

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008/HCV-05028

BETWEEN            BEVERLY SALU                            CLAIMANT  
AND                    WORLDWISE PARTNERS LIMITED    DEFENDANT

CLAIM NO. 2008/HCV-05087

BETWEEN            ICOLYN CHONG                            CLAIMANT  
AND                    WORLDWISE PARTNERS LIMITED    DEFENDANT

Mr. Andrew A. Irving for the Claimant.

Ms. Nicosie Dummett instructed by Townsend Whyte and Partner for the Defendant.

**Application for information pursuant to Part 34 of the Civil Procedure Rules 2002.**

**Heard on 28<sup>th</sup> April 2009 and 5<sup>th</sup> June 2009**

**BROWN J. (Ag):**

This was an application by the Claimants seeking an order pursuant to Part 34 of the Civil Procedure Rules 2002 for information.

The Claimants claim damages for Breach of Contract arising from sums deposited with the Defendant as investment. The Defendant has filed similar defences in their respective actions denying that there was a contractual agreement between itself and the Claimants and exhibited the application forms signed by the latter.

The defence filed denied that there was ever a contractual agreement between itself and the Claimants and alleges that there was a partnership agreement. The Defendant alleged that at all material times the Claimants were involved in a partnership with approximately 20 other persons, that the partnership was registered in Jamaica and that the Defendant was instructed by the Claimants to act as their secretary. This caused the Claimants to seek the following request for information:

- (a) Of the allegation that the Claimants were involved in a partnership, please state the name of the partnership, when was it registered in Jamaica and the names of the alleged twenty (20) other persons in the partnership.
- (b) Please state also whether there was a meeting to elect a secretary of the partnership and if so, when was this meeting and who was present at this meeting.

The Defendant has refused to provide the information requested thereby causing the Claimants to seek the orders.

Rule 34.1 states as follows:

- (1) This part contains rule enabling a party to obtain from any other party information which is in dispute in the proceedings.
- (2) To obtain the information referred to in paragraph (1) the party seeking the information must serve a request identifying the information sought on the other party.

Rule 34.2 states as follows:

- (1) - where a party does not give the 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 and 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 costs 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.

It was submitted on behalf of the Defendant that the application should be dismissed for the following reasons:

- (i) That the Claimants had not proved that the information was necessary now, that is, they had failed to show any special circumstances which would require disclosure before the time mandated by the Civil Procedure Rules for disclosure and exchange of evidence and information.
- (ii) The Claimants are bound by their pleadings, that is, for breach of contract and the Defendant has answered. The information requested are not facts which are in issue and are not central to the determination of the case. This case is one of contract law.
- (iii) The Claimants are clearly fishing for information to rely on their upcoming application for summary judgment.
- (iv) Rule 34 does not give the court any express mandate to strike out a litigant's pleading for failure to comply with an order of the court to provide further information.

Counsel for the Claimants on the other hand maintained that they are entitled to the order:

- (1) That the request was made and the Defendant has failed to provide the information within a reasonable time, that is, almost three months has passed.
- (2) He further maintained that it would certainly save costs if the Claimants are provided with the information as it relates to the application for the summary judgment. It would also allow for the fair disposal of the claim as the Claimants will not be taken by surprise and it would narrow the issues.
- (3) He had also dismissed the contention that the request is an attempt to fish for information. He submitted that a request is fishing where the party making the request does not have evidence to support their claim and is hoping that something will turn up. However, it is the Defendant who has raised the issue of partnership in their defence. As a general rule, information will be ordered for an affirmative allegation (Pinson v Lloyd (1941) 2 KB 72).

It has often been stated that the system of pleading is thus primarily designed to bring the parties to an issue or issues on which alone the court can adjudicate between them, but it is also

designed to fulfill some of the fundamental principles of natural justice, such as that each party should have a reasonable opportunity of answering the claim or defence of his opponent, and that each party should have a reasonable opportunity of preparing and presenting his case on the basis of the issues disclosed in the pleading and no other.

In this case, the Defendant has pleaded that a partnership was to be created as evidenced by the application form signed by the Claimants and annexed to the defence. Whether or not this was done or existed would be known to the Defendant. This would certainly define the issues between the partners. As Lord Radcliffe said in Esso Petroleum Co Ltd v South Port Corp (1956) AER 218 at pg 241:

*“It seems to me that it is the purpose of such particulars that they should help define the issues and to indicate to the party who asks for them how much of this range of his possible evidence will be relevant and how much irrelevant to these issues. Proper use of them shortens the hearing and reduces costs.”*

The court will not make an order for particulars which the party cannot give, nor will particulars be exacted where it would be offensive or unreasonable to make such an order, as where the information in the possession of either party could only be attained with great difficulty or expense or laborious research or exhaustive inquiry.

The Defendant was concerned that the information requested would be used to obtain summary judgment and therefore dispense with a trial. The intention is clearly to have a trial irrespective of the cost. However, this would only arise if the defence filed was a sham.

The Claimants on the other hand maintained that the information was needed in order to ascertain whether it can properly be alleged that there was a partnership. If this was a fact then the claim as filed would also be a sham. The issues would certainly be defined and narrowed.

The Defendant made no allegation that to obtain the information requested was impossible, onerous, and expensive or beyond their financial resources which would have effectively denied the order. I was, therefore, of the opinion that the Claimants have satisfied the conditions set out in Rule 34 and are entitled to the information requested.

I hereby make the following orders:

- (1) That the Defendant answers the request for information filed on the 12<sup>th</sup> February 2009 within 14 days.
- (2) That the Defendant's defence be struck out unless the Defendant answers the request within the aforesaid period.