

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2016-03150**

**BETWEEN**

**SHAHID MOHAMMED**

**Claimant**

**AND**

**SEAN HUTCHINSON**

**1<sup>st</sup> Defendant**

**SIERRA REAL ESTATE & PROPERTY DEVELOPMENT**

**2<sup>nd</sup> Defendant**

**Before the Honourable Mr. Justice Robin N. Mohammed**

**Date of Delivery:** Tuesday 21<sup>st</sup> May, 2019

**Appearances:**

Mr Adam Razack instructed by Mr Irshaad A Ali for the Claimant

Mr Colin Selvon instructed by Ms Kathy-Ann Mottley for the Defendants

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**DECISION ON NOTICE OF APPLICATION FOR PERMISSION TO FILE A REPLY**

**FILED ON THE 25<sup>TH</sup> AUGUST, 2017**

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**I. Background:**

- [1] This decision is concerned solely with the Claimant's Application for permission to file a Reply and the Defendants' objections to same. As such, a detailed summary of the background facts is not needed.
- [2] The parties' relations commenced by way of an oral agreement whereby the 1<sup>st</sup> Defendant, Mr Hutchinson, orally agreed in his capacity as Director of the 2<sup>nd</sup> Defendant Company, to sell 3 properties owned by the Claimant: Lot No.1C, Lot No.5 and Lot No.6. As consideration for acting as the Claimant's Real Estate Agent, it was agreed that a commission of 3% of the sale price of the properties would be charged.
- [3] After valuations were obtained, it was later agreed that the properties would be transferred into Mr Hutchinson's name. The parties are in dispute as to the reasoning for this transfer. The Claimant pleads that Mr Hutchinson represented to him that such transfer was necessary for the sale of the properties. Thus, on the Claimant's version, the properties were being held on trust by the 1<sup>st</sup> Defendant. Mr Hutchinson, however, maintains that this added term of the agreement was agreed at the Claimant's suggestion and was used as a means of repaying the numerous debts that he, Mr Mohammed, the Claimant, now owed to him.
- [4] Mr Hutchinson was able to secure a buyer for Lots 5 & 6 in the sum of \$1,300,000.00. It was later discovered by the Claimant through a title search that Lot No.1C was also sold for \$350,000.00. Out of these proceeds, several disbursements were made to the Claimant by way of cheque and cash payments from Mr Hutchinson. However, the Claimant claims that the sum of \$1,141,000.00 remains due and owing to him from the proceeds of sale of Lots 5 & 6 as it is money held on trust for him.
- [5] Both Defendants deny that any such money is held on trust for the Claimant. Mr Hutchinson maintains that the proceeds from the sale of the properties were to be used to repay the Claimant's many debts. The 2<sup>nd</sup> Defendant Company maintains that its involvement with the transactions ceased after the valuations were obtained and thus, had no knowledge of much of the material facts pleaded in the Statement of Case.

[6] After both Defences were filed, the Claimant filed the Application herein seeking permission to file a Reply to each Defence. The reasoning was that both Defences raised new issues/facts which were neither raised nor addressed on their Claim. The affidavit in support attached the draft Replies for both Defences.

[7] At the following CMC directions were given for the filing of Objections to the draft Replies with submissions. The 2<sup>nd</sup> Defendant filed its Objections/Submissions first and as such, will be dealt with primarily.

## **II. Law & Analysis:**

[8] The principles to be applied when determining the Claimant's Application for permission to file a Reply are straightforward and familiar. Mendonca JA set them out in **First Citizen's Bank Limited v Shepboys Limited Civ App P231 of 2011**. Essentially, he states that a Reply can only be filed in response to new matters raised in the Defence, which were not and should not have been dealt with in the Statement of Case. Thus, a Reply must neither be a restatement of the Claim or a Defence to a Defence.

