

IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 808 OF 2011

**BRITISH CARIBBEAN BANK
INTERNATIONAL LIMITED**

Claimant

AND

**SHEILA McCAFFREY
LIFE VENTURES LIMITED
SM LIFE VENTURES LLC**

**First Defendant
Second Defendant
Third Defendant/Ancillary
Claimant**

AND

**CHRISTOPHER COYE
COYE & CO.
COURTENAY COYE LLP**

**First Ancillary Defendant
Second Ancillary Defendant
Third Ancillary Defendant**

IN CHAMBERS.

BEFORE: Chief Justice Kenneth Benjamin.

October 16 & 18, 2012.

Appearances: Mr. Darrell Bradley for the Ancillary Claimant/Third Defendant.
Mr. Denys Barrow SC for the Ancillary Defendants.

RULING

[1] The substantive claim was filed on December 20, 2011 by British Caribbean Bank International Limited in respect of a loan facility. On 25th May, 2012, the Third Defendant SM, Life Ventures LLC, brought an ancillary claim against Christopher Coye, Coye & Co. and Courtenay Coye LLC claiming an indemnity for any amount for which the third Defendant may be found liable under the principal claim and damages with interest thereon for breach of fiduciary duty, breach of contract and negligence.

[2] This application was filed on October 2, 2012 and has been made by the Ancillary Defendants seeking an order to compel the Ancillary Claimant to give certain information in relation to certain averments made in the Ancillary Claim as requested by letter dated August 1, 2012. The application is made pursuant to Rule 34.2 of the Supreme Court (Civil Procedure) Rules 2005 which reads:

“34.2 (1) If a party does not give information which another party has requested under Rule 34.1 within a reasonable time, the party who served the request may apply for an order compelling the other party to do so.

(2) An order may not be made under this Rule unless it is necessary in order to dispose fairly of the Claim or to save costs.

(3) When considering whether to make an order the court must have regard to -

(a) the likely benefit which will result if the information is given;

(b) the likely cost of giving it; and

(c) whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with such an order.

The Ancillary Claimant opposed the request and the Court was informed that the request for information was rejected by letter on the eve of the hearing of the application.

[3] At the outset of his submissions, learned Senior Counsel for the Ancillary Defendants drew the attention of the Court to the Ancillary Claim and the averments and endorsements made therein. It was pointed out that no Statement of Claim was served along with the Ancillary Claim Form but that rather the following is stated therein:

“The grounds upon which this Ancillary Claim is based are set out as follows:

1. SM Life relies on the facts as they have been pleaded in the First Affidavit of Sheila McCaffrey sworn 9 May 2012 ...”

Following this statement, paragraphs 2 to 14 of the Ancillary Claim Form purport to contain averments as to the alleged causes of action appearing under the headings of ‘Breach of Fiduciary Duty’, ‘Breach of Contract’ and ‘Negligence’.

[4] The Ancillary Defendants challenged the adoption of this abbreviated approach to the requirements of Rule 18.2(2) which states that particulars of an ancillary claim must be contained in or served with the ancillary claim form. The requirement of a Statement of Claim is made manifest by the combined effect of Rule 18.2(1) and Rule 8.2(1). This is so as the ancillary claim is to be treated as if it were a claim for the purposes of the Rules and a claim form may only be served without a Statement of Claim or alternatively a supporting affidavit or document if all the information mandated to be included in the Claim Form and Statement of Claim is so included. The Ancillary Claimant has deliberately side-stepped this requirement to include the information by employing the device of making reference to an affidavit filed in the substantive claim by the First Defendant. This practice is unacceptable and the Court follows learned Senior Counsel for the Ancillary Defendants in denouncing the practice. The net result is that the particulars contemplated by Rule 18.2(2) and required by Rules 8.6 and 8.7 are to be gleaned from the said paragraphs 2 to 14 of the Ancillary Claim Form. The Ancillary Defendants say that the particulars ought to be found wanting and the request for information seeks to address that deficiency.

[5] So far as relevant to the Ancillary Claim in this case, the expectation of particulars would be guided by Rules 8.6 and 8.7. The request for information, as submitted by the Ancillary Defendants as far as I see it, seeks to address the absence of a statement, however summary, of all the facts upon which the Ancillary Claimant relies (see: Rule 8.7).

