary evidence *"through the back door"* of the claim as opposed to entering it where it should normally reside.

34. In response to the Claimant's argument that she could not have known beforehand that the issue would have been raised in the Defence so as to include it in her Statement of Case, counsel for the Second Defendants stated that under **CPR Part 8.6(2)** the Claimant's Statement of Case must identify or annex documents in support of the claim for damages. It is contended by counsel for the Second Defendants that the Claimant failed to follow the rule by failing to annex documents relating to her employer's coverage of a portion of her medical expenses as claimed under her Particulars of Special Damages. Counsel further argued that the Claimant could not just bring in relevant documents at any time, as seems to be her intention regarding the contents of the draft Reply. The Claimant's provision of the relevant documents was therefore not dependent on the issue being raised in the Defence as she was aware of it since the time that her Statement of Case was being prepared and filed.

35. Counsel for the Second Defendants further averred that the Claimant's use of tense in the intended Reply, specifically "*employer deducts…"* shows that the amount deducted is (a) being done presently; and (b) the Claimant more likely than not knew the amount by which her salary was being deducted. The deduction is not a vague future possibility but is a present concrete reality. Despite this, the Claimant failed to give such details. The

[1] Recommended citation: Blackstone's Civil Practice 2008, p. 361, para 27.2

overarching result is again therefore that the Statement of Case does not adequately inform the Second Defendants of how much they are required to pay for the claim. The issues given by the Claimant in the draft Reply to the Amended Defence, with the proposed attached documentation, would serve as adequate information of what the Claimant is asking them to pay. As such, such information should have been included and dealt with in the Statement of Case or the Amended Statement of Case.

36. Counsel consequently or further claims that there is no certainty nor is there proof as to: (a) whether the Claimant would repay her employer; (b) who exactly is she going to repay, if she does; or (c) how much is going to be repaid by her. The Second Defendants have no knowledge of the actual amount that has to be paid by the Claimant or of the obligations or further obligations held by the Claimant in this regard. He submits that nowhere is there an averment that she has to repay the money which, by her own admission, was allegedly paid by virtue of her employer's insurance plan. Assuming that she is allowed to recover the $200,000.00 or so and does not have to repay her employers, then the Claimant would have received double or unfair compensation which, counsel says, is contrary to public policy.

37. Regarding the Claimant's argument that the Reply did not contain new issues originating from the Claimant, counsel for the Second Defendants contended that the Claimant admits to a portion of her claim already being accounted for, for the first time (on paper), despite claiming the entire sum.

38. Counsel for the Second Defendants further or alternatively contended that although the issues raised by the Claimant in the Reply are not new to the case, they were initially raised by the Claimant in the first Case Management Conference dated 19 May 2014, but remained absent from her pleadings in her Amended Statement of Case. The First Defendants were therefore not the first parties to raise the issue but only the first to raise the issue *on paper*.

The Court's Analysis

39. Both parties have noted that the locus classicus in local common law in relation to the test for considering an application for permission to reply is the case of **Mayfair** (supra). For the sake of completeness, the test is set out below, as stated at paragraph 18 of the judgment:

> *"What must a reply contain? I wish to associate myself with* ***BLACKSTONE'S*** *statement of the learning on this matter:*
>
> > *'... 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 a defence'."*

40. An application for permission to put in a reply cannot therefore succeed if the proposed reply responds to matters which should have been dealt with in the particulars of claim (i.e. in the statement of case). It should deal with **"new" matters** that are raised by the defence. Neither can it succeed if it operates as a **"defence to a defence"**. This Court holds that the Claimant's intended Reply characterizes both of these elements in contradiction to an appropriately laid Reply. As such, the Reply cannot stand.

41. It is this Court's position that the issues discussed in paragraph 11(e) of the First Defendants' Amended Defence and in the Claimant's intended Reply amount to giving a

basis for a portion of the Claimant's Particulars of Special Damage. The Second Defendants were right to state that this is the Claimant's role pursuant to **CPR Part 8.6**, in that the Claimant has a duty to set out his or her case in the Statement of Case by stating the facts relied upon and annexing or identifying any documents that the Claimant finds necessary to the case. It is difficult for the Court to accept that the Claimant would not consider her proof of entitlement to a portion of her claim, substantial or not, to be an issue that is necessary to her claim. Simply put, if the Claimant's primary goal in starting litigation proceedings is to get a certain sum of money from the Defendants, it follows that she must show the reason why she should receive such a sum.