[9] Pemberton J (as she then was) reiterated the point by citing learning from **Blackstone's Civil Practice 2001** in her decision of **Mayfair Knitting Mills Limited v Mc Farlane's Design Studios Limited CV2007-002865** as follows:

*"...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."*

## **The 2<sup>nd</sup> Defendant's Objections:**

[10] The first objection was to the remainder of paragraph 1 from the words “...and at all material time he dealt with....” To the end of the paragraph. Objections were also raised to paragraphs 2, 3, 4 & 5 as well as the attachment “M1”.

[11] The grounds were as follows: (i) it was already pleaded that the 1<sup>st</sup> Defendant was the managing director of the 2<sup>nd</sup> Defendant; (ii) the mention of the role of Doreen Sookdeo is new and was not at all raised in the Defence or Claim; (iii) the other matters should have been pleaded in the Claim.

[12] With respect to the remainder of paragraph 1, I agree that the fact that Mr Hutchinson represented himself to be the Managing Director of and/or who had authority to do business on behalf of the 2<sup>nd</sup> Defendant was made patently clear throughout the Statement of Case. **Thus, the highlighted portion of paragraph 1 amounts to a restatement of the Claim and will be struck out.**

The mention of Mrs Doreen Sookdeo as being the second director of the 2<sup>nd</sup> Defendant Company and wife of the 1<sup>st</sup> Defendant is warranted. This is because paragraphs 2 – 5 of the Reply are stated as being in response to the 2<sup>nd</sup> paragraph of the 2<sup>nd</sup> Defendant's Defence. Thus, by pleading in its Defence (at para 2) that the 2<sup>nd</sup> Defendant Company is a separate and independent business entity from Mr Hutchinson, thereby seeking to remove itself from all liability, it was necessary for the Claimant to alert the Court, in response, that (i) the directors of the 2<sup>nd</sup> Defendant Company are husband and wife and (ii) the directors are the same two people with whom he interacted in the oral agreement and thus, the Company was aware and party to the agreement. **Accordingly, I overrule the Objections to paragraphs 2 – 5 of the Reply to the 2<sup>nd</sup> Defendant's Defence.**

However, I do agree that the attachment at “M1” of the Company documents is something that should have been included in the Claim. As stated by Pemberton J in **Mayfair Knitting** *supra*, 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...buttress or expand or clarify its claim.”

Given the nature of the Claim, which is premised on the law of agency and authority between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup>, the company documents and business card of the 1<sup>st</sup> Defendant ought to have been pleaded in the originating Claim. **I will therefore strike out the attachment “M1” from the Reply to the 2<sup>nd</sup> Defendant’s Defence.**

[13] The second objection is to the remainder of paragraph 6, from the words “...*The Claimant asserts however that the Second Defendant’s servants...*” to the end of the paragraph as well as to the entirety of paragraphs 7, 8 & 9 on the ground that those matters should have been pleaded and do not arise from the Defence.

[14] Paragraph 6 of the draft Reply is stated as being in response to paragraph 10 of the 2<sup>nd</sup> Defendant’s Defence, which again, seeks to separate the Company from the decisions of Mr Hutchinson by stating that any decisions must first be sanctioned by special resolution and approval from the Board of Directors. It was effectively putting the Claimant to proof that Mr Hutchinson ever represented that he had the authority to enter into the oral agreement on behalf of the 2<sup>nd</sup> Defendant Company. However, I find that paragraph 6 of the draft Reply is merely a restatement of paragraph 10 of the Statement of Case, to which paragraph 10 of the 2<sup>nd</sup> Defendant’s Defence was drafted in response. **Therefore, I move to strike out the highlighted words of paragraph 6 of the draft Reply to the 2<sup>nd</sup> Defendant’s Defence.**

[15] **Paragraph 7 as well is a restatement of paragraph 10 of the Claim and will also be struck out.**

[16] Paragraphs 8 & 9 of the draft Reply are in response to paragraphs 12 & 18 of the 2<sup>nd</sup> Defendant’s Defence, which, essentially state that the 2<sup>nd</sup> Defendant Company is not involved in the business of selling or purchasing of vehicles and therefore, took no part in the transaction involving PCD 2341. Paragraphs 8 & 9 of the draft Reply seek to respond by stating that the Claimant is not aware of the parameters of the 2<sup>nd</sup> Defendant’s business and in any event, both Directors were involved in the transaction relating to the vehicle in the course of its business.

