

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**CV No. 260 of 2012**

**BETWEEN**

**EGBERT LEON SMALL**

**CLAIMANT**

**AND**

**CALVIN BOYCE  
(Acting herein as the  
Executor of the Estate  
of Ursula Small)**

**DEFENDANT**

**Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.**

**2019: November 27**

**Mr. Desmond D. Sands and Mr. Damien Sands, Attorneys-at-Law for the Claimant.**

**Ms. Vonda Pile, Attorney-at-Law for the Defendant.**

## **DECISION**

### **Introduction**

[1] Two applications are before the Court in this matter. The first application by the Claimant is for the affidavit filed by the Defendant to be struck out

pursuant to Rule 26.3 of the Supreme Court (Civil Procedure) Rules, 2008, (“the CPR”). The Claimant is also seeking wasted costs. The second application by the Defendant prays for leave to amend the said affidavit.

### **Background**

- [2] Ursula Small (“the Deceased Wife”) was married to the Claimant at the date of her death on 03 January 2011 at the age of 91 years. They were married on 17 April 1965, and resided at the matrimonial property at Warners Gap, Villa Road, Brittons Hill, St. Michael.
- [3] Subsequent to the passing of his Deceased Wife, the Claimant discovered that she had made a will dated 19 April 2010, about nine months prior to her death. The Defendant is the Executor of the will, and he applied for a grant of probate. The Claimant filed a caveat on 09 March 2011, and entered an appearance to warning on 26 August 2011.
- [4] The will provides as follows:

“THIS IS THE LAST WILL AND TESTAMENT OF ME URSULA SMALL of Warners Gap Villa Road Brittons Hill in the parish of St. Michael in this Island:

1. I HEREBY REVOKE all former Wills and Testamentary dispositions heretofore made by me and declare this to be my last Will and Testament.
2. I APPOINT CALVIN BOYCE of Orange Hill Jackman Alley in the parish of Saint St. (sic)

James to be the Executor of this my last Will and Testament.

3. I DIRECT that all my just debts funeral and testamentary expenses be paid as soon as possible after my death out of my estate.
4. I GIVE DEVISE AND BEQUEATH my dwelling house situated at Warners Gap Villa Road, Brittons Hill St. Michael which is tenanted by Peter Burgess and Linda Edwards to CALVIN BOYCE.
5. I GIVE DEVISE AND BEQUEATH my dwellinghouse situated at Warners Gap, Villa Road, Brittons Hill, St. Michael which is tenanted by Ms. Sobers to CAROL SAYER.
6. I GIVE DEVISE AND BEQUEATH my dwellinghouse which is currently occupied by myself and my husband to EGBERT SMALL.
7. I GIVE DEVISE AND BEQUEATH my dwellinghouse situate at Warner (sic) Gap, Villa Road, Brittons Hill, St. Michael which is tenanted by Deborah Clarke to MEREDITH CLARKE.
8. All the residue of my real and personal property whatsoever and wheresoever situate I give devise and bequeath to CALVIN BOYCE absolutely”.

[5] The will is witnessed by two persons, including counsel for the Defendant.

[6] The Claimant commenced this suit by a fixed date claim form filed on 22

February 2012. An amended fixed date claim form and amended supporting

affidavit were filed on 15 October 2013. The Statement of Claim requires the Court to:

1. declare that the Claimant has a legal right to a one half share in the estate of the Deceased Wife;
2. declare that he has joint ownership in law or equity to the properties at Warners Gap, Villa Road, Brittons Hill, St. Michael; and
3. grant such further or other relief as the Court deems fit.

[7] The Statement of Claim and the amended affidavit set out the basis of the claim to one half of all the properties mentioned in the will, and to a further one half of the remaining interest of the Deceased Wife. The Claimant also admitted in the amended affidavit that during the marriage he had filed for a divorce from the Deceased Wife.

