**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Civil Appeal No. P 213 of 2021**

**Claim No. CV2017-01262**

**IN THE MATTER OF THE TRUSTS CREATED BY A TRUST DEED AND RULES DATED 24TH NOVEMBER 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 and on behalf of the members of the Staff Retirement Bonus Plan who resigned between 1999 and 2009)**

**Appellant/Applicant**

AND

**RBC FINANCIAL (CARIBBEAN) LIMITED**

**RBC ROYAL BANK (TRINIDAD AND TOBAGO) LIMITED**

**Respondents/Defendants**

**Civil Appeal No. P 214 of 2021**

**Claim No. CV2017-01264**

**IN THE MATTER OF THE TRUSTS CREATED BY A TRUST DEED AND RULES DATED 24TH NOVEMBER 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**

**Appellant/Applicant**

**AND**

**RBC FINANCIAL (CARIBBEAN) LIMITED**

**RBC ROYAL BANK (TRINIDAD AND TOBAGO) LIMITED**

**Respondents/Defendants**

**Panel: V. Kokaram, J.A.**
**R. Boodoosingh, J.A.**

**Appearances:**

**Mr. Terrence Bharath, Ms. Asha A. Watkins-Montserin, Ms. Esther Gaston instructed by Ms. Keisha Kydd-Hannibal for the Appellants.**

**Mr. Jason K. Mootoo instructed by Mr. Adrian Byrne for the Respondents.**

**Date of Delivery: Monday 31 January 2022**

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**JUDGMENT**

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**Delivered by V. Kokaram J.A.**

1. This procedural appeal deals essentially with certain pleadings in a Reply which raised the contention that the Respondents, RBC Financial (Caribbean) Limited and RBC Royal Bank (Trinidad and Tobago) Limited ("the Banks") acted with the RBC Trust (Trinidad and Tobago) Limited ("the Trust Company") as "a single economic unit" in the Appellants'/Claimants' claim for breach of trust[1] and that they "directed and controlled" the Trust Company. The main question that has arisen on this appeal is whether the case management judge was

[1] Both Appellants, Stephen Noel McCarthy and Vesta Dillon (who acts in a representative capacity) instituted separate proceedings for damages for breach of trust. They have been managed and heard together and as in the court below the judgment conveniently deals with both claims in the same judgment.

plainly wrong in granting permission to plead that the Banks directed and controlled the Trust Company but not to plead that they operated as a single economic unit.

2. The Appellants, beneficiaries under the Banks' ESOP[2] plans, argues that the pleading simply clarifies the issues for determination in the claim while the Banks contend that it asserts a new case against them and not properly a reply to new matters raised.

3. Unlike the former Rules of Supreme Court 1975, there is no right to file a reply to a Defence. The conjoint effect of rules 8.6[3] and 10.10[4] of the Civil Proceeding Rules 1998 ("CPR") places the burden on the Claimant to properly set out its case in its Statement of Case. The Claimant may only file a Reply to a defence either with consent of the Defendant before the Case Management Conference ("CMC") or with the permission of the Court. See Rule 10.10 CPR. The expectation is that with the burden on both parties to properly set out their respective cases the need for any further reply will be limited to any new matters that must be addressed by the Claimant. This seeks to further the overriding objective by reducing the costs of litigation, allotting an appropriate share of the parties' resources to the defence or pursuit of the claim and economising the time spent in distilling the issues that need to be resolved or

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[2] Employee Stock/Share Ownership Plan

[3] Rule 8.6 CPR provides:

> **"Claimant's duty to set out his case**
>
> **8.6** (1) The claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies.
>
> (2) The claim form or the statement of case must identify or annex a copy of any document which the claimant considers necessary to his case."

[4] Rule 10.10 CPR provides:

> "**Reply to defence**
>
> **10.10** (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."

adjudicated upon.

4. The Reply therefore must strictly be necessary for the purposes of dealing disjunctively with matters which could not properly have been dealt with in the Statement of Case. It is not an opportunity to restate the claim or as a defence to a defence or to deal with matters which ought properly to have been dealt with in the claim. In other words, there will be no "second bite" at formulating the claim. Any new claim should properly be the basis of an amendment of the claim made at the appropriate time.

5. We are mindful as well that what is required in considering whether a Reply is to be filed is whether to do so will give effect to the overriding objective. That is, is it proportionate; economical; maintains parties on an equal footing; and fair. The case management judge should be afforded some latitude or a margin of appreciation in the exercise of its case management powers and the Court of Appeal will only interfere if the judge was plainly wrong. See **The Attorney General of Trinidad and Tobago v Miguel Regis** Civil Appeal No.79 of 2011.[5]

6. We are also mindful of the critical value of procedural justice underpinning the overriding objective, promoting the values of voice, respect, trust and neutrality within the confines of the rules.[6] However, implicit in the principle of maintaining the parties on equal footing and securing proportionate

[5] In **The Attorney General of Trinidad and Tobago v Miguel Regis** Civil Appeal No.79 of 2011, it was noted:

> "11. The law as to the reversal by a Court of Appeal in Trinidad and Tobago of an order made by a trial judge in the exercise of his discretion is well-established. The appellate court will generally only interfere if it can be shown that the trial judge was plainly wrong. Thus, we may say that unless it can be demonstrated, for example, that the trial judge disregarded or ignored or failed to take sufficient account of relevant considerations or regarded and took into account irrelevant considerations or that the decision is so unreasonable or against the weight of the evidence or cannot be supported having regard to the evidence or that the judge omitted to apply or misapplied some relevant legal principle or that the decision is otherwise fundamentally wrong, the Court of Appeal will not generally interfere with the exercise of a court's discretion."

[6] **Exploring the Role of the CPR Judge**, Justice Peter Jamadar JA and Kamla Jo Braithwaite

responses to matters raised in pleadings, a case management judge will always have to finely balance the need to give voice to litigants, that is, to have their cases articulated with the need to orderly manage the shape and pace of the litigation. They are both important aspects in the duty to afford parties a fair hearing.

