Judgment 40/2003

Colfer v Carey Langlois Trust Company Ltd et al
Royal Court
(Civil Action File 714)
6th June, 2003

Exceptions de Forme – Royal Court Civil Rules, 1989 – further and better particulars – rulings on requests outstanding.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 6th day of June, 2003 before Alan Robin Winston Hancox, Esquire, E.G.H., C.B.E., Lieutenant-Bailiff; sitting alone.

In the matter of

Between

JOHN P. COLFER

Plaintiff/
Respondent

and

1. CAREY LANGLOIS TRUST COMPANY LTD)
2. C.L. TRUSTEES LIMITED)
3. C.L. NOMINEES LIMITED)

Defendants/Applicants

Whereas on the 16th day of May, 2003, the Lieutenant Bailiff considered an application by the Defendants for an Order pursuant to Rules 37 and 47 of the Royal Court Civil Rules 1989 that:

i) the Plaintiff within fourteen days of the date of the Order furnish the Defendants with Further and Better Particulars of his claim as requested at Requests 32, 36, 38, 39 and 40 of the Defendant's Exceptions de Forme dated the 27th day of July, 2001; and

ii) that if the Plaintiff fails to do so his claim be struck out for failure to

comply with an Order of the Court;

and heard thereon Advocates M.G.A. Dunster and R.I.C.E. Harris, Counsel for the Defendants and Plaintiff respectively;

The Lieutenant Bailiff this day gave judgment in the terms attached hereto and ORDERED:

1) that Requests 38 and 40 be answered as indicated in the said judgment by

   5.00 p.m. on the 1st day of August, 2003; and

2) that the costs of this application should be costs in the cause.

S. M. D. ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY
ORDINARY DIVISION

Between:

JOHN. P. COLFER

Plaintiff/
Respondent

and

1. **CAREY LANGLOIS TRUST COMPANY LTD..}**
2. **C.L. TRUSTEES LIMITED…….…….. }Defendants/**
3. **C.L. NOMINEES LIMITED……..} Applicants**

Judgment

1. By his Cause filed in June, 2001, the Plaintiff, a Canadian citizen claimed £450,000 from the Defendants for alleged breaches of the terms of an agreement between them, coupled with breaches of their duty of care and/or of fiduciary duties which they owed to the Plaintiff, who, at all material times was the beneficiary of a corporate and trust scheme which was devised and administered by the Defendants for the purpose of mitigating the Plaintiff's potential tax liabilities in connexion with his Canadian Company.

2. The facts alleged in support of the claim are that in early 1996 the Defendants formed a corporate and trust scheme for the benefit of the Plaintiff, for the purpose of mitigating these liabilities in relation to certain bonus and commission payments made in connexion with the Canadian Company known as Coranco Corporation Incorporated (formerly Coranco Corporation Limited) of which the Plaintiff was at all material times the President and majority shareholder. The Company dealt in household products which it purchased mainly from Asian manufacturers.

3. The detailed structuring of the Trust, which was administered by the Defendants on behalf of the Plaintiff until late in the year 2000, is set out in the Plaintiff's Replies to the Defendant's Requests (forming part of the *Exceptions de Forme* in the Defences filed on 27th July, 2001) for further and better particulars of paragraphs 3, 4, 5 and 8.1 to 8.6 of the Cause. Briefly, the structuring involved the incorporation of a Guernsey company called Euromar Holdings Ltd on 13th February, 1996, and the subsequent establishment of the Enniscorty Trust. The funds which accrued to Coranco by way of volume rebates on purchases and other bonuses, were then placed in Euromar's bank accounts in Hong Kong at the Defendants' suggestion in order to facilitate the re-transfer of the funds to Guernsey. It appears from the Reply to the Request for particulars of paragraph 4 of the Cause that an important aspect of the Scheme, so the Defendants are alleged to have advised, was that there was no requirement that the transactions which would be taking place should be reported to the Canadian Authorities.