[8] Although a Statement of Claim was filed by the Claimant, the Defendant responded by affidavit filed on 14 January 2014. He did not file a Defence or Counterclaim. The Court accepts his January 2014 affidavit as his defence or statement of case. Counsel for the parties proceeded to trial on the basis of the affidavits filed and the witness statements tendered on behalf of the Claimant. There was one other affidavit filed on 14 January 2014 by Meredith Clarke on behalf of the Defendant. Ms. Clarke is a beneficiary under the will of the Deceased Wife.

[9] Pursuant to an order of Kentish J, made on 17 April 2014, a Statement of Agreed Facts and Issues was filed by counsel for the Claimant on 07 August 2014. The issues raised in the Statement are whether:

1. the Claimant is beneficially entitled to one half share of the various properties in his own right;
2. the Claimant is entitled to a one half share in the estate of his Deceased Wife pursuant to the Succession Act;
3. the failure of the Claimant to exercise his right of election within the prescribed six months affected his entitlement to a share in the estate of the Deceased Wife; and
4. the Claimant is excluded from succession based on the fact that upon his admission he was living apart continuously for a period of five years or more immediately preceding the date of death of the Deceased Wife, and is therefore precluded from taking any share in her estate as a legal right or on intestacy.

[10] The Claimant was 91 years of age when he filed this administration claim. (See Part 67 of the CPR). Given his advanced years and his hearing challenges, the matter was expedited for trial which commenced on 28 January 2015. On the adjourned trial date of 13 February 2015, counsel for the Claimant submitted to the Court that the Defendant's pleadings did not

raised any issues to challenge the claim. He urged the Court that, in all the circumstances, the Defendant's affidavits should be struck out. Counsel for the Defendant conceded that the Defendant's pleadings did not join issue with the claim. The matter was further adjourned to allow the parties to discuss a possible consent order.

[11] There was no resolution of the matter between the parties. The Claimant filed a Notice of Application to strike out the Defence on 30 March 2015. It was submitted that on its face the Defendant failed to establish a Defence against the Claimant that is sustainable in law.

[12] Also on 30 March 2015, and within three hours of the filing of the Claimant's application, the Defendant filed his own application. He sought leave to amend his affidavit filed on 14 January 2014 by adding the following paragraphs:

“16a – That the Claimant on the 11<sup>th</sup> January 2010 filed an Application for Dissolution of Marriage and swore at paragraph 11 of that document as follows:

“The matrimonial relationship between the parties broke down in or about the year 1986 and although the parties continued to live in the matrimonial home they have lived separate and apart from the above date”.

16b - That the Claimant on the 24<sup>th</sup> February 2010 filed an Answer in which he swore at paragraph 3 as follows:

“As to paragraphs 4, 5 and 6 thereof, the applicant states as follows:

Even though we lived under the same roof we slept in different bedrooms. Sexual intercourse between us ceased in or about the year 1986 and even though it was unbearable, I decided to continue living a lie in the presence of friends and acquaintances because I was a Reverend...The Respondent has not washed or pressed my clothes for about eight years.....”.

16c - That I join issue with the Claimant in his statement of claim and affidavit.”.

- [13] The sole ground offered for the Defendant’s application was that his case would be seriously prejudiced if the amendments were not permitted by the Court.

### **The Strike Out Application**

- [14] Rule 26.3 of the CPR provides that:

“The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court.....

(b) that the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending the claim;”.

- [15] Rule 26.3 (b) is similar to Rule 3.4(2) of the CPR of England which states that:

“The court may strike out a statement of case if it appears to the court –

(a) that the statement of case discloses no reasonable ground for bringing or defending the claim”.

[16] Referring to the provision in England. Professor Stuart Sime writes that:

“...On hearing such an application it will be assumed that the facts alleged are true (**Morgan Crucible Co plc v. Hill Samuel and Co Ltd [1991] Ch 295** *per* Slade LJ)....

A number of examples of statements of case open to attack under CPR, r3.4(2)(a) are given by PD 3A. A claim may be struck out if it sets out no facts indicating what the claim is about (eg. A claim simply saying it is for ‘Money owed £5000’), or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognizable claim against the defendant. A defence may be struck out if it consists of a bare denial or otherwise fails to set out a coherent statement of facts, or if the facts it set out, even if true, do not amount in law to a defence of the claim.