I find that paragraph 8 of the draft Reply is permissible as it was not stated in the Claim and is a suitable response to the 2<sup>nd</sup> Defendant’s Defence. I also do not think that it ought

to have been pleaded in the Claim as the Claimant would not have known what matters the 2<sup>nd</sup> Defendant would have sought to deny in its Defence. **The objection to paragraph 8 is overruled.**

[17] Paragraph 9, however, amounts to a restatement of paragraph 12 of the Statement of case save for the fact that the Claimant is now stating that the other Director, Mrs Sookdeo, was also aware of the transaction involving the vehicle. The involvement of Mrs Sookdeo in this transaction ought to have been pleaded in the Statement of Case and thus, **paragraph 9 will be struck out as being a restatement of the Claim as well as for introducing new facts which should have been pleaded.**

### **1<sup>st</sup> Defendant's Objections:**

[18] The 1<sup>st</sup> Defendant objected to the following paragraphs of the draft Reply on the ground that they amount to a restatement of the Statement of Case: 1, 2, 16, 32, 35, 36, 45, 46 & 53

He also objects to the following paragraphs on the grounds that they aren't new matters emanating from the Defence and ought to have been pleaded in the Claim: paragraphs 3 - 7.

Finally, objection was made to the following paragraphs on the ground that they amount to a Defence to a Defence: 8 – 15, 17, 37, 38 & 40 – 43. The Court notes that this objection is the same as the objection to paragraphs 3 – 7.

[19] **I overrule the objections to paragraphs 1, 2 & 16 of the draft Reply to the 1<sup>st</sup> Defendant's Defence.** Nowhere is it stated in the Claim that the parties took 3 months before their friendship got close nor is it expressly stated that the Claimant's wife stole \$5 million of his money or that her family had beaten him, and so on. Further, the details of the Claimant and his wife's relationship are not apparent from the Claim. The issues with respect to the relationship between the Claimant and his wife and the savings of the Claimant are all matters raised for the first time in the Defence and are not facts which ought to have formed part of the Claim as they were not relevant to the cause of action.

Further, these matters require a response as they are pleaded to fit the Defendant's narrative that the Claimant was destitute and in debt and therefore, that he transferred the properties to the 1<sup>st</sup> Defendant as a means of repaying his debts. I therefore find them a sufficient response to the 1<sup>st</sup> Defendant's Defence.

[20] **Paragraph 32 is indeed a restatement of the Claim as it reiterates that the proceeds of sale from Lots 5 & 6 were held on trust. I therefore strike out this paragraph.**

**Paragraphs 35 & 36 of the draft Reply are also restatements of paragraph 33 of the Claim and will be struck out. Further, paragraph 45 & 46 will be removed for the same reason.** In fact, in the draft Reply, those paragraphs expressly state that they repeat paragraphs 73 & 74 of the Claim.

**Paragraph 53 is also a restatement of paragraphs 45 – 50 of the Claim and will be struck out.**

[21] Paragraphs 3 & 4 however, are in response to new matters raised in the 1<sup>st</sup> Defendant's Defence at paragraph 20 and were not facts that needed to form part of the Claim. **I therefore overrule the objections to these paragraphs of the draft Reply.**

[22] Paragraph 5 is also in response to the new facts concerning the 2<sup>nd</sup> Defendant Company's parameters of business and thus, will be allowed. Paragraph 6, as well, is in response to a new allegation concerning the advance of \$5,000.00 raised in the Defence and thus, will be permitted. The job description of the Claimant and his wife in paragraph 7 of the draft Reply are also in response to the 1<sup>st</sup> Defendant's Defence, which seeks to state that they were destitute. Their job description and finances were not matters material to the Claim and therefore, need not have been pleaded in the Claim. **In summary, I overrule the objections to paragraphs 3 – 7.**

