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Nov. 22  
Nov. 29

BETWEEN:

DURAND & CIE. . . . . PLAINTIFF;

AND

LA PATRIE PUBLISHING CO. LTD. . . . . DEFENDANT.

*Practice—Copyright—Demand for Particulars—Rules 42 and 88 of Exchequer Court—Rules of Supreme Court of England, 1883, Order XIX, r. 7, r. 7B, Order XLVIII A, r. 2—Particulars related to status of plaintiff to be furnished—Plaintiff not required to give particulars related to existence of copyright or title of owner since burden of proof on defendant if he put them in issue—The Copyright Act, R.S.C. 1927, c. 32, s. 20(3)—Manner in which plaintiff's title derives from the author a material fact to be alleged—Facts that would indicate whether or not plaintiff has parted with his title to copyright or those that would assist defendant in establishing plaintiff's title matters to be ascertained upon production or examination for discovery.*

*Held:* That in an action for infringement of copyright the defendant is entitled to have full particulars as to the status of a plaintiff instituting proceedings against him.

2. That particulars related to the existence of copyright in a play or to the title of the owner therein are not needed to enable a defendant to prepare his defence since the burden of proof on these points is on him should he put them in issue.
3. That assuming the plaintiff herein is neither author or composer of the play "Pelleas and Melisande", but that it holds whatever rights it possesses therein under assignments or licenses, particulars as to the manner in which its title is derived from the author and composer are required since it is a material fact on which the plaintiff necessarily relies to make his case. If not so alleged in the action the defendant is totally unaware of the nature of plaintiff's claim to title and unable satisfactorily to prepare a defence.
4. That the plaintiff is not required to set out facts which would indicate whether or not it has parted with its title to copyright, or such facts as would assist the defendant in establishing the latter's title. These are matters which can be properly ascertained upon production of documents or upon examination for discovery.

MOTION for particulars.

The motion was heard before the Honourable Mr. Justice Cameron at Ottawa.

*S. Rogers, K.C.* and *G. F. Henderson* for the motion.

*R. Quain, K.C. contra.*

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (November 29, 1951) delivered the following judgment:

This is a motion on behalf of the defendant for an order requiring the plaintiff to give certain particulars of the statement of claim. It is supported by the affidavit of Gordon F. Henderson—a member of the firm of solicitors acting as Ottawa agents for the defendant's solicitors—and concludes as follows:

5. The defendant is unable to plead to the Statement of Claim without such particulars having regard to the sparse nature of the information contained in the said Statement of Claim.

The usual demand for particulars was made but was not complied with and this motion followed.

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The action is one for damages for infringement of copy-right in the play "Pelleas and Melisande," it being alleged that the defendant was responsible for the broadcast over Radio Station CHLP of a recorded performance of the said work in its entirety, or substantially so.

It may be noted here that a default judgment was set aside by my order of September 5, 1951, and that by that order leave was given to the defendant to file a defence within twenty-one days after the payment by it of certain costs. That time has expired but the parties have agreed that the time should be extended to the date of hearing of this motion. Upon that hearing I reserved my finding but directed that the time for filing the defence would be further extended until the disposition of the motion, when the matter would be dealt with.

The defendant asks for particulars of eleven different matters. Counsel for the plaintiff opposed the motion as to all the items except No. 11, particulars of which he agreed to furnish. As to the remaining ten items, there can be no doubt that they are referable to matters which would be relevant to the issues to be determined at the trial, should questions be raised (as seems probable) as to the title of the plaintiff to copyright in the play, and as to the existence of copyright in the play itself. The main contention of counsel for the plaintiff was that the statement of claim was sufficient to disclose the issues, that particulars were not needed to enable the defendant to prepare its defence; and that in any event such particulars could properly be secured upon an examination for discovery or upon production of documents.

Rule 88 of the General Rules and Orders of this Court provides that "every pleading shall contain as precisely as may be a statement of the material facts on which the party pleading relies, but not the evidence . . ."