A cause of action that is unknown to the law will be struck out; as will, subject to the court giving permission to amend, a statement of case that omits some material element of the claim or defence. A statement of case ought also to be struck out if the facts set out do not constitute the cause of action or defence alleged, or if the relief sought would not be ordered by the court. A defence may be struck out if it does not answer the claim being made.

Striking out may be refused in developing areas of law (**Brooks v Commissioner of Police for the Metropolis [2005] 1 WLR 1495**), and will be

refused if the application requires minute and protracted examination of documents (**Wenlock v. Maloney [1965] 1 WLR 1238; Three Rivers District Council v. Bank of England (No 3) 2 AC 1**). Judges often apply the test of whether the claim is bound to fail, so that even a case ‘fraught with difficulty’ will not be struck out (**Smith v. Chief Constable of Sussex [2008] PIQR 12**). On the other hand, the documents may make it plain that there is no case. In **Taylor v. Inntrepreneur Estates (CPC) Ltd (2001) LTL 31/1/01**, the claimant brought a claim seeking a declaration that a lease agreement had come into force, damages for breach of the lease, and damages for misrepresentation resulting from having entered into the alleged lease. On the documents it was clear that throughout the parties had negotiated on a ‘subject to contract’ basis. It was held that as no written agreement had been signed, no lease had been entered into. It follows that there were no reasonable grounds for bringing the claim”. (In “A Practical Approach To Civil Procedure”, 22<sup>nd</sup> ed., 2019 at paras.30.16-30.19. See also Gilbert Kodilinye and Vanessa Kodilinye, “Commonwealth Caribbean Civil Procedure”, 4<sup>th</sup> ed., 2017 at pages 204-206 and the regional cases referred to therein).

[17] Striking out is viewed as a severe measure that a court should exercise with extreme caution. In **S &T Distributors Limited et al v. CIBC Jamaica Limited et al, SCCA 112/04, decision dated 31 July 2007**, Harris J.A. opined that:

“The striking out claim is a severe measure. The discretionary power to strike out must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into

consideration the probable implications of striking out and balance them carefully against the principle as prescribed by the particular cause of action which is sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases”. (See also **Sebol Limited v. Selective Homes & Properties Limited et al, Sup. Ct. Ja., Civ. Ap. No.115/2007, decision dated 12 December 2008 at para. 26 of judgment; and Victor Hyde v. E. Phil & Son A.S. Ltd [2015] JMSC Civ. 150**, per Anderson KJ at para. [9]).

[18] In more recent times, this cautious approach was disavowed by a Master in England. Referring to the arguments of one counsel, Master Shuman stated that –

“Mr. Mould submits that these examples confirm that the jurisdiction under r.3.4(2)(a) is only to be exercised in an extreme case. He says that approach accords with the emphasis in the authorities that the Court should only strike out a claim ‘in plain and obvious cases where the court can be certain that the claim is bound to fail’; **Oysterware Ltd v. Interior Ltd [2018] EWHC 611 (Ch)** at paragraph 40. I do not accept the gloss placed upon CPR 3.4 (2)(a) by Mr. Mould, that it may only be used in “an extreme case”. I go back to the rules and specifically the test for strike out set out in CPR 3.4 (2)(a) “that the statement of case discloses no reasonable ground for bringing the claim”: that is the test to be applied”. (In **Capita Pension Trustees Limited et al v. Sedgwick Financial Services Limited et al [2019] EWHC 314 (Ch)** at para.10).

[19] In Jamaica, David Batts J. pointed in the direction taken by Master Shuman as far back as 2013. He was of the view that:

“[10]....when the rule refers to “reasonable grounds” for bringing a claim it means nothing more or less than that the claimant has disclosed in the pleading that he has a reasonable cause of action against the defendant. He does this by pleading facts supportive of the existence of a cause of action or defence as the case may be....

