Claim 1

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2017-01262

IN THE MATTER OF THE TRUSTS CREATED BY A TRUST DEED AND RULES DATED NOVEMBER 24 1976 AND ITS VARIOUS EVOLUTIONS THAT ESTABLISHED AND CONTINUED
THE ROYAL BANK EMPLOYEE STOCK/SHARE OWNERSHIP PLAN [THE ROYAL BANK ESOP]

Between

VESTA DILLON
(Suing on her own behalf and on behalf of the named members of Staff Retirement Bonus Plan who resigned between 1999 and 2009)

Claimant

And

RBC FINANCIAL (CARIBBEAN) LIMITED

First Defendant

RBC ROYAL BANK (TRINIDAD AND TOBAGO) LIMITED

Second Defendant

Claim 2

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2017-01264

IN THE MATTER OF THE TRUSTS CREATED BY A TRUST DEED AND RULES DATED NOVEMBER 24 1976 AND ITS VARIOUS EVOLUTIONS THAT ESTABLISHED AND CONTINUED
THE ROYAL BANK EMPLOYEE STOCK/SHARE OWNERSHIP PLAN [THE ROYAL BANK ESOP]

Between

STEPHEN NOEL MCCARTHY

Claimant

And

RBC FINANCIAL (CARIBBEAN) LIMITED

First Defendant

RBC ROYAL BANK (TRINIDAD AND TOBAGO) LIMITED

Second Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: October 27, 2021

Appearances:

Claimants in both claims: Mr. T. Bharath and Ms. A. Watkins-Montserin instructed by Ms. K. Kydd-Hannibal

Defendants in both claims: Mr. J. Mootoo instructed by Mr. A. Byrne

REASONS

1. On October 12, 2021 the court made the following order after giving very brief reasons at the hearing;

    i. Permission is granted to the Claimants to file and serve a Reply in terms of the draft attached to the application of December 11, 2019 save and except for the following:

        a. The last sentence of paragraph 11.
        b. The words "having imputed liability for the Trust Company which is under their directive and whole ownership" appearing at the end of the second sentence in paragraph 12.
        c. Penultimate sentence of paragraph 9
        d. The words "as a single economic unit with the Trust Company" appearing in the final sentence in paragraph 24.

    ii. Issue of costs of the application reserved.

2. Both matters are similar and have been case managed together. By Claim Form filed on April 11, 2017, the Claimant commenced these proceedings on her behalf and on behalf of other certain named former employees of the Defendants who resigned from the employment of the Defendants between 1999 and 2000. The essence of the Claimants' claim is that Dillon, those whom she represents and McCarthy are beneficiaries entitled under various trusts to retirement benefits, which the Defendants have refused to pay to them under the Defendants' Employee Share Ownership Plan ("ESOP") and Staff Retirement Bonus Plan ("ESOP II").

3. This is the third substantive application that this court has had to treat with in this claim, the first being one of the Claimant Dillon to act on behalf of those whom she now represents, which application was contested, the second was the application of the Claimants to join RBC Trust as a party which was also contested. The Claimant Dillon was successful in the first application but not on the second. The third application was that of the Claimant to file and serve a reply. These applications have taken sometime to argue and determine.

4. In relation to the application to file and serve the reply, the parties took some time to agree to on the draft reply provided by the Claimants. In the end, they were able to narrow the dispute to particular averments on the draft reply so that it was agreed that the court would determine whether the disputed averments should be allowed. It is in that context that the order of October 12, 2021 was made. The common thread was whether the Claimants ought to be allowed in a Reply to answer the pleaded defence in so far as the relationship between the Defendants and RBC Trust was concerned. The ruling of this court was that the Claimants are allowed so to do but that they are not permitted to set up a wholly new claim or to change the character of the claim by way of the Defence. The court was of the view that having failed to satisfy it that RBC Trust ought to have been joined as a party, the Claimants were now attempting to slip in the new claim through the back door as it were. Hence, the court permitted the disputed averments in so far as they amounted to answers to pleaded defence of the relationship between the Defendants and RBC Trust but disallowed the averments that sought to establish a claim that RBC Trust and the Defendants were one single economic entity and therefore the Defendants are liable for the acts of RBC Trust. The latter was in the court's view a significant departure from the pleaded case.

5. This court said the following at paragraphs 35 and 36 of its decision of March 19, 2021 in relation to the issue of joinder of RBC Trust;

> 35. The new original deed also recites that the 1976 deed was made between the Royal Bank of Trinidad and Tobago Limited of the first part, C.P. de Souza. H.P Urich and H.H. Alleyne of the second part and RBC Trust of the third part 4. So that contrary to that which is argued by the Claimants, the Claimants would have known and is certainly vested with the knowledge by virtue of the deed which they have annexed that RBC Trust was in fact a party to the 1976 deed before filing their claim or certainly by the date they filed their statement of case. It is therefore not the case that they would have only been so informed when the defence was filed on March 29, 2019.