42. Counsel for the Claimant cited this Court's decision in **Central Bank and CLICO v Duprey** (supra). Counsel however omitted to refer to what the Court considered in paragraph 71 of that decision. In the **CLICO** case, the Court was made to consider whether several various extracts of a reply should be allowed. Some were allowed, while others were disallowed. Part of the Claimants' reply was in response to the 6th Defendant's claim that she knew little of the Claimants' affairs in question. The claimants had in their Re-Amended Statement of Case that the 6th defendant knew or ought to have known about the affairs in question. The Court observed at paragraph 71:

> *"All of these contentions necessarily relate to the knowledge which Ms. Sakal had or ought to have had of CLICO and CIB's affairs as a director. Accordingly, particulars establishing how or why she ought to have had such knowledge should have been set out in the RASOC[2]. The very particulars which the Claimants seek to introduce at paragraphs 4(b) to 4(d) and 4(h) of the Reply should have been stated therein. Accordingly, while it is so that the 6th Defendant claims to have no knowledge or limited knowledge of CLICO and CIB's affairs in the Defence, this does not detract from the fact that such particulars could have been properly dealt with in the RASOC and accordingly ought not to be permitted by way of a Reply to fill in or flesh out elements of the Claimant's claim."*

[2] RASOC – Re-Amended Statement of Case

43. In other words, it was decided in the **CLICO** matter that the Claimants wrongfully pleaded an issue in the reply that should have actually been pleaded in the re-amended statement of case. The Claimants sought to use the reply to flesh out an issue that was already referred to in the re-amended statement of case, even though there was ample opportunity to give such particulars in the re-amended statement of case.

44. Similarly, in the case at bar, the Claimant has stated in her **Particulars of Special Damages** that she has lost a certain sum of money in medical expenses. The proposed Reply to the Defence is now an attempt to provide more information as to how those expenses came to be. It matters not that the Claimant is seemingly answering the issues raised in the Amended Defence, because those said issues could have only been raised in the Amended Defence in response to the lack of information surrounding the expenses claimed in the Statement of Case. As was stated in **CLICO**, the reply ought not to serve to flesh out elements of the Claimant's claim, or as was said in **Mayfair,** it should not **"*buttress or expand or clarify its claim"***[3].

45. The Court again refers to **Mayfair** in considering a final issue. At paragraph 21, Justice Pemberton states:

> *"...it is my view 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."*

46. While the Claimant's intended Reply did not have any documentary evidence attached or annexed, the Reply does refer to an intention to submit such documentary evidence upon receipt or request. The intention on the part of the Claimant to submit such further documents therefore speaks even more incisively into the true nature of the intended Reply. The documents in question, which should contain information from the Claimant's employer concerning its coverage of her medical expenses, will serve to at

[3] **Paragraph 21 of Mayfair Knitting (Trinidad) Ltd v McFarlane's Design Studio Ltd CV2007-002865**

least clarify the claim that the Claimant has made in her Particulars of Special Damages. As has been made clear, this is not the function of a reply. A reply does not operate to elucidate matters of the statement of case, but to answer new questions from the defence that are distinct to the issues already raised in the statement of case.

47. The Court must also briefly consider the issue of whether or not the issue discussed in the Amended Defence and draft Reply was new, in that it was first raised in the Defence and, therefore, arguably, properly responded to by the Claimants by way of Reply, or whether it originated from the Claimant's Statement of Case and should have been dealt with therein as aforementioned. **Part 10.10 of the CPR** states that the Court can only give permission to a claimant to file and serve a reply to a defence at a case management conference (CMC), unless of course, the reply is filed before the CMC with the consent of the defendant[4]. What occurs in a CMC is therefore quite key to the approval of a reply. No great effort is then exerted in making what may seem as a sequential jump to the consideration that what occurs in a CMC can be quite relevant to the composition of a reply.

48. According to the Granger-Warrick affidavit, the Claimant first informed the Court and the Defendants of her need to reimburse her employer for her medical expenses, at the first CMC held on 19 May 2014. This has not been contested by the Claimant. In light of the relevance of the case management process to the Court's considerations in dealing with applications to file and serve a reply, the Court can consider the issue of her employer's coverage of her medical expenses to be an issue that was originally raised by the Claimant. This can be said even despite the issue not being put to paper by the Claimant until her making of the draft Reply in question, and said Reply being made after it was first raised on paper by the First Defendants.

49. Although the issue was not raised by the Claimant in her pleadings in her Statement of Case, it has already been established that it should have been so pleaded. Despite the issue not strictly originating from the Statement of Case therefore, the court can still say

[4] See CPR Part 10.10 (1) (a) and (b) and (2)

that for purposes of this application, the issue was not a new issue (to the Defence) as it originated from the Claimant, albeit orally at a Case Management Conference. In the event that such an approach proves to be a jump too far, the fact of the matter remains that the Claimant ought to have pleaded the issue in the Statement of Case but failed to do so.

50. Regarding the Claimant's argument that the Second Defendants admit to the issues being newly raised in the Amended Defence because of the Second Defendants' argument that said issues should have been dealt with in the Statement of Case, the Court notes that it does not quite follow this argument. This is especially so in light of its total contradiction to the statement made by counsel for the Claimant immediately preceding it; that "*in the Amended Statement of Case you could not then seek to amend to plead something raised in paragraph 11(e)* [of the First Defendants' Amended Defence]" as it did not yet exist.

