THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2013-01623

BETWEEN

EMILE PETER ELIAS
(personally and in his capacity as Legal Personal Representative of the Estate of Angela Elias, deceased)

Claimant

AND

(1) JOSEPH ELIAS
(personally and in his capacity as trustee of the trusts of the will dated 8th April 1982 of Linda Elias, deceased, and also in his capacity as executor of the will dated 12th November 1983 of Nagib Elias, deceased)

(2) INEZ MATOUK

(3) GEORGE ELIAS

(4) LILY ABOUD

(5) ROBERT ELIAS

(6) MICHAEL ELIAS
(in his capacity as Legal Representative of the Estate of Michael Elias, deceased)

Defendants

Before the Honourable Madame Justice Quinlan-Williams

Appearances: Mr. Jason K. Mootoo led by Mr. Alvin K. Fitzpatrick SC and instructed by Mr. Adrian Byrne for the Claimant

Mr. Kerwyn Garcia led by Ms. Deborah Peake SC instructed by Mr. Samuel Harrison for the First Defendant

Ms. Cherisse Huggins led by Mr. Elton A. Prescott SC instructed by Mr. Russell Huggins for the Fifth Defendant

REASONS FOR THE DECISION DELIVERED ON THE 17th SEPTEMBER, 2018

1. By notice of application filed on the 18th June, 2018 the applicant/claimant applied for permission to amend the statement of case. The proposed amendments were attached in a draft order annexed to the notice of application. This claim, CV2013-01623, was the culmination of protracted issues involving the estate of Linda Elias ("the deceased"), the mother of the applicant/claimant and respondents/defendants herein. Linda Elias died on the 4th May, 1984 and probate of her Will was granted in 1984. There were previous matters concerning the said Will, whereby the related judgments were delivered in 1993 and 2014.

2. Relative to this claim, the claim form and statement of case were filed on the 17th April, 2013. After years of case management, the trial took place over five days from the 4th to the 8th June, 2018. The first respondent/defendant, the trustee of the Trust created under Linda Elias' Will, was cross-examined. During the cross-examination, he provided answers to certain questions asked of him. At the end of the evidence, the court gave directions for the filing and serving of closing addresses. Ten days after the end of the evidence, this notice of application was filed. Answers given in cross-examination of the first respondent/defendant were the genesis of the notice of application.

3. The main issue raised by the notice of application was whether the court should give permission to the applicant/claimant to amend the statement of case. The applicant/claimant alleges that such permission to amend, if granted, would bring the claim and the statement of case in line with the evidence elicited by way of cross-examination of the first respondent/defendant.

4. The court considered the notice of application. By order dated 18th July, 2018 the court refused to give permission to amend the statement of case. The court also decided that a hearing would not be appropriate to determine the notice of application. Following are the reasons for the court's decision.

5. Upon the deliberation of the notice of application, the court had the benefit of the pleadings, the witness statements and the evidence at the trial; including the cross-examination. The court also considered the evidence in support of the notice of application, the affidavit filed by the applicant/claimant. The deponent affirmed that his claim was for the first respondent/defendant to be removed as trustee of the Trust created by his mother's Will. A different court, in another claim, previously determined that the applicant/claimant mother's Will did indeed create a valid Trust. The first respondent/defendant was the trustee of the Trust. In the course of the cross-examination, the first respondent/defendant (the trustee of the Trust) gave evidence about certain things, namely:

    a. that he gifted either $25,000 or $20,000 to his first cousin, Janet Karam. He could not recall the exact amount. The funds came from the estate of his deceased mother and he did so because the deceased, told him to do so;
    b. he knew that the Will did not contain any bequest to Janet Karam;
    c. he transferred 230 shares in the company Nagib Elias and Sons Limited to Robert Elias. These shares belonged to the deceased's estate at the time of her death;
    d. in 1992 he had not yet transferred the said 230 shares to Robert Elias because he didn't think the matter was one of urgency as dividends had not been paid thereon;
    e. the statement of accounts provided by him did not include the said 230 shares or the said sum of TT$25,000.00 or TT$20,000.00; and
    f. if he was wrong for not acting in accordance with the Will by paying the monies to Janet Karam, he was "ok with that" because it was what the deceased, whom he loved, told him to do.