6. *36. It follows that the averment at paragraph 13 and 14 that RBC Trust was a party to the 1976 deed was not new information. What appears to have been new information that lay solely within the purview of the defendants is that pleaded at paragraph 13 that RBC Trust was the administrator of the trust and not the defendants. It was also pleaded for the first time in the defence that the ESOP2 was not constructed from the 1976 Trust Deed and was not a trust but a contractual arrangement without a trust deed. It was pleaded alternatively that if the court were to find that ESOP2 was a trust in any event there is no case against the defendants because they were not Trustees of the plan*.

7. Consistent with its previous ruling therefore the court found that the Claimants would have been entitled to reply to the new information that RBC Trust was in fact the administrator of the trust and not the Defendants. To that end the court formed the view that the following was allowable for the following reasons;

a. The words “and whose directive and control was under the purview of the Second Defendant” appearing at the end of the paragraph 6 of the draft reply. These words were allowed as the entire line when read in context avers that the stocks were in fact administered by RBC Trust whose shares are owned by the First Defendant. Further, the averment also reads that the direction and control of RBC Trust was under the purview of the Second Defendant. These averments in no way suggest that RBC Trust was not a separate legal entity and was one economic unit with the Defendants. The ownership of the shares in RBC Trust Company does not import control and direction in the management and decision making by the RBC Trust in relation to the administration of the trust. Similarly, the fact that the Second Defendant appeared to be the company in overall control of RBC Trust and all of the other companies that fell under its “purview” according to the draft reply, equally did not provide a basis for suggesting that the day to day decision making in the administration of the trust was a matter for the Second Defendant. In its totality, the averment in reply meant that RBC Trust fell under the general direction and control of the Defendants, which was not a derogation from the originally pleaded case of the Claimant. The court therefore found that the reply was a proper one and allowed it.

b. The words “The Claimant will however maintain that he has a lawful right and reasonable cause of action against the Defendants with respect to the ESOP for although the Trust Company was set up to administer the ESOP the Bank also played direct role in control of the ESOP and the schemes of funding” appearing at the second sentence of paragraph 9. The court considered this to be a pure reply to paragraph 14 of the Re Amended Defence that the

Defendants were not trustees of the ESOP. In that regard, it was open to the Claimants to plead the extent of the relationship that they allege existed between the Defendants and RBC Trust so that this was allowed.

c. The words "under the directive and control of the latter who is" appearing at the fifth sentence of paragraph 9. This was allowed on the same basis as that set out at 7(a) above as it is but a repeat of the averment.

d. The penultimate sentence of paragraph 9 read, "For all intents and purposes all three companies acted as one in the administration of the funds in the plan and worked and served as a single economic unit". In the court's view, this averment offended the general principle that a Reply ought not to raise a wholly new cause of action. The claim was not premised on the fact that all three companies acted as one single economic unit so that this marked a substantive departure from the case of the Claimant and so was disallowed. The distinction here lay in the new allegation that the Defendants directed RBC Trust as to how to make decisions on the ESOP as it was in their economic interest to do so its interests being one and the same as that of RBC Trust.

e. The words "exercised decisive functions and took on administrative functions with respect to the ESOP SRB Plan despite the existence of the Trust Company and has" appearing in the first sentence of paragraph 11. The court omitted to consider these disputed words in error so that they would have been allowed by virtue of the nature of the order being, that which was excluded. Should the court have considered these words though, it would have

disallowed the application to include them in the reply as they fundamentally alter the case for the Claimant by now alleging that the Defendants actively usurped the decision making function of RBC Trust in relation to the plan.

f. The final sentence of paragraph 11 read "Given these facts the Claimant will maintain that the Defendants and the Trust Company are a single economic unit and thus liability for the administration of trust in favour of the Claimant is imputed on the Defendants". This in the court's view was a clearly defined shift in the case for the Claimant thereby changing the substantive claim so that the words were not allowed.

g. The end of the second sentence in paragraph 12 read, "having imputed liability for the Trust Company which is under their directive and whole ownership". Again, here the new claim was that the Defendants owned RBC Trust and would have therefore directed the decision making process and so would have acquired liability. This was excluded on the same basis as that set out at 7(f).

h. The final sentence of paragraph 24 read "as a single economic unit with the Trust Company". These words were excluded on the same basis as the above, namely that it raised a wholly new claim.

Single Economic Unit

8. In Roman law, it was an established principle that a corporation was a separate person in law from the members. The Latin maxim, ***si quid universitati debetur singulis non debetur, nec quod debet universitas singuli debent*** is often translated as *If anything be owing to an entire body*

[or to a corporation], *it is not owing to the individual members; nor do the individuals owe that which is owing by the entire body*.