7. In essence the Banks contend that the application seeks to introduce an averment that they and the Trust Company operated as a single economic unit in the administration of trust plans which should and could have been dealt with in the statement of case. The Appellants, however, advance that this has only become necessary after the Banks, contrary to their stated position in pre-action correspondence, have now made the point that they are not trustees of the ESOP plans. This has taken them by surprise with a new allegation in their defence. The Banks support the Judge's reasoning for debarring the Appellants from raising this issue for the first time but also contend that any pleadings that they "directed and controlled" the Trust Company is also a new case being made against them.

8. I am of the opinion that the case management judge was not plainly wrong in the exercise of his discretion in shaping the pleaded case of the Appellants. The Appellants' contention of breach of trust is aimed at the Banks. The single economic unit pleading is a new case and in my view it is not even necessary for understanding the true nature of the Appellants' case against the Banks for breach of trust. To dispose of this procedural appeal requires an appreciation of the case as pleaded by the parties inclusive of those portions of the Reply which are not in dispute.

**The Pleaded Case**

9. The Appellants' claim against the Banks for breach of trust concerned two retirement plans. A retirement plan called the Royal Bank Employee

Stock/Share Ownership Plan ("ESOP") was an investment retirement plan which enabled employees of the Banks and its subsidiaries to annually acquire, hold and benefit as co-owners and shareholders of the Banks by the acquisition of stock/shares of the Banks on the local stock exchange. This plan was established by a 1976 Trust Deed. The Appellants contend that the ESOP was expanded in 1984 and the two funding sources were then known as ESOP I which was funded by the employee contributions and ESOP II, the Staff Retirement Bonus Plan ("SRB plan") whereby the Banks annually contributed to the ESOP on behalf of all full-time employees, 10% of each employee's salary as at the end of every financial year of the Bank.

10. The ESOP was governed by a Trust Deed dated 24th November 1976 ("the 1976 Trust Deed") which was amended in 2010. The Appellants contended that under the terms and conditions of the 1976 Trust Deed, the Trust Company, a then subsidiary company of the Banks was appointed Trust Administrator of ESOP to use the contributions to purchase shares for the benefit of the employees.

11. The Appellants contended that the Banks as trustees failed to manage and distribute the accruals in both the ESOP I and ESOP II plans. As a result, the Banks breached the following trust duties owed to them:

    (a) To act in accordance with the trust document and the general law;

    (b) To comply with the terms of the trust;

    (c) To act fairly between the beneficiaries;

    (d) To consider the interests and needs of all of the beneficiaries;

    (e) To ensure that they do not put themselves in a position where their interests conflicted with those of the beneficiaries;

(f) To provide information and accounts to the beneficiaries upon request;

(g) To protect trust assets;

(h) To keep accounts;

(i) To manage the trust fund so as to maximise benefits to its beneficiaries and to ensure that benefits accruing to shareholdings over which they had control were credited to the fund.

12. The Banks in their Re-Amended Defence[7] contended that the ESOP I and ESOP II are separate plans. In relation to ESOP I, the Banks' contended that the Appellants received a payment arising from that plan as of her date of resignation. The Banks denied they were trustees of ESOP. They contended that the Trust Deed named RBTT[8] as sponsor of the Trust, the Trust Company as administrator and certain individuals as trustees. Though the trustees changed over the years, RBTT and FCL[9] were never trustees of ESOP.

13. ESOP II or the SRB plan contrary to the Appellants' assertion, was not a variation or expansion of ESOP. It was part of the terms and conditions of the employment of contract of the Appellants and not a trust but a contractual arrangement without any trust deed. According to the Banks "While the SRB Plan was described as a funding source for "the ESOP", the two plans had different constating documents, did not commingle assets and were operated and audited separately." [10] It was terminated in 2008 and the Appellants received a payment from that plan as of the date of her resignation as well. These were in full and complete satisfaction of all their entitlements under

[7] Filed 9th July 2019
[8] Royal Bank of Trinidad and Tobago Limited. In 2011 Royal Bank Trinidad and Tobago Ltd changed its name to RBC Royal Bank (Trinidad and Tobago) Limited [The 2nd Respondent]
[9] RBC Financial (Caribbean) Limited [The 1st Respondent]
[10] Paragraph 25 of the Re-Amended Defence

those plans.

14. As the Banks were not appointed under the 1976 Trust Deed as trustees of the ESOP there can be cause of action can against them in relation to the ESOP I plan or both plans if it is being alleged that the 1976 Trust deed also governed the ESOP II. I do not understand the Banks however to be saying that there exist trustees appointed by deed to administer the ESOP II plan.

15. In the Reply as it presently stands as permitted to be filed by the case management judge, the Appellants clarified the position with respect to the ESOP I and II plans. However, what was not permitted and is the subject of this appeal is to make a claim that the Banks and the Trustee operated the plan as a single economic unit.

**Procedural History**

16. After the Banks' filed their Re-Amended Defence, the Appellants filed two applications to deal with the allegation in the Re-Amended Defence that pursuant to the terms of the 1976 Trust Deed the Banks were not the trustees of either plan. The first was an application for leave to reply to the Re-Amended Defence, which is the subject of this appeal. The second was an application to join the Trust Company as a party to the proceedings and to make consequential amendments to the statement of case[11] ["the joinder application"].

17. The case management judge dismissed the joinder application from which there was no appeal. In that judgment the Court's main findings were that the application was made after the first CMC and there was no change in circumstances to warrant the amendment. The Appellants would have known about the 1976 Trust Deed which was amended by the 2001 Deed which they

[11] Claimant's Notice of Application for Leave to Reply to the Re-Amended Defence filed 11th December 2019 and Claimant's Notice of Application to Join a Party filed 15th October 2020

attached to their Statement of Case. This new deed recited that the Trust Company was appointed under the 1976 deed therefore the Appellants would have known that the Trust Company was a party to the 1976 deed before filing their pleadings and not when the Defence was filed on 29th March 2019. The Appellants were effectively raising a new case in circumstances where the facts to support the allegation were known to them prior to the filing of their claim.