6. As aforementioned, it was this evidence that precipitated the notice of application. The applicant/claimant claims that this was the first time he became aware of these disbursement from his mother's estate. Consequently, the proposed amendments are relevant to the issue whether the first respondent/defendant is fit to continue as trustee of the Trust. Further, it is alleged that the proposed amendments are also

relevant to determine whether the first respondent/defendant is liable to make good any loss or damage sustained by the Trust as a consequence of the payment of the said monies to Janet Karam and the transfer of the said shares to Robert Elias.

7. The Consolidated Civil Proceedings Rules, 2016 are clear in its Rule 20.1 (3); given the stage of the proceedings the court's permission was required for the proposed amendments to the statement of case. The CPR Rule 20.1 (3A) enumerates the matters the court shall have regard to when considering whether to give permission. The Rules 20.1 (3) and (3A) state:

> 20.1 (3) *The court shall not give permission to change a statement of case after the first case management conference, unless it is satisfied that—*
>
> *(a) there is a good explanation for the change not having been made prior to that case management conference; and*
>
> *(b) the application to make the change was made promptly.*
>
> *20.1 (3A) In considering whether to give permission, the court shall have regard to—*
>
> *(a) the interests of the administration of justice;*
>
> *(b) whether the change has become necessary because of a failure of the party or his attorney;*
>
> *(c) whether the change is factually inconsistent with what is already certified to be the truth;*
>
> *(d) whether the change is necessary because of some circumstance which became known after the date of the first case management conference;*
>
> *(e) whether the trial date or any likely trial date can still be met if permission is given; and*
>
> *(f) whether any prejudice may be caused to the parties if permission is given or refused.*

8. There is binding precedent from the Court of Appeal that Rules 20.1 (3) and 20.1 (3A) are conjunctive. They must both be satisfied before a court can give permission to

amend a statement of case; **Louis A Monteil and Another v Central Bank of Trinidad and Tobago and Another, Civ App No P019 of 2015 (2016.05.27)**. The court also considered the learning in **Zuckerman on Civil Procedure Principles of Practice, Third Edition** (Zuckerman). At paragraph 7.47 Zuckerman states:

> *The foremost consideration is whether the proposed amendment is needed in order to determine the real issues in dispute between the parties in light of all the relevant circumstances. But this is not the only consideration, as Peter Gibson L.J. has stated:*
>
> > *"Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in efficient administration of justice is not significantly harmed"*

9. The court additionally considered the discretion given by Rule 11.13 to determine applications without a hearing. Rule 11.13 states:

> *11.13 The court may deal with an application without a hearing if—*
>
> *(a) the parties agree that the court should dispose of its application without a hearing;*
>
> *(b) the court considers that the application can be dealt with over the telephone or by other means of communication;*
>
> *(c) the parties have agreed to the terms of an order—*
>
> *(i) which do not come within rule 27.9(1); and*
>
> *(ii) the application (or a copy of the application) is signed by all parties to the application or their attorneys-at-law; or*
>
> *(d) the court does not consider that a hearing would be appropriate.*

10. The court assumed, based on the evidence that supports the application that the proposed amendments could not have been made prior to the first case management conference. The court also assumed that the application was made promptly. The

court was next required to consider the factors under Rule (3A); **Louis A Monteil and Another v Central Bank of Trinidad and Tobago and Another (supra)**. The court considered all the factors, however two of the factors were of particular importance to the court in making its decision: the interest of the administration of justice and whether any prejudice may be caused to the parties if permission is given or refused.

11. The court considered the interest of the administration of justice and the applicant's/claimant's opinion that the proposed amendments will serve to avoid a multiplicity of causes of action. The applicant/claimant specifically alleged that the proposed amendments were important to a new issue. This new issue was "whether the trustee is liable to make good any loss or damage sustained by the Trust as a consequence of the payment of the said monies to Janet Karam and the transfer of shares to Robert Elias". However, this additional issue would require the court to, inter alia, examine the words of the Trusts, including the words "…who will use the same at his own discretion to assist those who are in need and for the sole purposes of family use as has been discussed between us". Moreover, there are other legal issues that may arise such as limitation claims.