[6] The Ancillary Claimant has countered that by virtue of Rule 18.2(2), there is no express requirement of a Statement of Claim provided that the particulars are contained in the ancillary claim form, which was done. The Court agrees that it is open to the ancillary claimant to obviate the need for a Statement of Claim by setting out full particulars of the ancillary claim in the ancillary claim form; this is the purport of rule 18.2(2). It is with the question of whether full particulars have been furnished in the Ancillary Claim Form, that issue is joined.

[7] There can be no demur that the overarching purpose of pleadings is to inform the party against whom suit is brought of the case to be met. Such case must be set out with sufficient particularity to afford an opportunity to the party against whom the suit is directed to determine whether the case can be answered and if so, to allow for preparation of a case in defence of the claim. The Rules require 'all' the facts upon which the claimant relies to be included in the pleading (Rule 8.7(1)) and prolixity is discouraged (Rule 8.7(2)).

[8] The entitlement to information by way of particulars is driven by the desirability of open litigation devoid of ambush. The purpose of particulars was put in this way by Lindley, LJ in **Duke v Wisden 1896-99 TLR 481**:

“What are particulars wanted for? The object of particulars is to prevent surprises; to inform the other side of the nature of the case which they have to meet as distinguished from the mode in which that case is to be proved.”

Inherent in this dictum is a recognition of the distinction between a statement of the cause of action and the facts to support same on the one hand and the evidence to be adduced in support of the case on the other.

[9] The test to be applied by the Court in deciding whether a party is entitled to particulars is embodied in Rule 34.2 (set out in full in paragraph 2 above). The party applying must satisfy the court that the information being sought is necessary for the issues in the case to be resolved in a fair manner and/or to save costs. Notwithstanding the filing of a Defence to the Ancillary Claim, the Ancillary

Defendants crave particulars with reference to paras. 2, 4, 5 and 6 of the Ancillary Claim Form. These paragraphs are located under the heading 'Breach of Fiduciary Duty' in the case of paras. 2 and 4 and under 'Breach of Contract' in the case of paragraphs 5 and 6. These headings are stated to be the causes of action (in addition to that of negligence) upon which the Ancillary Claimant grounds the Ancillary Claim.

[10] It is unavoidable that the targeted paragraphs be reproduced in full:

"Breach of Fiduciary Duty.

2. Christopher Coye ("Coye") was at all material times counsel to SM Life as a sole practitioner, as a partner (or alternatively, an employee) of the law firm Coye & Co., and after joining Courtenay Coye LLP as partner (or alternatively, an employee). Together Coye & Co. and Courtenay Coye LLP are referred to below as "the Law Firms". Coye, and at their respective times of engagement, the Law Firms were fiduciaries to SM Life arising out of, among other things, the attorney-client relationship between them. Coye was the main thread which knitted the Law Firms to SM Life. As a result, the Law Firms are directly responsible, or alternatively vicariously liable for his acts.
3. ...
4. Coye and the Law Firms acted for both SM Life and Belize Bank International Limited ("Belize Bank") in the same transaction (being the credit facility which is the subject of the principal claim) without receiving SM Life's informed consent. Further, Coye had SM Life entered into a transaction with Belize Bank while he acted in his capacity as Bank Director without advising SM Life to receive independent legal advice. In the result, Coye and the Law Firms breached their fiduciary duties to SM Life, which has suffered damage.

Breach of Contract

5. In Addition, or in the alternative to paragraphs 2 to 4 above, it was an express or implied term of the attorney-client relationship and all retainers flowing from the relationship between SM Life and Coye, that the latter would discharge his engagement as legal counsel with reasonable skill and care, and in particular with the degree of skill, care and diligence to be expected as a reasonable competent lawyer.

6. In representing SM Life in this transaction Coye had an obligation to properly advise SM Life on all matters relevant to the retainer, including its rights and potential liabilities with respect to the Facility Agreement and Mortgage Debenture the latter being dated 18 June 2007, and entered into between the Claimant and SM Life. Coye also had an obligation to inform SM Life of the need to obtain independent advice.”

It can be at once noticed that the paragraphs are devoid of any dates of the relationship nor are any facts furnished relative to any of the relationships alleged to have existed between the ancillary Claimant and the Ancillary Defendants.