4. As I understand the position, the monies so accruing to Coranco formed most, if not all, of the Trust Fund which the Defendants administered. The subsequent transfer of the funds to Guernsey indicates the importance of any relevant Guernsey

legislation which was likely to come into effect. In sub-paragraph 8.6 of the Cause it is alleged that the Defendants' officers assured the Plaintiff that the Scheme, outlined above, would not be affected, in particular by that which has been termed as the proposed 'All-Crimes legislation'. Although this is stated in the Cause to have occurred during two meetings in 1998, it seems from the further and better particulars supplied that these assurances were given at meetings between the Plaintiff and one Mr. Cleal in September, 1999, and with a Mr. McAuliffe in the November of that year. The Plaintiff was also assured that the Defendants would continue to administer the Scheme, which they had been doing on a day to day basis.

5. Approximately a year later, according to the Cause, the Defendants then reneged on their assurances, and offered alternative schemes to the Plaintiff which, however, were unattractive because they would not have resulted in any mitigation of tax. It also appears, from the Reply to the particulars requested of paragraph 8.8 of the Cause, and the Cause itself, that the Defendants threatened not only to repatriate the funds to Canada, but, moreover, to disclose details of the Scheme and its structure to the Canadian Revenue Authorities. The Plaintiff, accordingly, alleges that all these matters, which I have outlined, constituted the breaches of the conditions of the initial agreement between the parties, as well as the breaches of the duty of care and fiduciary duties, and, above all, of confidentiality, which the Defendants owed to the Plaintiff.

6. The Defendants have made those which were described by Collas Day in their letter of response of 8th October, 2002, as voluminous Requests for further and better particulars of the majority of these allegations as contained in their *Exceptions de Forme*. Apart from admissions as to the formal descriptions of the Defendants the Defence is a general traverse of the allegations in the Cause. Of the forty Requests, mercifully, only five, numbered 32, 36 and 38 to 40, remain extant as allegedly not, or inadequately, answered. On the 17th January, 2003, the Plaintiff applied generally for directions and for a date to be set for the hearing of the *Exceptions*, but this has been overtaken by the Defendants' Application of 12th February, 2003, to strike out the Plaintiff's claim in default of the disputed particulars being furnished should the Court so Order.

7. Advocate Dunster, who represents all the Defendants in this case, opened his submissions in support of their Application by outlining the events which appear to have brought about the *impasse* which led to this action being commenced. Broadly speaking, prior to the introduction of that which became known as the All Crimes Law, banks, financial and trust institutions with or by whom funds were deposited or managed were concerned in ensuring that they did not further or aid persons to commit crimes or engage in obvious criminal activity. The Criminal Justice (Proceeds of Crime)(Bailiwick of Guernsey) Law, 1999, thenceforth, by very comprehensive provisions in Part II of the Law, enjoined these institutions to disclose to the authorities a suspicion or belief that any funds or investments which they retained or controlled were derived from or used in connexion with criminal conduct under pain, if they did not do so, of committing an offence themselves.

8. Although the All Crimes Law did not come into force, (by virtue of Ordinance XXVII of 1999) until 1st January 2000, the intended legislation, was, if I may be permitted the expression, in the pipeline much earlier, the proposal being addressed to the Bailiff by the President of the States Advisory & Finance Committee, with a view to preventing money-laundering, on 26th June, 1997. The Plaintiff says the inference

from this time-frame must be that the Defendants took the steps they did late in the day, when the trust arrangements were already in being and the Plaintiff's funds had been committed, rather than at the inception of the legislation. But, says Mr. Dunster, were, or are, they the Plaintiff's funds? This is thrown into question, in particular, by the contents of Advocate Greenfield's letter to Collas Day of 21st November, 2002, which, additionally, reveals some of the reasoning which might have led to the Requests being made, especially Request No. 40. Although the legislation is targeted at the proceeds of narcotics it is evident from the wording that any kind of criminal, or, possibly suspected, criminal, activity, would be covered by it.

9. The foregoing is of considerable importance in understanding both sides of the dispute which has led, and the background, to this action. Turning to the Requests themselves the submission of Advocate Harris, who represents the Plaintiff, as to the first two of these, numbers 32 and 36, is succinct. He says that the clear wording of Rule 37 of the 1989 Rules, under which the Defendants' Application is brought, provides that further and better particulars may be ordered of another party's claim, defence

> "…….or other matters stated in his pleadings."

