

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

Before: Mr. Justice R.S. Veale

Appearances:

Samuel Marr

Counsel for James Douglas Anderson and
Samuel Anderson

Robert Deane

Counsel for Bell Mobility Inc.

REASONS FOR JUDGMENT
(Application to Strike Reply)

INTRODUCTION

[1] . This is an application by Bell Mobility to strike paragraph 2 of the Plaintiff's Reply dated June 2011 with costs payable by James and Samuel Anderson.

BACKGROUND

[2] This case is a class action by the Andersons which alleges, among other things, that Bell Mobility has charged a fee for a 911 emergency access service without providing the service.

[3] In November 2008, the Andersons filed an Amended Statement of Claim which set out the claim of breach of contract and unjust enrichment as follows:

11. The Defendant is charging the Plaintiffs and the Class Members a fee for 911 Emergency Access. Expressly or impliedly the contracts which 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.

12. As a result of the Defendant charging the Plaintiffs and the Class Members monies for 911 Emergency access not provided, the following has occurred:

- a) the Defendant has been enriched; and*
- b) the Plaintiffs and Class Members have suffered a corresponding deprivation.*

[4] Bell Mobility filed a Statement of Defence dated March 7, 2011 and stated as follows:

9. In answer to paragraphs 11 to 17 and the whole of the Amended Statement of Claim, as particularized, the Defendant denies that there has been any breach of contract or unjust enrichment, as alleged or otherwise, and further says that it provides and the Plaintiffs have the benefit of availability to them of 911 call processing

and routing services through the Defendant's national mobile wireless network if, as and when designated by local authorities in areas where the Plaintiffs have used or may use the 6009 phone and the 4405 phone.

[5] Paragraph 9 of the Statement of Defence is based upon the Affidavit of Nuno Martins, sworn September 4, 2009, which was filed as part of Bell Mobility's material in opposing the certification application. Mr. Martins deposed, among other things, as follows:

14. Regardless of the type of 911 service offered by the local government in the particular jurisdiction from which the calls are made, Bell Mobility processes all 911 calls over its network, and through the interconnection with the local ILEC, without imposing any tolls or charges for airtime. Bell Mobility does so regardless of the customer's calling plan with Bell Mobility and regardless of whether the customer's Bell Mobility account is active and in good standing.

...

34. The 911 Fee assists, among other things, in recovering the costs incurred by Bell Mobility nationally to provide the capacity to process 911 calls and, where local authorities have provided specific routing instructions, to route those 911 calls as directed and, as well, to provide the additional information required for E911 service (Phase 1 and Phase 2) as and when requested.

[6] The order for Certification dated May 27, 2011 set out the following common issues at para. 1(c)(iv) and (v) as follows:

(iv) Did Bell Mobility breach the contracts with the class members?

(v) Has Bell Mobility been unjustly enriched for no juristic reason, or has there been a failure of consideration?

[7] After the Certification Order, the Andersons filed a Reply as follows:

2. *In reply to paragraph 9 of the Statement of Defence, the Plaintiffs state:*

i) all cellular customers whether Bell Mobility customers or not, whether they have an active phone or not, have the use of 911 service in any place in Canada where 911 service is available. The availability of 911 services is unrelated and unconnected to the 911 fees charged by the Defendant;

ii) the benefit of the availability of 911 call processing and routing services offered by the Defendant's national mobile wireless network are mandated by the government, but the 911 fees are not mandated by any government;

iii) the Defendant has been unjustly enriched because the monies received by the Defendant from Canadians who have paid 911 fees vastly exceed the cost of creating and maintaining Defendant's 911 call processing and routing services and national mobile wireless 911 network.

[8] Although Bell Mobility initially applied to strike the entire paragraph 2 of the Reply, it now takes no issue with 2(i) and (ii) and limits its application to strike para. 2(iii) of the Reply. In this judgment, I am assuming that the reference to "Canadians" is in fact a reference to class members.

ISSUE

[9] The issue to be determined is whether the Andersons have filed a proper Reply or whether they have added new facts that raise a new claim of relief in unjust enrichment that requires an application to amend their Statement of Claim. This would likely be opposed by Bell Mobility as it comes after the Certification Order.

DISCUSSION

[10] The issue boils down to whether the Reply of the Andersons is inconsistent with their Statement of Claim.

[11] In the *Rules of the Supreme Court of the Northwest Territories* (“Rules of Court”), “reply” means a pleading by which a plaintiff answers a statement of defence.

[12] Bell Mobility’s application to strike relies upon Rule 112 of the Rules of Court:

Matter arising after action commenced

112.(1) A party may plead any matter that arises after the commencement of an action except that, if by reason of the new matter it becomes necessary to amend a pleading already delivered by the party, the amendment may only be made with the leave of the Court.

(2) No pleading may, except by way of amendment, raise a new ground of claim or contain an allegation of fact inconsistent with the previous pleadings of the party pleading it.

[13] The four purposes of a Reply, originally set out in *Bullen & Leake’s Precedents in Pleadings* and relied on in *C.H.S. v. Alberta*, 2006 ABQB 528 at para. 14 and *Mikisew Cree First Nation (2004) v. Canada*, 2004 ABCA 279 at para. 15, are as follows:

- (a) to admit some of the facts alleged in the defence, or meet them by asserting new and additional facts;
- (b) to plead an objection in point of law;
- (c) to plead an answer to the defence that it mistakes the causes of actions; and
- (d) if the defendant has pleaded a counterclaim which the plaintiff desires to contest, to deal with allegations of fact in the counterclaim.

[14] The precise point raised by Bell Mobility is the following:

If it is intended that inconsistent facts be alleged, on the one hand that *no service is provided for the fee charged* (Amended Statement of Claim) and on the other hand that *a service is provided but the fee charged is “too*

high” (Reply), this would have to be done by way of amendment to the Amended Statement of Claim where inconsistent pleadings may be made in the alternative. (emphasis not mine)

[15] Counsel for Bell Mobility submits that this is a different basis for a claim in unjust enrichment from that alleged in the Amended Statement of Claim.


[16] I disagree. The Andersons have plead unjust enrichment and that has been certified as a common issue for trial. The pleading of unjust enrichment is a cause of action that will require a great deal of evidence at the trial. Bell Mobility has denied an unjust enrichment based on the facts of “the benefit of availability to them of 911 call processing and routing services through the Defendant’s national mobile wireless networks if, as and when designated by local authorities...”.

[17] In my view, the Andersons have not changed their cause of action but simply replied and joined issue on the facts as alleged by Bell Mobility.

[18] The ultimate function of pleadings is to clarify the issues of fact and law so that each party knows the case it has to meet before examinations for discovery and trial.

[19] To place it in the context of the four purposes of a reply pleading, this Reply is within the purpose set out in paragraph (a), in that it meets a factual allegation in the Statement of Defence and asserts different facts. The cause of action has not changed.

[20] I therefore dismiss the application to strike and award costs in any event of the cause to the Andersons. Counsel may speak to costs in Case Management, if necessary.



VEALE J.

S-1-CV2007000247

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(APPLICATION TO STRIKE REPLY)
OF THE HONOURABLE JUSTICE R.S. VEALE