18. Having failed to amend the claim, the need to make these allegations in the Reply assumed critical significance for the Appellants.

**The Application for Permission to File the Reply**

19. The Appellants have criticised the case management judge for failing to deal with this application before hearing the joinder application as that application was filed first in time. This criticism in my view is unwarranted as the joinder application clearly sought reliefs to adjust the time frames for the filing of a Reply taking into account the need for the Banks to file any amendment in response to the Amended Statement of Case.[12] The case management judge had already formulated a timetable of events which included the filing of a Reply. Prudence therefore dictated that the status of the claim be first established to properly case manage consequential pleadings and vary the

[12] The reliefs sought in the Joinder Application were as follows:

i. That RBC Trust (Trinidad and Tobago) Limited, a company duly incorporated in Trinidad and Tobago under the Companies Ordinance Chapter 31 No. 1 and continued under the Companies Act No. 35 of 1995 Chapter 81:01 with its registered officer at St. Clair Place 7-9 St. Clair Avenue, Port of Spain be joined as a party to these proceedings;
ii. That the Claimant do make the consequential amendments to the Statement of Case arising from the joining of the proposed Third Defendant;
iii. That the Order of the Court for the filing of the application to file Replies be varied to a date and time subsequent to the determination of the issue of joinder and any consequential orders;
iv. Such further order and/or relief that the Honourable Court may deem fit; and
v. That there be no order as to costs.

deadlines for pleadings including any proposed replies. Were the Appellants successful on that application it would have rendered this application otiose.

20. The Appellants' application for permission to file a Reply was based on the grounds that the Re-Amended Defence raised new facts and matters which were not contained in the Statement of Case and which could not have been properly dealt with in the Statement of Case namely that the SRB Plan was not held on trust for the employees and the Respondents are not liable in this action because they are not trustees of the ESOP and SRB plan.

21. In determining the application, the case management judge found that:

    i. The Claimants would have been entitled to reply to the new information that the Trust Company was in fact the administrator of the trust and not the Defendants.

    ii. It was open to the Claimants to plead the extent of the relationship that they allege existed between the Defendants and the Trust Company.

    iii. The claim was not premised on the fact that all three companies acted as one single economic unit so any pleading to that effect was a departure from the case of the Claimants.

    iv. The Claimants on the evidence knew that the Trust Deed appointed the Trust Company as the Trustees and ought to have pleaded same in the Statement of Case.

22. The case management judge disallowed the following parts of the Reply:

    i. Penultimate sentence in paragraph 9 which reads "**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."**

ii. The final sentence in paragraph 11 which reads "**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."**

iii. That portion in paragraph 12 that reads "**having imputed liability for the Trust Company which is under their directive and whole ownership".**

iv. That portion of paragraph 24 that reads "**as a single economic unit with the Trust Company".**

23. The following portions of the draft Reply were allowed:

i. Paragraph 6 the words "**and whose directive and control was under the purview of the Second Defendant".**

ii. Paragraph 9 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."**

iii. Paragraph 9 the words "**under the directive and control of the latter who is".**

iv. Paragraph 11 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".**

**The Issues**

24. This judgment addresses the following issues which arise for determination on this appeal and cross appeal:

    (a) Were the Appellants, by their Reply, attempting to make a new case or merely clarifying the issues that were in dispute by the Re-Amended Defence.

    (b) Whether the issues in relation to the nature of the trustee could only have been gleaned from the 1976 Trust Deed which came to the Appellants' attention after the Re-Amended Defence was filed.

    (c) Whether the ruling was inconsistent in relation to the pleaded relationship between the companies that was permitted in the Reply.

    (d) Whether the case management judge ought to recuse from hearing this matter on the ground of apparent bias.

**Filing a Reply: Principles**

25. In **Blackstone's Civil Practice, 2005** the learned authors noted at paragraph 27.2 that:

> "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. It has always been a cardinal principle of pleading (which has certainly not been altered by the CPR) that a claim should not anticipate a potential defence, (popularly known as "jumping the stile"). Once, however, a defence has been raised which requires a

response so that the issues between the parties can be defined, a reply becomes necessary for the purpose of setting out the claimant's case on that point. The reply is, however, neither an opportunity to restate the claim, nor is it, nor should it be drafted as, a "defence to the defence".

Where the defence takes an 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, (see chapter 31), and not deal with the matter in a reply (PD 16, para. 9.2). Thus where, for example, the particulars of claim contain an error as to the quantity of goods ordered, and the correct quantity is set out in the defence, the error should be corrected by way of amendment, rather than reply."

26. In **First Citizens Bank Limited and Shepboys Limited v David Anthony Sheppard** Civil Appeal No. P231 of 2011 one of the issues which the Court of Appeal had to determine was whether the trial judge was correct to conclude that the claimant could not rely on certain matters pleaded in its Reply because the fact pleaded should have been pleaded in the Statement of Case. Mendonça J.A. made the following observation on the grant of a permission to file a reply:

"22. 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."

27. It is important to note in **Shepboys** that while the court accepted that a claimant need not anticipate a limitation defence in its Statement of Case, it should have set out the nature of the account between the parties in its Statement of Case. Critically, therefore, the Statement of Case must plead all the relevant facts to establish its cause of action. In this case the immediate question that arises is, was it a necessary ingredient to establish liability with the Banks or for the Appellants to constitute their cause of action in breach of trust, to plead the single economic unit argument in their Statement of Case. In my view it was. The single economic unit is not a clarification of any issue but the platform of a new case against the Banks. In any event the concept of a single economic unit to hold a company liable for the actions of others is of doubtful utility in this case.