Accordingly objection is taken in the Replies sent on 8th October, 2002, on the grounds that they do not relate to any of the matters pleaded in paragraphs 8.8 and 8.9 of the Cause, in respect of which the Requests 32 and 36 were made. In their letter of 9th April, 2003, enclosing, *inter alia*, those which are described as Voluntary Particulars, Collas Day asked Advocate Dunster to provide authority for the proposition that particulars can be sought of matters not specifically pleaded, and offered to consider such authority if it were produced.

10. As I understand it, Mr. Dunster's argument runs thus: given that the background of the pleaded case is that of a potential liability to Canadian tax, then, once the relationship between the parties had broken down, so that the Plaintff was forced to consider alternatives, these alternatives, in the context of this case, could only be put forward by advisers who were familiar with Canadian Tax Law. Consequently the Defendants were entitled to the further and better particulars sought in Request 32 as to the expertise professed or claimed by those advisers. As regards Request number 36, Mr. Dunster suggested that the heart of the matter is that the circumstances of this case are such that the money should more properly be regarded as that of Coranco, a suggestion which, although the whole of this section of the correspondence has not been included in the Agreed Bundle, is supported by Mr. Greenfield's letter referred to above.

11. If there is any truth in the foregoing suggestions, Mr. Dunster says, then the Plaintiff could hardly claim that he had suffered the loss and expense which he has claimed in paragraphs 11 and 12 of the Cause. It followed that it was necessarily implicit from the particulars constituting paragraph 11.1 that the legal, accountancy and ancillary expenses, which were said to have been incurred by the Plaintiff in having to 're-order and regularise his affairs' that these funds would be restored to the lawful owner. This, in turn, carried the secondary implication that the supposed restoration would necessarily involve the repatriation of the funds in question to the Canadian company. Consequently, so the argument runs, the Defendants were entitled to know who was the lawful owner of the funds which were previously held by

Euromar Holdings Ltd, and therefore to be provided with the particulars sought in Request number 36.

I now pass to consider the legal position relating to Requests 32 and 36. Both Mr. Dunster and Mr. Harris cited the Guernsey case of Chadwick v. Lovell [1985] 29th October, in their Skeleton Arguments. That was an action for damages for professional negligence by a firm of Architects and Surveyors in which the Court accepted the joint submission by both Counsel that the English authorities on Order 18 Rule 12 R.S.C. were appropriate as providing guidelines on which the Royal Court would act in determining in each case whether the particulars given were sufficient to provide the defendants with adequate details so as to enable them to prepare their defences.

12. It has to be remembered, of course, that Chadwick v. Lovell was prior to the introduction of the Royal Court Civil Rules 1989. In Victor Hanby Associates Ltd & Hanby v. Oliver [1990] Jersey Law Reports at page 349, the Jersey Court of Appeal indicated that the Royal Court was not necessarily bound by the practices which had developed in England during the latter part of the nineteenth and the early part of the twentieth centuries, and may develop its own practice. However, in view of the similarity in wording of Rule 37 of the Guernsey Rules to Rule 12(3) of Order 18 of the former Rules of the Supreme Court it seems to me that the Royal Court in Guernsey should tend towards following the English practice as it was prior to the introduction of the new C.P.R's.

13. If literal compliance with the words 'or other matter stated in his pleadings' is to be observed then Mr. Harris' argument would seem to be correct. However, the matter is not free from difficulty since there is no direct authority on the meaning of this phrase. Apart from the general statement by Bowen L.J. at page 533 as to the purpose of particulars and that which they should contain, I did not find Ratcliffe v. Evans [1892] 2 Q.B 524, which was mentioned by Mr. Dunster, of great assistance in determining the precise point at issue here. That was an action for malicious falsehood in which it was held that proof of general injury to the plaintiff's business was sufficient, and that it was not necessary to particularise the persons who had withdrawn their custom from him.