51. The Court finds it difficult to understand how a contention that the issue stated in the Reply should have been included in the Statement of Case, equate with admitting that the said issue was raised in paragraph 11(e) of the First Defendants' defence, when, as counsel for the Claimant submitted, a party cannot plead to something in its Statement of Case that first arises in a defence which has yet to be created. The Claimant's argument would only make sense if the Second Defendants were contending that the issues first arose in the First Defendants' Defence. The Second Defendants are however arguing something quite different. It is the Claimant who is claiming that the new issue arose in the Amended Defence. The Second Defendants are claiming, in vast contradiction to the Claimant, that the issue first arose from the Claimant at the first CMC and furthermore should have been identified in the Statement of Case or in the Amended Statement of Case.

III. Whether the Court requires evidence to exercise its discretion in granting permission to file a Reply?

Second Defendants' Submissions

52. Counsel for the Second Defendants contended that the Claimant's application for permission to file a Reply was, in law, flawed, as the Claimant has failed to put evidence before the Court in support of the application. Counsel argued that it is a discretion that the Court is called upon to exercise in granting permission for a claimant to file a reply. Counsel referred to CPR Part 10.10 in support of his submission and stated that there is a need to put evidence in support of one's contention to show that the *necessity* to file a reply has arisen, precisely what the Claimant has failed to do.

53. It was further argued by counsel for the Second Defendants that the Claimants failed to "*take the court into their confidence"* so as to provide the Court with factors for exercising its discretion. Counsel states that the Claimant should have provided the Court with at least evidence of attempts to write to the Claimant's employers on the pertinent details of which the (Second) Defendants and the Court remain ignorant.

54. Counsel for the Second Defendants also contended that in the interests of justice, cases must be frontloaded so as to grease the wheels, as it were, for justice to be expedited; otherwise, applications, such as the one currently being made by the Claimant, would prevent the efficient application of the overriding objective of the CPR.

The Court's Analysis

55. **Part 10.10 of the CPR** stipulates as follows:

> **"(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."

56. **CPR Part 10.10** does not by itself stipulate that evidence must be given for the Court to grant permission to file a reply. This can however be implied, as in order for the Court to give permission it follows that some reasons should be provided for the Court to properly assess whether a reply is *necessary*. If the Court were not called upon to exercise its discretion based upon relevant evidence, then there would be no need for the Court to be called upon to give permission. So that a proper construction of **CPR Part 10.10** would be to require the applicant to base the application for permission to file a reply on evidence that a reply is indeed necessary for the purposes of answering new matters or issues raised in the defence which could not have been dealt with in the statement of case.

57. The Court at paragraph 17 of **Mayfair** states as follows:

> *"...the ability of the Claimant to Reply is based on necessity, all with a view to saving costs a component of the court's duty to further the overriding objective of dealing with cases justly."*

The overriding objective of the CPR is then to be considered by the Court in granting permission to the claimant to reply to a defence. As is cursory knowledge, the Court under CPR Part 1.2(1) must seek to give effect to the overriding objective whenever it exercises its discretion given to it by the CPR or when it interprets the meaning of any rule. The Court is therefore called upon to interpret **CPR Part 10.10** which in this Court's view requires evidence in order for the Court to effectively exercise its discretion when considering an application for leave to reply to a defence.

58. This Court consequently accepts the submission that the Claimant was less than forthcoming in relation to when the documents in question would be available, or why their availability was taking such a long time from the Claimant's employers. The Court would go so far as to agree with counsel for the Second Defendants that the Claimant could have been of greater assistance to all concerned in this material particular. The

Court finds however that such a consideration bears little weight in the immediate matter of determining whether the Reply should be permitted or not. The aforementioned issue as to whether the information included in the draft Reply should not have been more appropriately brought in the Statement of Case carries the most weight and significance in determining this application.

59. This is confirmed in the Court of Appeal case of **First Citizens Bank Limited v Shepboys Limited & David A. Sheppard CA Civ P231/2011**. At paragraph 22 of page 7, Mendonca JA made the following observation:

> *"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."*

Disposition

60. The Court accordingly holds, that in light of all the circumstances, analyses and findings, in the exercise of its discretion, the proposed Reply put forward by the Claimant cannot be permitted. The pivotal reasoning for this decision is that said Reply contains issues which should have been more appropriately included in the Claimant's Statement of Case.

61. Accordingly, the order of the Court is as follows:

ORDER:

1. **The Claimant's Notice of Application filed on 5 August 2014 for permission to file and serve a Reply to the First Defendants' Amended Defence filed on 11 July 2014 be and is hereby refused.**

2. **The Claimant shall pay to the Second Defendants costs of the said Notice of Application to be assessed pursuant to CPR Part 67.11, in default of agreement.**

Dated this 21st day of October, 2016

_____
Robin N. Mohammed
Judge