[11] I doubt that the new rule invites any further examination than an examination of the statements of case to ensure that the facts as alleged support a reasonable cause of action against a defendant. It seems to me that the new wording more accurately reflects the approach the courts took to the interpretation and application of the old rule....

[12] It is therefore my respectful view that on an application such as this, the court is to examine the pleadings to determine whether the facts alleged establish a reasonable cause of action or defence....

[13] In this case, I have considered the submissions of the parties and the relevant pleading. The defence which is being challenged is rather inelegantly pleaded. Paragraph 2 for example states “it is submitted”, and submissions clearly have no place in pleadings. Nevertheless, the allegations in the defence are sufficiently clear and if adequately supported by evidence which is accepted by a court at trial can afford a defence to the claim and establish a valid counter claim”. (In **City Properties Limited v. New Era Finance Limited** [2013] JMSC CIVIL 23. This approach was adopted by Anderson KJ in the **Hyde** case (supra.

at para. [17], where the learned Judge stated at para. [15] that: “...this court has paid special regard to the issue as to whether, when considered in the context of the claimants’ consolidated claims against them, the 2<sup>nd</sup> defendant’s defence is one which can constitute, as a matter of law, a valid and reasonable defence to such claims. This is precisely the approach adopted by my brother judge – Mr. Justice David Batts, in a similar legal context [in the **City Properties** case]”.

[20] The **City Properties** case also emphasized that clumsily drafted or “inelegant” pleadings do not indicate necessarily that there are no reasonable grounds for either a claim or a defence. However, pleadings may be struck out if they are unnecessarily vague and incoherent. (**Towler v. Wills [2010] EWHC 1209 (Comm)** ).

[21] CPR 1.2 exhorts this Court to give effect to the overriding objective when interpreting the Rules, or exercising any power under the Rules. Therefore, any consideration of the Claimant’s application should also be guided by the overriding objective in Rule 1.1 of the CPR, which provides that:

“(1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing justly with a case includes, so far as is practicable,

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

- (c) dealing with the case in ways which are proportionate to
  - (i) the amount of money involved;
  - (ii) the importance of the case;
  - (iii) the complexity of the issues; and
  - (iv) the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".

[22] This is how Conteh CJ underscored the importance of the overriding objective in a striking out application:

“It is important to bear in mind always in considering and exercising the power to strike out, the court should have regard to the overriding objective of the rules and its powers of case management. It is therefore necessary to focus on the intrinsic justice of the case from both sides; why put the defendant through the travail of a full blown trial when at the end, because of some inherent defect in the claim it is bound to fail, or why should a claimant be cut short without the benefit of a trial if he has a viable case?”. (**Belize Telemedia Ltd. et al v. Magistrate Usher et al (2008) 75 WIR 138** at para. [20]).

[23] The question which this Court is called upon to answer is whether the Defendant's statement of case discloses any reasonable grounds for defending the claim. But first the Court has to ascertain the extent of the

Claimant's case, as this is the context in which the defence will be evaluated.

- [24] The assumption that the facts alleged are true, applies to both the Claimant's and the Defendant's statement of case. (**Hyde v Steward**, supra, at para.[10] of judgment). The Claimant did not challenge the testamentary capacity of the Deceased Wife. His case is that the Deceased Wife was not entitled to a 100 percent share in the properties, which she sought to dispose of in her will, because he had a 50 percent interest in those properties. Additionally, the claim is for another 50 percent in the remaining assets of the Deceased Wife.
- [25] The claim was buttressed by a statement of claim and a lengthy affidavit in support. The Claimant contends that all the properties mentioned in the will of his Deceased Wife were built by him on a piece of land that she owned at the time of their marriage in 1965. He says that he used his own money and his skills as a contractor to build all the houses. He even sold his house, and used the funds to assist with the construction of one of the matrimonial houses.
- [26] The properties were rented out with the exception of the matrimonial home. The Claimant and the Deceased Wife each collected rental income at various times until she died. However, the sharing of the rental proceeds became a source of discord between them.
- [27] The Claimant and the Deceased Wife lived together in the same home from