[23] Paragraphs 8 – 15 of the draft Reply are stated as being in response to paragraphs 15, 17, 18, 20, 21 & 22 of the 1<sup>st</sup> Defendant's Defence. Each of these paragraphs raises new matters in the Defence that were not addressed in the Claim. In fact, many of the paragraphs begin with the words "*the 1<sup>st</sup> Defendant now states...*" Paragraph 15 mentions a loan of \$10,000.00 to the Claimant which was not mentioned in the Claim. Paragraphs 17 & 18 talk about the lack of town and country approvals for the properties which made

it difficult to find a buyer. Paragraphs 20 – 22 discuss the alleged kidnapping attempts, problems and debts of the Claimant, which again were not and need not have formed part of the Claim. **Thus, in the circumstances, I overrule the objections to paragraphs 8 – 14 of the draft Reply.**

[24] The fact that the Claimant wanted a quick sale of the properties, however, is a matter which I find should have been included in the Claim. In any event, that fact is not material to the cause of action to be included in the Reply. Further, the fact that the Claimant alleges that he was co-operative with respect to the showing of the properties is not a response to the allegation pleaded at paragraph 22 of the 1<sup>st</sup> Defendant's Defence.

**I therefore strike out paragraph 15 of the draft Reply to the 1<sup>st</sup> Defendant's Defence on the basis that the content is irrelevant.**

[25] Paragraph 17 of the draft Reply is a valid and acceptable response to the new allegation raised at paragraph 24 of the 1<sup>st</sup> Defendant's Defence. The same can be said for paragraph 37 as it responds adequately to the new matter raised at paragraph 44 of the Defence. **The objections to both paragraphs 17 & 37 of the draft Reply are therefore overruled.**

[26] **The objection to paragraph 38 is sustained with respect to the last sentence only which reads “The Claimant trusted the First Defendant in his personal capacity...the properties only.”** This portion is a restatement of the Claim and will be struck out.

[27] **Finally, the objections to paragraphs 40 & 41 of the draft Reply are overruled** in similar fashion to the above. However, **I will strike out paragraphs 42 & 43** as the payments have already been particularised at paragraphs 43 (i) & (ii) of the Statement of Case and thus, amount to a restatement of the Claim.

### **III. Disposition:**

[28] **Accordingly, in light of the foregoing analyses, the order of the Court is as follows:**

#### **ORDER:**

- 1. That the Claimant be granted permission to file a Reply to the 1<sup>st</sup> Defendant's Defence filed on the 30<sup>th</sup> December, 2016 and to the 2<sup>nd</sup> Defendant's Defence filed on the 30<sup>th</sup> June, 2016 in the terms set out in the draft Replies annexed to**



the Application filed on the 25<sup>th</sup> August, 2017, subject to the terms of clauses (2) & (3) of this Order below.

2. That the following paragraphs of the draft Reply to the 2<sup>nd</sup> Defendant's Defence attached to the Notice of Application filed on the 25<sup>th</sup> August, 2017 be and are hereby struck out:

(a) Paragraph 1 from the words "*...and at all material times he dealt with the First Defendant who...his own purposes.*"

(b) Paragraph 4 from the words "*...A true copy of the Company's documents and business card...marked M.1.*"

(c) Paragraph 6 from the words "*...The Claimant asserts however that the Second Defendant's...did nothing to stop same.*"

(d) Paragraphs 7 & 9 in their entirety.

3. The following paragraphs of the draft Reply to the 1<sup>st</sup> Defendant's Defence attached to the Notice of Application filed on the 25<sup>th</sup> August, 2017 be and are hereby struck out:

(a) Paragraphs 15, 32, 35, 36, 42, 43, 45, 46 & 53 in their entirety.

(b) Paragraph 38 from the words "*...The Claimant trusted the First Defendant in his personal capacity...the properties only.*"

4. The question of costs to be considered at the next hearing.

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**Robin N. Mohammed**  
**Judge**