14. Such authorities as I have been able to find relate to whether particulars should be ordered against a *defendant* where he pleads a traverse which can be said to involve a positive allegation, sometimes called a negative pregnant. The Court refused to do so, for example in Weinberger v. Inglis [1918] 1 Ch. 133, a case involving a German National who had applied for naturalization. This case was considered by Clauson J. in La Radiotechnique v. Weinbaum [1928] Ch 1, a passing off action, in which, as here, there was a general denial of all the material allegations in the statement of claim. The plaintiffs contended that by their traverse the defendants had set up an affirmative case, namely that there were persons other than the plaintiffs who had applied the words 'Radio Micro' to cartons containing their radio valves. As the words were not part of a registered trade mark, then if the defendants could establish that which the plaintiffs claimed they meant, it would follow that the words in question were in common use and not entitled to be protected. Consequently the plaintiffs maintained they were entitled to particulars of the persons who had so used the offending words.

15. In the Radiotechnique case Clauson J. said that the word 'stated' in Order 19 Rule 7 (the forerunner of Order 18 Rule 12(3)), in the light of the more recent decision in McLulich v.McLulich (*infra)*, meant 'stated expressly or by reasonable or necessary implication', and that if this had been realised at the time Weinberger v. Inglis might have been decided differently. In other words, the mere fact that something is not stated in so many words will not preclude the Court from ordering particulars. Clauson J. then posed the question: 'Did the defendants' denials involve any positive allegation' and continued that in that instance he did not consider the defendants were setting up an affirmative case, and that the plaintiffs could not call upon the defendants to give particulars which would assist them in preparing their case for them. The opposite result was arrived at in McLulich v.McLulich [[1920] P.439, in which the respondent's denial that he had withdrawn conjugal rights from the petitioner 'without just cause' necessarily involved the positive averment that he had had just cause, and that the particulars sought thereof would be ordered.

16. In the instant case the boot is on the other foot, in that it is the Plaintiff, and not the Defendants, who are being asked to provide the particulars. Even so, on the foregoing authorities, I still consider that I now have to address to myself the question 'does the allegation in sub-paragraph 8.8 of the Cause that

> "the Defendants advised the Plaintiff that……..they could not continue to administer the scheme and suggested alternative schemes to the Plaintiff {which the Plaintiff did not accept}……"

reasonably or necessarily imply the affirmative allegation that

> "a representative of the Defendants professed to be expert in the tax laws of any jurisdiction other than Guernsey, and if so identifiying which representatives professed such expertise…."'

and so on.

17. In my judgment, to hold that an additional affirmative allegation, such as that contended for by the Defendants here, is reasonably or necessarily implied from the context of paragraph 8.8 would be stretching matters too far. So to decide would, I think, require the Court to be able to say (to borrow a phrase used in another context recently) that the affirmative allegation postulated by the Defendants in their Request No. 32 is such that it '*goes without saying'* that it follows from the averment made by the Plaintiff in paragraph 8.8. In McLulich v McLulich *(supra)* it clearly 'went without saying' that the husband was averring that he had had some just cause for what he did. I cannot say this in the present case. It follows, then, that I rule that the Plaintiff need not answer Request No. 32.

18. As regards Request No. 36, I agree with Mr. Harris that on the pleadings, as they stand, no issue of ownership of the funds arises. With great respect to Mr. Dunster, I cannot see how, applying the tests I have just stated in relation to Request No 32, an affirmative allegation that someone other than the Plaintiff is the lawful owner of the funds, which were previously held by Euromar, as part of the structure of the corporate and trust scheme set up by the Defendants for the Plaintiff's benefit, is reasonably and necessarily implied from sub-paragraph 8.9 of the Cause:

> "..the defendants refused to transfer the administration of the scheme to another third party and e[n]vinced an intention to repatriate funds to the Canadian company and make disclosures of the Plaintiff's affairs to the Canadian Revenue Authorities."

so that particulars of it can be ordered.. True the word 'funds' appears in both, but that is not to say that the premise on which, if the Request is to make sense, it is based, necessarily follows from the language used in the subparagraph. To put it more colloquially, I do not think the allegation that the Plaintiff was not the lawful owner of the funds can legitimately be carved out of paragraph 8.9 as it stands. In this connexion I have borne in mind that although Mr. Greenfield's letter was written subsequently, and does not say when the 'frank admission' made by the Plaintiff occurred, it appears that the Defendants' information probably leading to this Request emanated from a source other than the Cause. Very possibly, the same request could be put by way of an interrogatory; but that is not the application which I have to determine. I rule, therefore, that the Plaintiff need not answer this Request.