**A Single Economic Unit: A New Case or the Need for Clarification?**

28. The general well-established principle in company law is that a company is a legal entity distinct from its shareholder and with proper rights and liabilities of its own which are distinct from those of its shareholder. The Banks rely on the well-known authority of **Adams and Ors v Cape Industries Plc and Anor** [1990] 2 WLR 657 to demonstrate that the Court is not free to disregard the separate legal personalities of companies because it is in the "interest of justice to do so". A company in a group of companies is a separate legal entity and if the company chooses to arrange the affairs of a group in a way that its business is carried out by different companies, it is entitled to do so. In **Leonora Deslauriers v Guardian Asset Management Limited** CA P094/2021, Pemberton J.A. in commenting on the fact that a sale of property from the Bank to a Trust company within the same group of companies which was a subsidiary in its holding company was not a sale to itself paid due regard to this long-standing principle of not lightly piercing the corporate veil:

“31. In **Adams and Ors v Cape Industries Plc and Anor**, the Court opined that, ‘There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that "each company in a group of companies … is a separate legal entity possessed of separate legal rights and liabilities:" The Albazero [1977] A.C. 774, 807, per Roskill L.J’. Further,

> Save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of Salomon v. A. Salomon & 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. 37 (emphasis added.)

…….

35. Adapting the dicta in **Farrar v Farrars Limited** to the facts of this case it is clear that a sale by a company to a fellow subsidiary is neither in form nor in substance a sale by one company to itself. To hold to the contrary would be to ignore the axiom, which lies at the root of the legal principle that corporate bodies within a group of companies are distinct from each other unless one of the exceptions set out in Adams v Cape Industries Plc apply. [Footnote 41 The exceptions are: 1. Lack of clarity about a statute or document that would allow the court to treat the group as a single economic entity; 2. Evidence that the group has been set up as a mere façade; and 3. Evidence that the subsidiaries act as agent of the parent company.]

……..

37. Therefore, the trial judge did not err nor was he plainly wrong to find that while GAML and the Trustees are 'inextricably connected' they were not the same. Even within that relationship, the law is clear that they are not one and the same legal entity. Thus, in answer to this issue, we do not find that GAML engaged in a sale to itself. The proposed sale is not tainted as being in contravention of Clause 5 of the 2014 Order."

29. The starting principle in law is that the independent legal personality of a company is not to be lightly ignored simply on the basis that it is a wholly owned subsidiary and they acted together as one. It is difficult to see how the argument even if pleaded in its present form can be successfully argued. The Appellants did not refer us to any authority in which such an argument will have merit.

30. However, **Adams and Ors v Cape Industries Plc and Anor** did leave room for a court to investigate the relationship between companies to determine if in fact one was acting as the agent of the other:

"In deciding whether a company is present in a foreign country by a subsidiary, which is itself present in that country, the court is entitled, indeed bound, to investigate the relationship between the parent and the subsidiary. In particular, that relationship may be relevant in determining whether the subsidiary was acting as the parent's agent and, if so, on what terms. In *Firestone Tyre and Rubber Co. Ltd. v. Lewellin* [1957] 1 W.L.R. 464 (which was referred to by Scott J.) the House of Lords upheld an assessment to tax on the footing that, on the facts, the business both of the parent and subsidiary were carried on by the subsidiary as agent for the parent. However, there is no presumption of any such agency. There is no presumption that the subsidiary is the parent company's alter ego. In

the court below the judge, ante, pp. 703H–704A, refused an invitation to infer that there existed an agency agreement between **Cape** and N.A.A.C. comparable to that which had previously existed between **Cape** and Capasco and that refusal is not challenged on this appeal. If a company chooses to arrange the affairs of its group in such a way that the business carried on in a particular foreign country is the business of its subsidiary and not its own, it is, in our judgment, entitled to do so. Neither in this class of case nor in any other class of case is it open to this court to disregard the principle of *Salomon v. A. Salomon & Co. Ltd.* [1897] A.C. 22 merely because it considers it just so to do."[13]

31. In this case from the outset of the dispute prior to the filing of the proceedings the Appellants were well aware of (a) the independent legal status of companies in a corporate group (b) the trustees of the ESOP I by the 1979 Trust Deed was not the Banks but the Trust Company, a separate legal entity (c) its contention that the Banks were making decisions that affected the Appellants' entitlement to benefits under the ESOP I and SRB plan (d) that the Banks were interfering with the administration of the plans by the trustees. This is evident both in the pleadings and in the correspondence passing between the parties.

32. By way of illustration, the following aspects of the Re-Amended Statement of Case[14] and its attachments are highlighted:

- **Paragraphs 3-5-** The Appellants plead the creation of the ESOP pursuant to the 1976 Trust deed as amended by a 2001 Deed.

- **Paragraph 5-** The Appellants identify the Trust Company as a subsidiary

[13] **Adams and Ors v Cape Industries Plc and Anor** [1990] 2 WLR 657 at 753

[14] The Re-Amended Statement of Case of Vesta Dillon v RBC Financial (Caribbean) Limited and RBC Royal Bank (Trinidad and Tobago) Limited CV2017-01262 filed 27th May 2019

of the Banks appointed as the administrator of the plan.[15]

- **Paragraph 10-** The Appellants plead the operationalisation and administration of the fund by the Trustees.

- **Paragraph 18-** The Appellants are aware of the allegation that ESOP and SRB were two separate plans headed by individual Trustees.

- The 2001 Trust Deed annexed to the Statement of Case amending the 1976 Trust Deed clearly appoints the Trust Company as the trustee of ESOP and outlines its duties and obligations as well as those of the sponsor company.

- The memorandum issued in the 1980s annexed as "B" and "C" outlines the duties and responsibilities of the Trust Company as the trustee of the plan. It identified one of the major responsibilities of the administrator of the plan which was to invest the funds in accordance with the directive of the trustee.

- The circular letter of Exhibit "E" in 1991 explains what the trustees of the plan had agreed to do as distinct from the Banks in the utilisation of bonus units to acquire additional benefits for the employees.