9. In ***Adams v Cape Industries plc***[1] (a case cited by the defendants) Slade LJ rejected the single economic unit argument. Slade LJ took the same approach in ***Salomon v Salomon & Co Ltd*** [1897] AC 22 and held that there is no general principle that all companies in a group should be regarded as a single economic unit and, on the contrary, each company in a group of companies is an independent entity. At 536F, after referring to some cases in which parent and subsidiary companies have been regarded as one unit he said:

> *…the court is not free to disregard the principle of Saloman v A. Saloman & Co. Ltd. (1897) A.C.22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities*.

10. Further, at 544 of the judgment, Slade LJ remarked that a corporate group may use whatever corporate structures are available to organize their legal liability in the most advantageous way.

11. Following the reasoning above, the court is of the view that to plead a degree of decisive influence exerted by the Defendants over the RBC Trust is in fact permissible by way of reply as it is not uncommon for companies within a group to be closely associated. In some instances, there may be

[1] [1990] Ch. 433

some form of operational unity, or else an overlap of management[2]. So that to the extent that the Claimants sought to reply on the solitary issue of the relationship between the companies as raised in the defence same is not objectionable in the court's view. However, the Claimant filed a claim for breach of trust predicated in her Statement of Case on the fact that the Defendants were trustees of the plans and would have so acted. However, the averments in the Reply that have been struck was a clear attempt in the court's view to raise a wholly new cause of action which itself was inconsistent with that which was pleaded in the Statement of Case.

Law on the filing of a Reply

12. The court directed itself in terms of the following. According to **Blackstone's Civil Practice 2017**[3], the contents of a reply are as follows:

> *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…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'. When the defence takes issue 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 seek to amend his statement of case accordingly… and not to deal with the matter in a reply…*

[2] The court will pierce the corporate veil only in cases of deliberate evasion of obligations or liabilities.
[3] Chapter 27, page 494, para 27.2

13. In ***First Citizens Bank Ltd. v Shepboys Ltd. and Anor***[4] the Court of Appeal gave guidance with respect to the filing of a Reply. Mendonça JA made the following observations.

> *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*.
>
> *37. In this case the Judge was of the view that the claimant pleaded in the reply facts, which in accordance with rule 8.6 of the CPR, should have been included in the statement of case. The question is whether the judge was correct to come to that conclusion in the circumstances of this case. As I have observed, the claimant's duty is to set out in the statement of case a short statement of all the facts on which it relies. This must at least refer to facts necessary to formulate a complete cause of action…*

[4] C.A.CIV.P.231/2011

14. Mendonça JA also made the point at paragraph 40. *It has been recognized that once an allegation is sufficiently made in the statement of case it may be amplified by further information and/or by witness statements*.

15. The learning in ***Shepboys***, supra, highlighted the difficulty of the Claimants in this case in that the Claimants on the evidence knew that the Deed of Trust had appointed RBC Trust as the Trustees and quite simply ought to have pleaded same in the Statement of Case. In so doing, they would have set out all of the facts and circumstances that were likely to be in issue and more importantly, they would have pleaded a very different case from the one, which they now attempt to plead through a reply.

16. Additionally, the court considered the application of the overriding objective and having done so, concluded that it would be improper to use the overriding objective as justification for the grant of permission to reply in this case where it was manifestly clear that the case to be pleaded on reply would be a new one other than the one set out in the Statement of case. It would therefore in the court's view not have been just to permit the reply on the disputed matters that were disallowed.

17. In relation to the objections by the Defendants on the issue of abuse of process, having regard to the ruling above the court was of the view that the Claimants were not using the court for an improper motive in relation to the disputed parts of the reply that were allowed. In relation to the parts that were disallowed the court was similarly of the view that the application was not an abuse of the court's process but fell to be dismissed on the pure legal basis of the non-appropriateness of the matter sought to be included in a reply in keeping with the authorities set out above.

18. In closing the court adds that at the end of delivery of short oral on October 12, 2021, in keeping with the duty of the court to have the parties actively consider a resolution other than by way of trial at an early stage after pleadings are closed it enquired of the parties of what it saw as the broader issue in the case as to how far it could go and asked the parties whether they would wish to have a discussion amongst themselves at some point and suggested that they so do. Immediately thereafter Attorney at law for the Claimants indicated that he was surprised at the comment of the court, would appeal the ruling and may ask the Court of Appeal to remove the present Judge from presiding in the matter. The court suggested that it would be open to the Claimants to make the application for recusal before it at first instance as a matter of process but to the date of writing, no such application has been made before this court.

Ricky Rahim

Judge