19. I now come to Requests numbered 38 and 39. As Mr. Harris said, these are really a hybrid, inasmuch as the two relevant paragraphs in the Cause, that is to say the latter part of paragraph 9 is the same, if not in form, in substance to the first part of paragraph 11.1, save that the latter quantifies the aggregate of the different types of expenses allegedly incurred by the Plaintiff at £450,000. This has now been reduced by the removal of Item 6 from the list of expenses in the Reply to these Requests, to the sum stated less the Sterling equivalent of $ 41,600, though I did not understand whether this sum is expressed in Canadian or U.S.Dollars. Mr. Harris submitted that, following the supposed custom in Guernsey, even if general, in the sense of unliquidated, damages are claimed, it is usual to plead a definite sum as a kind of measure, or yardstick, for the consideration of the Court which will be called upon to decide the case. In any event, he said, he had supplied sufficient particulars in the Reply at page 18 of Divider 5 in the Agreed Bundle, and in the Voluntary Particulars supplied on the 9th April.

20. As regards Requests 38 and 39, that which I have said touching Requests 32 and 36 as to matters not pleaded applies to some portions of these two requests. A degree of editing is therefore necessary. As regards Request No. 38 the words

> "……and in the case of professional advisers whether any advice received was materially different to any advice alleged to have been given by the Defendants."

should be excised, since they are not reasonably and necessarily to be implied from the language of paragraph 9 of the Cause. By the same token I consider the words

> "…….and the identity of the party instructing those advisers."

should be excised from Request No. 39, since nowhere in paragraph 11.1 of the Cause is it alleged that any person other than the Plaintiff instructed the advisers.
Request No. 39 should therefore read as follows:

> "Particularise each legal accountancy and ancillary expense allegedly incurred stating with whom the expenses were incurred [and] the date(s) upon which those persons were instructed."

This brings me to Request No. 40. Applying the authorities and principles I have stated in relation to Requests 32 and 36, it is clear that the words

> "……..and whether all funds that may have belonged to the Canadian company have been repatriated to the company including funds which may have been transferred by or upon the instructions or upon the request of the Plaintiff to any other jurisdiction prior to the alleged reordering and regularising."

are surplusage in that they do not relate to any matters stated in paragraph 11.1 of the Cause. Nowhere in that paragraph is it alleged that the Plaintiff repatriated any funds to the Canadian company. Again, this might possibly be the subject of an interrogatory.

21. As regards the remaining portions of Requests 38 and 39 that have not been excised, there is some overlap between the two. However, I fully agree with Mr. Dunster that it is clear from the relevant Commentary in the 1999 White Book at paragraph 18/12/22 that these particulars ought to be given. I do not agree that the £450,000 (less the $41,600) is a sum, as it were, 'plucked from the air'. The particulars appurtenant to paragraph 11 expressly state that the Plain- tiff has incurred losses to the amount stated. Accordingly there is clear authority that he is obliged to give particulars of the kinds of expenses which he describes. As regards the accountancy and law firms mentioned in paragraphs 3.1 to 3.4, I presume the Plaintiff paid accounts rendered for the amounts shown against each firm in the earlier particulars. He has set out the charges of each firm and the relevant time–frames, together with indications of the type of advice given. I therefore regard Request No. 39, in its present form, as substantially complied with.

22. Turning to paragraph 3.5 of the Voluntary Particulars, however, I do not consider the information supplied is enough. For instance the Plaintiff gives an estimate of his time spent in dealing with the various matters listed. This is too vague. In my view he should specify this with more precision, indicating in particular which are the travelling expenses, which are the 'related costs' and whether these are the 'ancillary expenses' mentioned in 11.1. I therefore direct that the Plaintiff should amplify the particulars given as indicated in this paragraph.

23. In the final result I rule that Requests 32 and 36 should not be answered by the Plaintiff. As regards the other two, I direct that he should answer them, as they appear hereunder, to the extent indicated in the last pre-ceding paragraph hereof:

Request 38. "Please identify the substantial costs, loss and damage including how such costs were incurred and with whom and in what sum.

Request 40. "Please state how the Plaintiff's affairs have been reordered and regularised."

I will hear Counsel as to when these should be answered and as to costs.

A.R.W.Hancox.
Lieutenant Bailiff
6th June 2003.