- The role of the trusts, the Trust Company, is further explained in an ESOP manual as exhibit "F" to, among other things, manage the plan in terms of policy. In the document "ESOP and You" it is clearly stated that the ESOP is managed by a Board of Trustees which makes the

[15] Paragraph 5 of the Re-Amended Statement of Case states:

> "Under the terms and conditions of the 1976 Trust Deed the Royal Bank Trust Company (Trinidad) Limited (Trust Company), a then subsidiary company of the Bank was appointed Trust-Administrator of the ESOP to use these funding inflows, which are also called 'contributions' from the Bank to annually and specifically acquire Shares in the Bank and to ascribed proportionately ESOP Unit holdings to each employee-member of the ESOP according to their individual elections, allocations and due payouts.

policy and philosophy decisions which govern the plan.[16] The annual day to day operation is delegated to the official administrators of the Trust Company.

- Importantly, in a letter annexed as "I" from the Trust Company they make it plain that any allegation against them for breach of trust in relation to the SRB plan is misplaced as they are trustees of ESOP. Insofar as the Appellants' dispute relates to the management of the SRB plan, they directed the Appellants to RBTT Financial Holdings Limited. This certainly opens the door for the argument who is the trustee of the SRB Plan, is it not the Banks if it is not the Trust Company? More so, the question is relevant where the Banks have asserted that there is no trust deed establishing the SRB plan but that it was their contractual arrangement with the employees. This certainly is a matter that is best left for trial.

- In a 1999 memo annexed as "J" the note from the Trustee to the employee demonstrate the type of decision making and policy making that engaged the Trust Company when dealing with the members benefits and administering the fund to ensure its solvency.

- The Banks announced by a memo in 2004 of the decision of three entities: the sponsor company RBTT Financial Holdings Limited and the Trustees of the plan the Trust Company and the management committee of ESOP to restructure the plan.

33. Against this backdrop it should have been plain to the Appellants that (a) the sponsor company and the appointed Trustees of ESOP I were not one and the same and always held out and operated as distinct legal entities (b) that the Trust Company as trustees were entrusted with specific duties and

[16] See page 121 of the Record of Appeal filed 2nd November 2021

responsibilities in relation to the management of the ESOP and (c) the Trust Company/trustees' responsibilities and appointment emanated from the 1976 and 2001 Trust Deeds. The latter was in the Appellants' possession and a basic understanding of the 1976 Trust Deed can be gleaned from the circulars issued to the employees.

34. In this state of affairs, the Appellants have formulated its claim for breach of trust against the Banks and not the named trustees of the ESOP I. Paragraph 2 of the Re-Amended Statement of Case is important as it sets out the various reorganisations of the RBTT group over the years.[17] However, it pointedly failed to identify the Trust Company as part of that organisation or to make any plea of the organisation acting as a single economic unit. They have foisted their claims against the Banks as trustees of both the ESOP and SRB (ESOP II) plans.

35. Paragraphs 19, 20 and 21 of the Re-Amended Statement of Case therefore contains the core of the Appellants' case where they set out the obligation of the Banks "as Trustee" of the plan and the breach by the Banks as trustees of their obligations.

36. The careful and deliberate choice of the Appellants in its 70 paragraph Re-Amended Statement of Case was to bring its claim against the Banks as the

[17] Paragraph 2 of the Re-Amended Statement of Case states:

> "2. The First Defendant is a subsidiary of the Royal Bank of Canada. The Second Defendant is a subsidiary of the First Defendant. It began its operations in Trinidad and Tobago initially as The Royal Bank of Canada in 1902. In 1972 it was localized and incorporated as The Royal Bank of Trinidad and Tobago Limited with shares being placed on the local stock exchange. Via the Bank's corporate actions, over the years it had several other business name changes leading to RBTT Bank Limited in 2002 following a re-organization carried under the name of a separate holding company RBTT Financial Holdings Limited in 1998. The Shareholdings of RBTT Financial Holdings Limited were sold in 2008 by way of an Amalgamation Agreement to the Royal Bank of Canada which continued its brand of international banking and finance operations in Trinidad and Tobago under license from the Central Bank of Trinidad and Tobago. The Defendants will be referred to as "the Bank" and are sued as the Trustees of the various employee benefits and retirement Plans as described more fully hereunder."

trustee notwithstanding its knowledge of the group of companies and the Trust Company as part of that group exercising the functions and duties of trustee pursuant to a trust deed.

**The Pre-Action Correspondence**

37. The pre-action correspondence also underscores (a) that the Appellants were aware of the separate and distinct appointment and responsibility of the Trust Company as the trustee of the ESOP I plan and (b) the choice to bring its claim against the Banks alone for breach of trust.

38. Paragraphs 1.19 and 1.20 of the Appellants' pre-action letter reveal that their complaint was with respect to the Banks making decisions regarding benefits payable to employees which was detrimental to them. It also alleged that "our clients as beneficiaries under a Trust operated under the directions of the Bank were entitled as the ultimate owners of the share in ESOP to every benefit…" There was never an allegation that the Banks were the controlling mind in an economic unit or that the Banks and the trustee are to be regarded as one entity. Nothing of the sort is either supported in the documents annexed to the pleadings. Rather, the allegation was that one corporate entity was giving directions to another. In paragraph 4.3 they ask the question "who instructed the trustees to close the plan?" Their litigation guns are therefore pointed solely at the Banks as a separate corporate entity. At paragraph 5.8 of the pre-action letter, they make their case against the Banks as Trustees of the plan.[18]

[18] Paragraph 5.8 of the Pre-Action Letter states:

> "Counsel has further advised that the Bank has not produced any valid reason for refusing to consider claims by our Clients. The Bank is relying on an artificially limitation period as a basis for its position that our Clients' claims are statute barred. These dates comprising this limitation period were chosen by the Bank arbitrarily and illegally. As a Trustee of shares on behalf of all Bank employees as beneficiaries under the Turst, at the very least "Offer Letters" ought to have been sent to all employees as beneficiaries under the Trust. Any failure in this regard would be a fundamental breach of trust by the Bank as Trustee under the Staff Retirement Bonus Plan."