01 July 1959 until her death on 03 January 2011. The first limb of his claim is for a one half interest in all the properties. It is based on a very long marriage of approximately fifty-one years, and his contributions to the building and conservation of the houses. In his Witness Statement filed on 15 May 2014, the Claimant annexed a letter in which the lawyer for the Deceased Wife was informed that the properties were jointly owned. (See Exhibit ES3 annexed to Witness Statement). Certificates of Registration for three of the houses were issued by the Department of Inland Revenue in the joint names of the Claimant and his Deceased Wife. (Exhibit ES2 to Witness Statement).

[28] Neither his Statement of Claim nor the supporting affidavit mention that on 11 January 2010, the Claimant applied to the court for the dissolution of the marriage. The reason given for that application was that the marriage had broken down irretrievably in or about the year 1986. This was revealed in his Witness Statement. (paras. 134-145).

[29] The second limb of the claim is that the Claimant is entitled to one half of the Deceased Wife's 50 percent interest in the properties. The contention here is that the Succession Act, ("Cap.249") gives him a legal right to this half share in her 50 percent interest. (See S.93(2)).

[30] The Claimant's case is built on two legal pillars which are clearly laid out in

his various pleadings. The Defendant was therefore required to concede to the Claimant, or to challenge the claim through his defence. In **Towler v.**

**Wills [2010] EWHC 1209 (Comm)**, Teare J commented that:

“18. The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he **will** not, or may not, be able to do any of those things. Time and costs **will**, or may, be wasted if the defendant seeks to respond to a vague or incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case in a manner which saves unnecessary expense. For these reasons it is necessary that a party’s pleaded case is a concise and clear statement of the facts on which he relies”.

[31] These comments apply equally to the Defendant’s statement of case. The Defendant filed an acknowledgment of service on 12 December 2013, and indicated that he intended to defend the claim. His statement of case is contained in the affidavit filed on 14 January 2014. The affidavit details how the Defendant met the Deceased Wife and began working for her and the Claimant. Nowhere in this affidavit does the Defendant take issue with any of the claims made by the Claimant.

[32] The Defendant does not deny that the Claimant has a 50 percent interest in the properties. The companion affidavit filed by Meredith Clarke asserts that the Deceased Wife was a landlord in her own right before she married the Claimant. Clarke does not deny that the Claimant built the houses; or that over the years he contributed his own resources to the marriage and the conservation of the houses; or that he had a 50 percent or any interest in the properties.

[33] The facts set out in the two affidavits are assumed by this Court to be true. However, these facts do not answer the claim to 50 percent of the properties. There is no allegation that during her lifetime the Deceased Wife refuted the assertion from the Claimant's lawyer that the Claimant had a half share in the properties. (See para.[27] supra). The Defendant's statement of case does not disclose any reasonable grounds for defending the first limb of the claim.

[34] With respect to the second limb of the claim, again there is no specific denial of the Claimant's right to one half of the estate of the Deceased Wife. There is no reference in the Defendant's statement of case to a separation or estrangement between the Claimant and the Deceased Wife. There is mention that they "started going through problems" at paragraph 10 of the Defendant's affidavit. But again this is not an allegation of a separation for a specific or any period of time. Meredith Clarke's affidavit is silent on this

issue.

[35] Cap.249 makes provision for the share of the estate of a deceased spouse to which the remaining spouse is entitled, either on testacy or intestacy. The sections relevant to this case enact as follows:

“93 (2) If a testator dies leaving a spouse and no such child as is mentioned in subsection (1), the spouse shall have a right to one-half of the estate.

94 The spouse’s legal right under section 93 shall have priority over other devices, bequests and shares on intestacy.

97 (1) Where under the will of a deceased person who dies wholly testate, there is a devise or bequest to a spouse, the spouse shall elect within six months of the probate of the will to take either the devise or bequest or the share to which he is entitled as a legal right.

