Date: 2008 10 30
Docket: S-1-CV2007-000247

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JAMES DOUGLAS ANDERSON, and SAMUEL ANDERSON on behalf of themselves, and all other members of a class having a claim against Bell Mobility Inc.

Plaintiffs

- and -

BELL MOBILITY INC.

Defendant

REASONS FOR JUDGMENT
(Application to Strike)

[1] This case is a representative action for damages against Bell Mobility Inc. for charging fees for a 911 service but failing to provide a 911 service with a live 911 operator. Bell Mobility Inc. applies under Rule 129(1)(a)(I) to strike the statement of claim on the ground that it discloses no cause of action.

THE FACTS

[2] The plaintiffs state that Bell Mobility Inc. has charged them .75 cents a month for 911 emergency services but fails to provide any 911 emergency service.

[3] The breach of contract is set out in paragraph 11 of the Amended Statement of Claim.

> The Defendant is charging the Plaintiffs and the Class Members a fee for 911 Emergency access. Expresslyor impliedlythe contractswhich the Plaintiffs and the Class members have with the Defendant, require the Defendant to provide the services for which fees and monies are charged. The Plaintiffs and Class Members have paid the Defendant monies in consideration for 911 Emergency access service. No 911 emergency area service is provided by the Defendant to the Class

> Members. The Defendant has breached its contracts with the Plaintiffs and Class Members by not providing their customers for 911 Emergency access services, for which services the Plaintiffs and Class Members have paid.

[4] In reply to a demand for particulars, the plaintiffs further refined their pleading as follows:

> The 911 emergency access service which your client is contractually obligated to provide is that, in the home district of the customer (In Mr. Anderson's case within the 867 area code), if a customer dials 911 on his/her cellular phone your client is obligated under contract to connect the customer to a live 911 operator.

[5] The plaintiffs also rely upon a three-page Mobility Service Agreement (the MSA) dated August 30, 2005. The MSA contains a definition of 911 service as follows:

> 9-1-1 Services: Any emergency services that we are mandated to provide you.

[6] There are other references in the MSA 911 emergency services that are not necessary to set out for the purposes of this application.

THE LAW

[7] Rule 129(1)(a)(I) states as follows:

> The Court may, at any stage of a proceeding, order that
>
> (a) any pleading in the action be struck out or amended, on the ground that
>
> (I) it discloses no cause of action …
>
> …
>
> (2) No evidence is admissible on an application under subrule (1)(a)(I).

[8] Rule 106 is also relevant as it sets out the required content of a statement of claim:

> A pleading must contain only a statement in a summary form of the material facts on which the party pleading relies for his or her claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.

[9] Rule 114 also makes it clear that raising a point of law is not obligatory but discretionary for the pleading party.

[10] In an application to strike a statement of claim, the allegations of fact are accepted without evidence and the question is whether those allegations of fact disclose a cause of action. *Hunt* v. *Carey Canada Inc*., [1990] 2 S.C.R. 959, stated that a pleading will be struck only if it is "plain and obvious" that it discloses no reasonable claim. The case elaborated further at para. 33:

> … if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[11] In *Fullowka* v. *Whitford*, [1996] N.W.T.J. No. 95(C.A.),the court set out similar principlesat paras. 34 and 35, which I paraphrase:

1. on a motion to strike the pleading must be read generously;

2. a pleading will not be struck out if the flaws are capable of amendment;

3. the flaw in the pleading must be plain and obvious and beyond doubt;

4. a court must use extreme caution on a motion to strike out a pleading for want of a cause of action;

5. that the plaintiff will have to make novel arguments is no ground to strike out.

[1] The Northwest Territories Court of Appeal went on to say at para. 45 that a motion to strike out a pleading is not the appropriate time to decide general important or serious questions of law. In fact, taken at its plainest meaning, Rule 129(1) is not enacted to consider the merits of a cause of action but whether the pleading discloses a cause of action. Indeed, no cause of action need be pleaded so long as there are facts pleaded that disclose a cause of action.

ANALYSIS

[2] In my view, the defendant has misapprehended the purpose of Rule 129(1)(a)(I). The Amended Statement of Claim clearly indicates that the cause of action is based upon either express or implied contractual terms. The factual basis for this is clear from the pleadings:

1. there is a contract;

2. the contract has been breached; and

3. there are damages arising from the breach.

[1] The defendant submits that the plaintiff must go further and plead facts that relate to three grounds on which contractual terms may be implied, namely:

a) based on custom or usage;

b) as the legal incidents of a particular class or kind of contract; or

c) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the officious bystander" test as a term which the parties would say, if questioned, that they had obviously assumed.

[1] These terms may be found at para. 27 of *M-J.B. Enterprises Ltd* v. *Defence Construction (1951) Ltd*, [1999] 1 S.C.R. 619 (M-J.B. Enterprises). But M-J.B. Enterprises case has nothing to do with an application to strike a pleading for failure to disclose a cause of action. It is a case based upon an invitation to tender, where the contract was awarded to the lowest tenderer,notwithstanding the fact that bid did not comply with the tender specifications. One of the issues in that case is whether it was an implied term that the lowest compliant bid must be accepted.The case went to trial and the Supreme Court of Canada opined on the law of implied terms of contract. The case does not stand for the principle that the Andersons, in the case at bar, must be plead facts that relate to these three grounds or be struck out.

[2] In my view, the plaintiff must plead facts that disclose a cause of action and they have done so. The defendant raises issues of law that may be determined after the evidence is heard. There is no plain and obvious flaw in the pleading of the plaintiffs. The plaintiffs will obviouslyhave to produce evidence to support their pleading that Bell Mobility Inc. is contractually required to provide a live 911 operator whether expressly or impliedly. At this stage, the facts alleged by the plaintiffs are accepted and no evidence is admissible. The plaintiffs do not have to plead evidence and law.

[3] The same arguments apply to the causes of action for unjust enrichment and waiver of tort, although the latter is an unsettled area of law and should proceed to trial rather than attempting to be conclusive as to the merits at the pleading stage.

[4] The defendant goes on to state that the plaintiffs have not plead that they defendant is expressly obligated to provide the live 911 emergency operator service. In fact, the plaintiffs have made that precise pleading in their paragraph (c) reply to particulars set out above. Having demanded particulars, the defendant must accept the particulars provided as if they are facts.

[5] The defendant then says that the plaintiff must plead facts that support the implication of a term that the defendant provide a live 911 emergency operator. Once again, that is a matter that will be determined after the evidence is heard at trial.

[6] The application to strike for failure to disclose a cause of action is dismissed. The plaintiffs shall have their costs against the defendant taxed on a complex application basis and payable forthwith.

R.S. VEALE
Deputy Judge

Dated this 30th day of October 2008.

Counsel for the Plaintiffs: Keith M. Landy

Counsel for the Respondent: Robert J.C. Deanne

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REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE R.S. VEALE