39. At paragraphs 6.3 and 6.6 of the pre-action letter, not only were the Appellants aware of the 1976 Trust Deed appointed trustees but that those trustees acted as "the behest and direction of the bank". It certainly is open for one company to give directions to another but without more that leaves no room to advance a case that the separate corporate entities are to be ignored or that they are mere technicalities and they are to be construed as a single economic unit. It is the Banks' power over the Trustees that appeared to be the focus of the Appellants, not that the Banks and the Trustees acted as one.

40. The letter in response by the RBC Royal Bank (Trinidad and Tobago) Limited dealt with all the allegations made against them for breach of trust in the management of the ESOP II plan. It is noted that the Trust Company was appointed as trustees for ESOP and not the ESOP II plan (the SRB plan). Nothing in the Banks' response can be construed as "waiving" any point that they are not the trustees under the 1976 ESOP created plan. According to the Banks that trust instrument did not govern the ESOP II or SRB Plan therefore, to that extent, the Banks must at least answer the allegations made against them in relation to that plan which they attempted to do. It did not and they need not have said that they are not the appointed trustees of the ESOP I plan. That fact is, based on the analysis above, obvious to all parties in the dispute.

**1976 Trust Deed: No New Fact Raised in the Defence**

41. In the circumstances set out above, the pleadings by the Banks that it is not the appointed trustee of ESOP is not surprising nor is it a new fact. It is entirely consistent with the state of affairs that existed, the knowledge of both parties prior to the claim and the clear terms of the governing deeds, both 1976 and its 2001 amendment.

42. The fact that the Appellants did not have the 1976 Trust Deed prior to the claim is of no moment. The clear knowledge of the terms of the 1976 Trust

Deed appointing separate trustees is enough to demonstrate that the Appellants were at all material times aware that the administration and the control of ESOP was in the care of those trustees and not the Banks.

43. In light of those known facts, it was always open to the Appellants to make the case, as difficult as it may be from the outset, that both the Banks and the trustees operated in tandem together as part of a single economic unit. Instead, it chose to focus on the actions of the Banks directing the trustees to do certain things in breach of trust. This is a matter for the Banks to answer.

**No Inconsistent Findings**

44. In light of this analysis therefore, it will not be inconsistent for the case management judge to restrict the claim to the allegation that the Banks are in breach of trust and not that the Banks and the Trust Company were operating as a single economic unit. In my view, such a contention is (a) not consistent with the pre-action correspondence and the pleadings (b) bears little or no merit in light of the documents and the nature of the case advanced prior to filing the claim; and (c) in any event, irrelevant to the Appellants' case which includes the allegation that the Banks gave directions to the trustee which were in breach of the Banks' fiduciary obligations to the beneficiaries of the ESOP.

45. In my view the Banks have overstated their case when they submitted that the trial judge stated that the claim has been brought against them solely as trustees appointed in relation to the trusts created by the 1976 Trust Deed.[19] While the Banks were not appointed as the trustee of the ESOP plan under the 1976 or 2001 Deed that is not the end of the matter for the Appellants based on their pleadings and the attachments. They have alleged the Banks owe them duties in trust and that they were directing the appointed trustee (where

[19] See paragraph 49 of the Respondents' submissions filed 23rd November 2021

relevant) to act in a manner that was detrimental to them. Furthermore, according to the Banks, with no trust deed establishing the SRB plan or ESOP II, the issue must arise who acted as the trustees for that plan or who discharged trust obligations in relation to the employees of the Bank as the fund's beneficiaries?

46. In light of this there is no inconsistency in the case management judge permitting the Appellants to plead by way of properly clarifying the issues that in full knowledge of the separate legal entity appointed to operate the Trust, the Banks were giving directions and operating a level of control over the Trust Company to be in breach of trust. In the context explained in this analysis, this is not a single economic unit argument which in effect ignores the separate legal personality of companies but is a matter of evidence of the extent to which the Banks assumed trust responsibilities or gave instructions to the trustee which were inimical to the best interest of the Appellants as the Banks' employees and beneficiaries under the trusts.

47. Furthermore, as **Shepboys** quite correctly pointed out once these issues have been crystallised in the pleadings the parties are free in their witness statements to provide further particulars of their allegations. It is only then that in some cases the parties will truly appreciate the full extent of the respective claims, their merits or weaknesses.[20]

[20] In **First Citizens Bank Limited and Shepboys Limited v David Anthony Sheppard** Civil Appeal No. P231 of 2011 Mendonça J.A. noted:

> "40. But it does not follow from the fact that the claimant cannot rely on the reply that that is the end of the matter and there is no answer to the limitation plea. 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. **In East Caribbean Flour Mills Ltd v Boyea** (St Vincent and The Grenadines, Civil Appeal No. 12 of 2006) Barrow JA (as he then was) said;
>
> > " 45. However, I am firmly of the view that additional instances or particulars of a sufficiently made allegation do not constitute a change in the statement of case.

**A Premature Allegation of Bias**

48. The allegation by the Appellants that the case management judge in making certain statements at the CMC demonstrated a closed mind and pre-determined this case is premature. The proper course for the Appellants to make such an allegation is to make a formal application for recusal to the case management judge. See **Cherry Ann Rajkumar v Southern Medical Clinic and others** Civil Appeal No. Ca S-192/2019:

> "36. Ms. Rajkumar helpfully referred to a recent Caribbean Court of Justice (CCJ) judgment on recusals of **Walsh v Ward and others** (2015) 87 WIR 101. The learning is consistent with that of our Courts…..
>
> 37. First it sets out the procedure for making an application for recusal.

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> 46. If a party alleges misconduct of a certain nature, say misappropriating funds by making false entries in an accounting record, and gives 5 instances of false entries, and a closer look at document reveals a 6th false entry I see no reason why the party should be prevented from giving particulars of it in his witness statement, provided the requirements of fairness have been satisfied and there has been no abuse of process or other disentitling conduct. I emphasise the distinction between changing a statement of case and supplying particulars to say I expect the courts will be keen to ensure that the one does not masquerade as the other. Decisions will be made on a case by case basis."