(2) In default of an election under subsection (1), the spouse shall be entitled under the will, and shall not be entitled to take any share as a legal right.

.....

(6) The personal representative shall notify the spouse in writing of the right of election conferred by this section; but the right shall not be exercisable after the expiration of 6 months from the receipt by the spouse of such notification or from the first taking out of representation of the deceased’s estate, whichever is later.

102 (4) Where a husband and wife have

ceased to cohabit with each other and have been living apart continuously for a period of 5 years or more immediately preceding the date of death of either of them, the survivor shall be precluded from taking any share in the estate of the deceased as a legal right or on an intestacy”.

- [36] Absent from the Defendant’s statement of case is any pleading that:
1. as executor of the will he notified the Claimant in writing of his right of election; or
  2. the Claimant, having been informed in writing of his right of election, failed to elect within the time specified by Cap.249; or
  3. having failed to elect the Claimant is entitled under the will, and is not entitled to a share in the estate of the Deceased Wife as a legal right; or
  4. the Claimant is not entitled to any share in the estate of the Deceased Wife as a legal right because they ceased to cohabit for a period of five years or more prior to the date of death of the Deceased Wife.

[37] The Agreed Statement of Facts and Issues filed in this matter does raise some of these issues. (See para.[9] supra). Therefore, the Claimant would not have been surprised when counsel for the Defendant attempted to cross examine him about the cessation of cohabitation between the parties. It was at this juncture that counsel for the Claimant took objection as the issue was not raised in the defence. Counsel for the Defendant conceded the point,

however, the parties were unable to resolve the matter during the adjournment granted for that purpose. It is to be noted that on 14 March 2013, Kentish J also adjourned the matter to allow the parties to negotiate a settlement.

[38] The Defendant's statement of case discloses no reasonable grounds for defending the second limb of the claim. However, before ruling on whether the Defendant's statement of case should be struck out either in part or in its entirety, the Court will address the Defendant's application to amend his statement of case.

### **The Application to Amend the Defence**

[39] Part 20 of the CPR permits amendments to a statement of case. In that regard, Rule 20.1(2) states that:

“The court may give permission to amend a statement of case at a case management conference, upon an application being made to the court”.

[40] The Defendant's statement of case was vulnerable to a strike out application, and desperately in need of amendment, from its date of filing on 14 January 2014. It does not challenge the facts as alleged by the Claimant, neither does it record a counterclaim. In essence, there is no defence, and the Defendant is in breach of Rules 10.5 (2) and (4) of the CPR. Without the permission of

this Court, he cannot rely on any allegation or ground that is not set out in the defence, and which he could have set out there. (Rule 10.7 CPR).

[41] Rule 20.1 (2) confers a discretion on the Court, and in exercising that discretion the Court must give effect to the overriding objective. According to Kokaram J:

“Disposing of a case justly would mean that amendments should be allowed to enable the real matters in controversy between the parties to be determined. However, the court does not act in vain and amendments with no real prospect of success will be refused as to do otherwise will defeat the overriding objective. See **Clarke v. Slay [2002] EWCA Civ.13**”. (**In Thadeus Clement v. A.G. T&T., Cm. No. CV 2009-03208, 01 Feb. 2010, unreported**).

[42] Tugendhat J also observed that:

“...where the court holds that there is a defect in pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is a reason to believe that he will be in a position to put the defect right.” (**Kim v. Park [2011] EWHC 1781 (QB)** at para.40).

[43] A perusal of the proposed amendments indicates the inclusion of statements by the Claimant, in his divorce application, which speak to the breakdown of the marriage in 1986. (See para.[12] supra). And, even though the Defendant seeks to join issue with the statements of claim, there is nothing in the

proposed amendments that addresses the Claimant's claim to 50 percent of the matrimonial property. There is no evidence offered to challenge this aspect of the claim. Therefore, there is no real prospect of success against the claim to a half share of the matrimonial assets.