12. Implicit in the application for permission, is an expectation that the court will then decide on the new issue of "whether Joseph Elias is liable to make good any loss or damage sustained by the Trust as a consequence of the payment of the said monies to Janet Karam and the transfer of the said shares to Robert Elias". If permission is granted, the respondents/defendants would be denied an opportunity to respond to the new issue that is unrelated to the instant claim of "whether the trustee should be removed". Furthermore, the respondents/defendants would not have the opportunity to amend their defence, file new or additional witness statements or cross-examine the applicant/claimant and his witnesses on the new issue.

13. The court considered that the interest of the administration of justice should provide the respondents/defendants an opportunity to answer, in as much detail as they believe necessary, this new issue. Given the stage of the claim and the history of litigation relating to Linda Elias' estate, the interest of the administration of justice is to bring to a closure this particular claim. This is a circumstance where an additional

claim to resolve the new issue, if the applicant/claimant so chooses, is more in keeping with the proper administration of justice than to amend the statement of case at the stage permission was sought. Such amendments as proposed and the projected changes to the issues for the court to decide, would cause immense prejudice to the respondents/defendants. The prejudice cannot be compensated by orders for costs or any other remedy that is appropriate to this claim.

14. The applicant/claimant also alleged in the notice of application, that the amendments were important for the court to resolve "the question as to whether Joseph Elias is fit to continue as trustee of the Trusts". There is nothing preventing the court from considering all the evidence adduced at the trial. In fact, the court is well able and entitled to consider all the evidence, including evidence elicited in the cross-examination of the trustee. The applicant/claimant has the opportunity to submit to the court in the closing address, that the evidence is relevant and should be heavily weighted to the issue in this claim. In addition, the other side would also have the opportunity to address the court on the evidence, its relevance and weight. The court is then able to determine its relevance and what weight (if any) to the core issue. This can be done without the proposed amendments. An amendment is not necessary. The evidence was adduced by way of cross-examination and is available to assist in determining the issue before the court. In these circumstances, it would be inimical to the administration of justice to give permission to allow the proposed amendments at this stage.

15. The court also considered whether prejudice would be done to either side if permission is granted or refused. If permission is granted, without an opportunity given to the respondents/defendants to answer the amended statement of case, they would be deprived of an opportunity to respond to the new issue. This is especially important as the applicant/claimant proposed in their application that the court should make orders for restitution to the Trust. The court considered that there must be finality to the pleadings and the evidence – except in exceptional cases and circumstances. One would also expect that the later such an application for permission to amend the statement of case is made, the more exceptional the circumstances that

should cause the grant of permission to amend. This is not one of those exceptional circumstances. The evidence is relevant to the claim whether or not the trustee should be removed. If permission is not granted, the evidence is still available.

16. Contrarily, there is harm that would be done to the respondents/defendants in giving permission to amend. This harm can only be mitigated by allowing further amendments to the respondents'/defendants' defence and possibly allowing further evidence. If permission is not given, the applicant/claimant still has the opportunity to address the court about the weight that it should give to evidence elicited in the cross-examination of the trustee. The court therefore determined that if permission is granted unrequited harm will be done to the respondents/defendants. However, if permission is not granted, no harm will be done to the applicant/claimant nor the respondents/defendants. The court decided that to give permission would not be in keeping with the overriding objective of the CPR to deal with cases justly within the mean of Rule 1.1. Giving permission to amend the statement of case would result in a delay in the resolution of the claim, more costs to the parties and the waste of judicial time.

17. The court also considered Rule 11.13 (d), and determined that the application should be dealt with, without a hearing. The court did not consider that a hearing would be appropriate. The notice of application was supported by evidence that made clear the nature of the application and why permission was being sought. Additionally, the court had the benefit of the pleadings, the witnesses' statements and the evidence at trial.

18. The court's decision was therefore, assuming that the requirements outlined in Rule 20.1 (3) were met, the court was not satisfied that the applicant/claimant discharged his burden regarding the requirements outlined in Rule 20.1 (3A). Since Rule 20.1 (3) and Rule 20.1 (3A) are conjunctive, the court refused permission to the applicant/claimant to amend the statement of case and it so ordered.

Justice Quinlan-Williams

JRC: Romela Ramberran

20th September, 2018