41. These paragraphs were cited with approval by the Privy Council in **Charmaine Bernard v Ramesh Seebalack** [2010] UKPC 15. The Board having referred to the paragraphs went on to say:

> "If a statement of case contains allegations which are 'sufficiently made' (so that it satisfies the requirements of Part 8), there is no need to amend it in order to provide particulars. These can be provided by way of further information or in the form of a witness statement. But for the reasons stated earlier, in the present case the statement of case should have included a short statement of the heads of loss that were being claimed. This could have been amplified by further information and/or in the witness statements."

These observations were made in the context of the interpretation of rule 20.1 (3) which deals with changes to statements of case. But they do show that an allegation if sufficiently made may be particularized or "amplified" in a witness statement or by further information.

42. In this case the allegation that the principal debtor defaulted in the payments due from it is sufficiently made. The claimant could therefore have given in a witness statement particulars of the payments made so as to establish the default of the principal debtor and on which he could rely to attempt to rebut the respondent's plea of limitation……."

Such an application should have been made to the panel that made the decision:

> "When Counsel wishes to allege that a member of the Court of Appeal is disqualified by reason of bias or an appearance of bias, if possible, an application should first be made to the individual judge or judges to recuse. This should be a summary application made in Chambers before, and determined by, the judge concerned. If the judge opts to recuse then s/he must naturally be replaced. If the judge denies the application, then it may be renewed in open court before the entire appellate panel. The renewed application must be a formal procedure and must be supported by an affidavit setting out in full the material supporting the recusal. The renewed application must be heard and determined by the entire appellate panel prior to the hearing of the underlying substantive appeal. If the panel unanimously rejects the application, the panel may proceed to hear the substantive appeal unless counsel indicates an intention to seek special leave to appeal to this court. Reasons in writing denying the application for recusal must be given as soon as possible and no later than the time when the judgment on the substantive matter is delivered. Where convenient, the two judgments may be rolled into one. If, on the hearing of the renewed application, a member of the appellate panel agrees that the application should succeed, then that panel may not hear the substantive appeal. The appellate panel must forthwith be reconstituted so as to exclude the challenged judge(s). A litigant who is dissatisfied with the order made on the application to recuse, may file an application before this court for special leave to appeal and the filing of that application will operate as a stay on the hearing of the merits by the Court of Appeal. For this reason,

the dissatisfied litigant should lodge the application for special leave quickly, within at most one week. This court will deal swiftly with such applications."

49. Applications to recuse should not be made lightly and the case management judge has a duty to sit and hear matters allocated to the judge. With this comes the duty to observe the tenets of procedural justice and to give consideration to proper applications for recusal.[21] In **Locabail (UK) Ltd v Bayfield** [2000] QB 451, [2000] 1 All ER 65, [2000] 2 WLR 870[22] it was noted that a determination of apparent bias is fact specific and the "expressed views" of the judge "particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see Vakauta v Kelly (1989) 167 CLR 569)" may give rise to a real danger of bias.

50. I do not wish at this stage to make any judgment on the language used by the case management judge as the issue of whether he ought to recuse should first be determined by that judge. The parties are reminded, however, that case management judges are not "silent sphinxes" and an important aspect of giving effect to the overriding objective is to explore the nature of the respective cases to distil the issues that must be resolved and how they are to be disposed of whether through adjudication or some other forms of resolution. They are to expect "robust" case management. Equally, in our docketed system the case management judge must always walk the fine line between robust case management and observing the basic requirements of procedural justice.

[21] See **Basdeo Panday v Senior Superintendent Wellington Virgil** Mag. App. 75 of 2006, per Warner J.A., page 25
[22] Paragraph 25

**Conclusion**

51. Both the appeal and the cross appeal therefore are dismissed. The case management judge has not been shown to be plainly wrong in his approach to the contested parts of the Reply. He applied the correct principles in relation to the filing of a Reply and the portions of the Reply allowed and rejected are entirely consistent with the case advanced by the Appellants.

52. We will hear the parties on costs but it will appear, subject to the submissions to be entertained from the parties on this issue, that the general rule is where both parties were unsuccessful on their respective appeals, they should each bear their own costs.

**Vasheist Kokaram**
**Justice of Appeal**

**Delivered by R. Boodoosingh J.A.**

53. I agree with my learned colleague that both the appeal and cross-appeal should be dismissed. I wish to add a few observations about this case.

54. According to **Blackstone's Civil Practice**, a reply may deal with:

- A necessary response to a pleaded fact in the defence,
- Which could not or ought not to have been dealt with in the statement of case,
- Bearing in mind that the statement of case is not expected to anticipate the defence or "jump the stile".

55. The reply is not to restate the claim. It is confined to what is necessary to place relevant facts before the court. The court's discretion to permit a reply is to

be applied consistent with the overriding objective, that is to say, proportionately to achieve a fair and just result. Pleadings are there to focus the parties and the court on the issues for resolution.

56. When the pleadings in this case are interrogated, the crux of the issue for determination is whether there was a surplus of the stock / pension plans which the claimants/appellants (appellants) contributed to and were to be beneficiaries of. These plans were run by their employers, the defendants/respondents (respondents). If there was a surplus, the question is what was the amount of the surplus and are the appellants entitled to benefit from it. The reliefs are essentially declaratory and for an account. This is the case even though there are pleaded facts of a breach of the trust obligations by the respondents.

57. At paragraphs 13 to 15 of the defence it is contended that the respondents were never the trustees of the plans and therefore the claim was wrongly brought against them. The respondents pleaded that the Trust Company was the administrator.

58. Previously, the appellants had communicated with the respondents for several years about the plans. They say they were never told that their enquiries were misdirected.

59. The appellants sought to put in a reply in response to this defence stating two main things:

    i. The respondents directed and controlled the Trust Company and are therefore liable for anything the Trust Company did.

    ii. The respondents and the Trust Company operated as a single economic unit for all intents and purposes. Therefore, the respondents are in any event liable.