[44] The proposed amendments are only relevant to the claim to 50 percent of the Deceased Wife's half share in the matrimonial properties. Even if this court accepts, for the purposes of the Defendant's application, that the marriage broke down in 1986, there is no specific denial of the reconciliation that was alleged by the Claimant.

[45] In his witness statement the Claimant did not deny the statements made in his divorce application. However, he alleged that " The Judge suggested that the court would leave it to the two lawyers to see whether [the Deceased Wife] and I would "come together" ". (Para.139). The Defendant never filed a Witness Statement, and his statement of case mentions neither a separation nor the absence of a reconciliation between the Claimant and the Deceased Wife.

[46] Additionally, the Defendant joins issue with the statement of claim and the affidavit in support. But there is no reference to a divorce application or a reconciliation in either of these documents. These issues were raised in the Claimant's witness statement. There is therefore, no joinder of issues in

relation to a separation or to a reconciliation. This means that any amended defence must of necessity raise these issues specifically. The amendments craved by the Defendant do treat with the separation of the Claimant and his Deceased Wife. But there is no specific denial of a reconciliation, farless any evidence advanced by the Defendant in his amended statement of case to challenge the allegation of a reconciliation.

[47] This Court is also intrigued by the fact that counsel for the Defendant represented the Deceased Wife when the divorce application was filed. Counsel drew, prepared and filed the answer by the Deceased Wife, which was filed on 05 February 2010 in suit FL0010 of 2010. In that document the Deceased Wife asked for the divorce application to be dismissed. She only admitted to recent frequent quarrels between the couple relating to the collection of rental income, and expressed the opinion that counselling would assist in their disagreements. The Deceased Wife did not admit to any separation between the parties.

[48] Counsel for the Defendant also prepared two wills for the Deceased Wife subsequent to the divorce application. The first will is dated 08 March 2010. The second will, dated 19 April 2010, is the reason for the claim in this matter. As the person with knowledge of the circumstances alleged by the Claimant about a reconciliation at the behest of the court, counsel for the

Defendant has filed no affidavit or witness statement in this case denying that the parties ever reconciled.

[49] There is nothing in the Defendant's statement of case or in the proposed amendments that deny a reconciliation between the Claimant and the Deceased Wife. Therefore, there is no pleading on which the Defendant can rely to negative the Claimant's assertion of a reconciliation. Even if the Court exercised its discretion to permit the amendments, the Defendant does not deny or challenge the assertion of a reconciliation in the proposed amended pleadings.

[50] Because of this defect in the original statement of case and the proposed amendments, the Defendant has no prospect of success with the bare allegation that the Claimant and the Deceased Wife were separated for the requisite time period prior to her death. Therefore, any question about the Claimant's disinheritance under Section 102(4) of Cap.249 is not an issue properly before the Court.

[51] The Court also notes that the Defendant's statement of case does not raise any issue of the Claimant's failure to exercise his right of election under Cap.249. Also missing is an essential pleading that the Defendant gave the Claimant written notice of his right of election, as required by Section 97(6) of Cap.249. The proposed amendments are also silent on these issues.

[52] The Defendant contends that his case would be seriously prejudiced if the Court did not approve the amendments. However, this submission on his behalf offers no explanation for the lateness of the application to amend. It is true that with the filing of the agreed statement of facts and issues, counsel for the Claimant was well aware of the issues likely to be raised by the Defendant. But this knowledge could not transcend to a waiver of faulty pleadings that did not set out any defence to the claim. And the Court is unable to assist the Defendant when his counsel admitted to the deficiencies in the defence, but has not cured them in the proposed amended defence.

[53] Any prejudice suffered by the Defendant is of his own making. The Claimant never changed his case to raise new issues which the Defendant should be allowed to address through amended pleadings. In **Christofi v. Barclays Bank plc [2000] 1 WLR 937**, an amendment sought at a late stage, in an attempt to save a claim that would otherwise have been struck out as disclosing no reasonable claim, was refused in accordance with the overriding objective. (Cited by our Ct. of App. in **Paradise Beach Limited et al v. Edghill et al, Civ.App. No.10 of 2011, decision dated 12 December 2012** at para.[24] of the judgment).

