In the Court of Appeal of the Northwest Territories

Citation: Bell Mobility Inc. v. Anderson, 2009 NWTCA 03

Date: 2009 04 27
Docket: A-1-AP2008000013
Registry: Yellowknife, N.W.T.

Between:

Bell Mobility Inc.

Appellant
(Defendant)

- and -

**James Douglas Anderson and Samuel Anderson,
on Behalf of Themselves and All Other Members of a Class
Having a Claim Against Bell Mobility Inc.**

Respondents
(Plaintiffs)

The Court:

**The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Keith Ritter
The Honourable Mr. Justice Jack Watson**

**Memorandum of Judgment
Delivered from the Bench**

Appeal from the Whole of the Order by
The Honourable Mr. Justice R.S. Veale
Dated the 30th day of October, 2008
(Action No: S1CV2007000247)

Memorandum of Judgment
Delivered from the Bench

Côté J.A. (for the Court):

[1] This is an appeal from 2008 NWTSC 85, refusing to strike out the amended statement of claim. The notice of motion to strike out alleges that the statement of claim "fails to disclose a reasonable cause of action and it should be struck out."

[2] The statement of claim complains that the named plaintiffs and their fellow subscribers are charged each month for 911 emergency telephone service, but no such service exists anywhere in this whole Territory. The plaintiffs claim general, special, and punitive damages and restitution, plus interest and G.S.T.

[3] Though there is a formal written set of particulars, and though the defendant also relies upon two contracts and a billing statement, nothing turns upon that. There is a problem about whether the contracts and bill are admissible on such a motion; some conflicting case law is available, and the respondents' legal concession does not bind. In our view, neither admitting that evidence, nor assuming for purposes of this motion to strike that there is no express contract, would impair a cause of action. So we need not decide what documents are admissible.

[4] It is trite law that a statement of claim need not disclose a valid cause of action to survive a motion to strike. An arguable cause of action suffices, based on what facts are pleaded. The test for striking out a statement of claim on this ground is stiff. That the certification judge would find some aspects of this statement of claim difficult later, is not a ground to strike out.

[5] This Territory has Rules of Court on pleadings stemming from the English *Judicature Act* of 1875, whereunder a plaintiff need only plead facts, not causes of action. Naming a cause of action, or the wrong cause of action, or only some of the causes of action, does not matter, if the facts pleaded would support one or more arguable causes of action. The amended statement of claim here clearly follows that tradition, though to help the reader, it bears headings, and the headings mention two causes of action.

[6] One heading mentions breach of contract. Though there may be here no express contract to supply 911 services, an implied contract is clearly also pleaded. We cannot see why such a contract is not arguable on these very striking facts, especially if evidence of other circumstances and dealings is led at trial. It would be an unusual contract which let one party charge for doing nothing, and clear words would be needed.

[7] The other heading refers to unjust enrichment, which also seems to us arguable, both in the general form alleged (no juristic reason), and also under some of the nominate forms of unjust enrichment long recognized by English and Canadian case law.

[8] One of those is money paid under a mistake of fact, which paras. 6 and 7 of the amended statement of claim would also support. A person paying an itemized invoice usually does so in the belief that the goods and services listed have been provided.

[9] Where someone has paid money under a contract but got nothing in return, there is a very old and well-established cause of action for return of the money for failure of consideration. The defendant may have a defence if the failure is partial and not total, but that defence may not work, and the plaintiff may win, if the parts of the consideration are separate or severable, or if the defence otherwise is unjust. The law is developing here. See 1 *Chitty on Contracts*, paras. 29-062 and 29-063 (pp. 1671-72) (29th ed. 2004). A shrinking defence is no ground to strike out a statement of claim.

[10] The respondents demonstrate that yet another cause of action is arguable in the Northwest Territories: waiver of tort. And *a fortiori* if it is a remedy only.

[11] The appellant seems to suggest more than once that one part of the statement of claim bars another part of it. But we read the pleas as alternatives: see ***Wi-Lan v. St. Paul Guarantee Ins.***, 2005 ABCA 352, 380 A.R. 256 (paras. 12-17). We understand that its statements about pleading practice apply equally to this Territory.

[12] The appeal is dismissed.

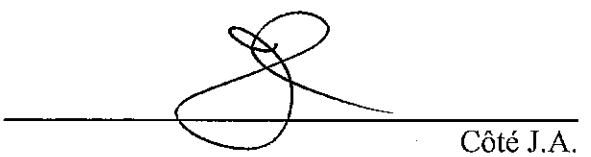
(Discussion regarding costs.)

Côté J.A.:

[13] Costs of this appeal will be paid by the appellant (defendant) to the respondents immediately on taxation. We will not set the details.

Appeal heard on April 21, 2009

Memorandum filed at Yellowknife, N.W.T.
this 21st day of April, 2009



Côté J.A.

Appearances:

R.J.C. Deane
for the Appellant

K.M. Landy/S.S. Marr
for the Respondents

A-1-AP 2008000013

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