60. The judge allowed those aspects of the reply which pleaded “directed and controlled”, but excluded the part stating the entities “operated as a single economic unit”.

61. Both of these matters are mixed law and fact issues, whether there was direction and control (primarily factual) and whether they operated as a single economic unit (factual and legal).

62. The appellants want the entire reply to go in. The respondents want both aspects to be excluded. The appellants filed their application for the reply before they had filed an application to add the Trust Company as a party. The application to make the Trust Company a party was resisted by these respondents. The judge ruled that the Trust Company should not be made a party.

63. The significance of the contents of the 1976 Trust Deed which provided for the role of the Trust Company, was brought out in the Defence filed 29 March 2019 as a formal pleading. This, according to the appellants, was the first occasion that the respondents asserted they were not liable on the basis that they were not the trustees. The Trust Deed illustrates the intertwined relationship.

64. When the pleadings of the appellants are read as a whole, their case is that the respondents are responsible for all actions relating to the plans and specifically to account for the plans. These plans were part of their terms or benefits of employment with the respondents. The primary relationship of the appellants was with the respondents, not with the Trust Company. Their employment contracts were never with the Trust Company.

65. If the respondents chose to have a relationship with the Trust Company for efficiency of operations or other reasons, this does not affect the appellants’ entitlement to claim against the respondents.

66. The appellants' pleadings are replete with references to the Bank and the administrators, what was done and their roles. The responsibility of the respondents is, however, put at the centre of the case. There was reference in the statement of case to the 1976 Trust Deed. The focus of the case remained the issues of the surplus, entitlement and quantum. It is not a new case, therefore, to say the respondents directed and controlled the Trust Company. The judge allowed this part of the reply. From a practical perspective, if the appellants cannot prove that the respondents directed and controlled the Trust Company, they will be unable to prove the single economic unit case. In my view, it is not so much that the single economic unit case is a new one, but rather that it is an unnecessary one to the substantive relief that the appellants seek. From this perspective, it is, in my view, unnecessary to disturb the judge's ruling in not permitting the single economic unit case to be made in the reply. The judge is seized of the case and can manage it effectively to get to a resolution of the core of the relief being sought.

67. The appellants are not prejudiced by not being allowed to run their single economic unit case nor are the respondents being made to meet a new case of the Trust Company being directed and controlled by them.

68. There had been some years of pre-trial correspondence among the parties – these may show that the respondents were responsible for the actions of the Trust Company (see letter dated 7 March 2007, Braithwaite letter, among others). There were also communications sent by the Bank to employees about the plan. These documents may help the judge to resolve the issue whether the respondents directed and controlled the Trust Company. The Trust Deed itself also provided that the administrators were to act in accordance with the directions of the company.

69. In my view, the judge ought not to have said that the reply was an attempt to "slip in a new claim through the back door" as the reply application pre-dated

the joinder application by almost a year. The claim remained for an account of any surplus of the plans. The reply was simply a clarification or explanation in light of respondents' defence to the appellants saying the respondents were liable.

70. Context is important. The pleadings are aimed at obtaining an account of the plans. Getting an account being the focus, the appellants are entitled to seek this from their employers, with whom they had a contractual relationship. Liability of the Trust Company is to my mind a bit of a red herring in this case. Put another way, whether or not the Trust Company was the administrator of the Trust does not affect whether the appellants are entitled to accurate information about the plans from the respondents. Whether they are entitled to benefit from any surplus is also an issue for the trial unaffected by who administered it. Who were the administrators is a different question as to who is liable to give an account of the operation of the plans to the appellants.

71. The trust breaches alleged are in relation to what the respondents may have done by themselves or in directing and controlling the administration of the trust. When carefully looked at, the allegations of breaches are not central to whether there are surplus funds, the amount of funds, and if the appellants are entitled to benefit from those funds. The alleged breaches and the respondents' answers to those allegations are part of the factual matrix of the case but the core issues remain what they are. Whether there were breaches or not, the appellants would be entitled to an answer to these three issues identified.

72. In light of the history of the apparent relationship among the parties and the contentions of the respondents in and out of court, it would allow for a fair, just and proportionate resolution of the issues to allow the claimants' reply as decided by the judge to stand. The factual history of the relationship among the parties is stated in detail in the respective statements of case. The reply

responds to the contention of the respondents on whether the claim should be permitted against the respondents. The appellants could not reasonably be expected to anticipate the defence contention. The respondents having made this an issue, the necessity for the reply arises.

73. In the application to join a party the respondents had submitted that the Trust Company was not a necessary party. Having resisted the appellants' application to join the Trust Company it seems unfair to the appellants for the respondents to now submit that the claim was wrongly brought against the respondents. Someone must be responsible for accounting to the former employees of the respondents and fairness suggests it should be these respondents to do so.

74. I am also of the view that there is no prejudice to the respondents. Ultimately, the appellants have to make their case that some relief should be granted against these respondents. The judge may permit the respondents a rejoinder should he consider it necessary so the factual and legal disputes can be addressed at trial.

75. Finally, I agree with my learned colleague that the recusal point has no legs. An application ought first to have been made to the judge. In any event, there is nothing in the exchange which suggests the judge has pre-judged the issues. The judge's invitation to the parties to talk is the normal interaction that a judge being well-seized of the contents of a claim is expected to have with the parties or attorneys. The judge had dealt with other applications before, had cause to carefully review the pleaded cases and in accordance with his case management powers was entitled to make the comment he did. Even if a judge expresses a view at a preliminary stage of a case is no reason to suppose that after all the evidence is put forward and submissions that he will not address the case on the merits at that stage. Judges change their minds or can

be persuaded to. More than what the appellants identified is necessary to reach the threshold to ask the judge not to continue with this case.

76. I therefore join with my learned colleague in dismissing both the appeal of the appellants and the cross-appeal of the respondents and remitting this case for further management by the judge. I thank the attorneys on both sides for their spirited, and as usual, helpful submissions.

**Ronnie Boodoosingh**
**Justice of Appeal**