[54] Also in **CIP Properties v. Galliford Try [2015] EWHC 1345 (TCC)**, Coulson J reviewed the principles relating to late amendments:

“15....in the earlier Court of Appeal decision in *Worldwide Corporation Ltd v GPT Ltd and another* [1988] WL 1120764, Waller LJ stressed that a payment in costs was not adequate compensation for the other party being ‘mucked around’ at the last moment. Subsequently, in *Savings and Investment Bank Ltd (in Liquidation) v Fincker* [2003] EWCA Civ. 1630; [2004] 1 WLR 667, Rix LJ noted that *Worldwide* was authority for the proposition that “the older view that amendments should be allowed as of right if they could be compensated in costs without injustice has made way for a view which paid greater regard to all the circumstances which are now summed up in the overriding objective.”

16. The subsequent decision of the Court of Appeal in *Swain-Mason and Others v Mills and Reeves LLP* [2011] EWCA Civ. 14; [2011] 1 WLR 2735 also stressed that, when dealing with very late amendments, the court should be less ready than in former times to grant a late application to amend. Moreover, Lloyd LJ said that, when considering the competing arguments of prejudice, the prejudice to the amending party in not being able to advance its amended case was a relevant factor, but was only one of the factors to be taken into account in reaching a conclusion. It was also stressed that a late amendment cannot be insufficient or deficient. And at paragraph 72 of his judgment Lloyd LJ said: “a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court.”

17. In *Andrew Brown and Others v Innovatorone PLC and Others* [2011] EWHC 3221 (Comm), Hamblin J said that parties had a legitimate expectation that trial dates would be met and they

would not be put back or delayed without good reason. At paragraph 14 of his judgment, the judge set out some of the likely factors that would be involved in striking a fair balance. They were “(1) the history as regards the amendment and the explanation as to why it is being made late; (2) the prejudice which will be caused to the applicant if the amendment is refused; (3) the prejudice which will be caused to the resisting party if the amendment is allowed; (4) whether the text of the amendment is satisfactory in terms of clarity and particularity.” ”

[55] This Court is of the view that the Defendant has not satisfied the four factors identified by Hamblin J in the **Andrew Brown** case. The application for the amendment was made only after the Claimant’s application to strike out the Defendant’s statement of case. The statement of case was fundamentally flawed from the time of its filing. Had the case proceeded to completion, counsel for the Claimant was entitled to ask for judgment in his client’s favour in the face of the defective pleadings. There was essentially no case for the Claimant to answer.

[56] The prejudice to the Defendant is obvious. Not only is he the executor of the Deceased Wife’s estate, he is also the beneficiary of a property under the will. Losing this case would reduce his inheritance to one quarter of the value of the property. And the Court has to decide whether to replace him as executor in preference to the Claimant’s executor.

[57] If the amendments are permitted by the Court, the prejudice to the Claimant is even greater. He is now deceased; and it was well known that at the beginning of the trial he was old, frail and hard of hearing. He is no longer available for further cross examination or re-examination if the amendments are permitted.

[58] The Court has also pointed out that the proposed amendments are defective, and do not provide a full defence to the claim. The propose amendments do not cure the defects in the original statement of case. In the **Worldwide** case, an amendment was requested to the claim during the first week of trial, and after a reappraisal of the claim by new counsel. The amendment was rejected by the Court of Appeal.

[59] Lord Justice Waller opined in **Worldwide** that:

“Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which [was suggested] applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided.

We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants requires him to be able to pursue it”.

[60] The Defendant has not discharged this heavy burden. And the Court finds that the justice of the case does not support the grant of permission to the Defendant to amend his statement of case.

### **Disposal**

[61] The Court grants the following orders:

1. that the defence filed on 14 January 2014 be struck out;
2. that the Defendant’s application to amend the defence be dismissed.

[62] The Court will hear the parties on costs and any consequential orders to be made as a result of the Court’s decision.

**Sonia L. Richards**  
**Judge of the High Court**