[11] The first request seeks the dates of engagement of the First Ancillary Defendant encompassed by the phrase “at all material times” in paragraph 2. The third request similarly requests the times of engagement of the Second and Third Ancillary Defendants. Learned Counsel for the Ancillary Claimant has argued that the Defence has set out the dates of existence of the Law Firms and has gone on to state, which was repeated in answer to several of the requests, that the information was within the knowledge of the Ancillary Defendants. With respect, the Ancillary Claimant can hardly expect the Ancillary Defendants to be clairvoyant. The particulars required as to times and dates in the first and third requests cannot be resisted as they go to the root of the case the Ancillary Defendants are being asked to meet.

[12] With respect to the second request which seeks a description of the obligations and incidents of the relationship whereby Christopher Coye is styled "Counsel". Also the facts creating the relationship of 'Counsel' are being sought. It seems to me that the usage of the term 'Counsel' attracts the need for clarification as to the nature of the relationship and the facts incidental to the creation of the relationship of Counsel to Client. These particulars are therefore properly required.

[13] The fourth request is for the facts relied on to support the averment in paragraphs 2 that the law firms were fiduciaries to SM Life. The Ancillary Claimant asserted that this is a matter of law and the facts and evidence to support such a finding are a matter for trial. At the very least, the Ancillary Claimant must plead the essential facts that support the existence of fiduciary duty. It may be that the facts would be co-extensive with the facts relied on to establish the relationship of Counsel. Therefore, this request is best dealt with along with the sixth request which targeted the facts relating to the creation of the attorney client relationship. These requests can be taken together as the response to the sixth request would provide the answer to the fourth request.

[14] The usage of the words 'among other things' in paragraph 2 has attracted the fifth request for particulars. This omnibus approach to pleading inevitably attracts suspicion and it is proper for the Ancillary claimant to be requested to detail whether there is any other relationship being alleged.

[15] The seventh request is for details as to how the Ancillary Defendants came to be acting for SM Life. This request is subsumed in the first and sixth requests and in my view, will be answered when those preceding requests are fulfilled.

[16] The eighth request is for particulars as to the manner in which Christopher Coye caused SM Life to enter into the credit facility with the Claimant. The Ancillary Defendants wish to know what exactly did Christopher Coye do to have SM Life enter into the transaction. In this regard, it would be sufficient for the Ancillary Claimant to indicate the manner of the advice tendered. This request eminently identifies a gap in the essential facts to support the cause of action.

[17] The Ancillary Defendants by their ninth request are requesting information as to what actions Christopher Coye took in acting in his capacity as Bank Director of the substantive Claimant. It is for the Ancillary Claimant to indicate whether any actions were carried out by Christopher Coye in his specific capacity as Bank Director or whether the simple fact of him being Bank Director is being relied upon. This request must be responded to by the Ancillary Claimant.

[18] In the tenth request, the Ancillary Defendants again address 'the attorney-client relationship'. The fact of its repetition suggests that it is the same relationship referred to in paragraph 2 of the Ancillary Claim which is the subject of the 6th request. This request may be amenable to a short reply but the Ancillary Claim ought to so state unless some other relationship is contemplated, in which case that must be particularized.

[19] In respect of the eleventh request for the meaning of 'all retainers', this language is mere surplusage and its meaning is absorbed into the 6th and 10th requests for information as to the attorney-client relationship asserted by the Ancillary Claimant in paragraphs 2 and 3 of the Ancillary Claim.

[20] The twelfth request is for particulars of 'express or implied term' of the attorney-client relationship. It is expected that this matter would be addressed in the response to the 6th and tenth requests. In the event, that this matter is not so addressed, this request is allowed. It is desirable that the Ancillary Defendants be informed as to whether the alleged term is to be treated as express or implied in order to prepare their witness statements.

[21] The last and thirteenth request is based on paragraph 6 of the Ancillary Claim and seeks information as to how Christopher Coye represented SM Life. This request is superfluous having regard to the other requests sanctioned by the Court and is accordingly disallowed.

[22] In the premises, it is ordered that the Ancillary Claimant give further information to the Ancillary Defendants in respect of the first, second, third, fourth, fifth, sixth, eighth, ninth, tenth, and twelfth requests set out in the letter of August 1,

2012 appended to the Notice of Application on or before the 16th day of November 2012. The Ancillary Defendants shall be entitled to their costs which shall be in the cause.

KENNETH A. BENJAMIN
Chief Justice