Rule 42 thereof would also appear to be applicable to this case and therefore the practice and procedure to be followed is that in force in similar proceedings in His Majesty's Supreme Court of Judicature in England. 0.19 of those Rules is in part as follows:

7. A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleadings, notice, or written proceedings requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise as may be just.

7B. Particulars of a claim shall not be ordered under Rule 7 to be delivered before defence unless the Court or Judge shall be of opinion that they are necessary or desirable to enable the defendant to plead or ought for any other special reason to be so delivered.

The statement of claim herein is unusually short. Exclusive of the claim for damages in the sum of \$600, it merely states in brief form that the plaintiff is the owner of copyright in the play, that the defendant on March 10, 1950, performed or caused to be performed a recorded performance over Station CHLP of the play in its entirety or substantially so.

Item 1 of the demand is for particulars as to the status of the plaintiff. The only information furnished in regard to the status of the plaintiff is its name as shown in the style of cause. Nothing is stated as to the jurisdiction in which it is located, where it carries on business, or whether it is an incorporated company or a partnership. I have no doubt whatever that a defendant is entitled to have this information in regard to a plaintiff instituting proceedings against him. If the plaintiff is a corporation, the claim should state that fact, the jurisdiction in which it was incorporated and the location of its head office. If it be a partnership, that fact should be stated, together with the names and addresses of the partners on whose behalf the action is brought.

0.48(a), r. 2 of the English Rules, provides that when proceedings are instituted in the firm name of a partnership, the defendant may demand particulars of the names and places of residence of the partners on whose behalf the action is brought, and that if such be not supplied all proceedings in the action must be stayed.

It would appear that the plaintiff has an office in or may carry on business in France. It is of interest, therefore, to note that under the English practice, if such a firm was a partnership and had no place of business in England, it could neither sue nor be sued in the name of the firm. In the 1950 Annual Practice, p. 851, it is stated: "A partnership firm which has no place of business in England within the meaning of words 'carrying on business within the jurisdiction' as defined in the preceding note, can neither sue nor

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be sued in the firm's name. The partners must sue or be sued individually in their own name and be served as ordinary defendants."

The particulars required under Item 1 must be furnished by the plaintiff.

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Items 2, 3 and 4 of the demand are for particulars of the names of the author of the words and the composer of the music, of the play, and the name of the country in which they are citizens or subjects. Item 8 is for particulars of all assignments by virtue of which the plaintiff claims to have acquired the copyright in the said work or any interest therein, and the extent of such interest, and setting forth the date of and parties to such assignments. The particulars required in these items all go to the question of the title of the plaintiff to copyright in the play.

Items 5 and 6 are for particulars as to whether the author and composer are alive, and if deceased, the dates of death. Item 7 is for particulars of the name of the country in which the play was first produced, the date thereof and the name of the publisher. These demands in my opinion relate to the question of the existence of copyright in the play.

These particulars are among those which counsel for the plaintiff submits can be ascertained upon discovery. It is not always easy to draw the line between what ought to be furnished by way of particulars and what ought to be obtained by way of discovery. Particulars are ordered primarily with a view to having a pleading made sufficiently distinct to enable the applicant to frame his answer thereto properly, and secondarily to prevent a party from being taken by surprise at the trial. Examination for discovery is made to get at the knowledge of the adverse litigant.

Rule 88 of this Court requires pleadings to contain the precise statement of the material facts on which the party pleading relies. The general rule was thus stated by Cotton, L.J. in *Phillips v. P.* (1):

In my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they have to meet when the case comes on for trial.

In *Bruce v. Odhams Press Ltd.* (1), Scott, L.J. defined "material":

The word "material" means necessary for the performance of formulating a complete cause of action, and if any one "material" statement is omitted, the statement of claim is bad.

Sections 20 to 24 of the Copyright Act, R.S.C. 1927, c. 32, as amended provide the civil remedies for infringement of copyright. Under section 20(3) thereof, certain statutory presumptions arise in infringement proceedings when the defendant puts in issue either the existence of the copyright or the title of the plaintiff thereto. In such a case the work, unless the contrary is proved, is presumed to be one in which copyright subsists; and the author of the work, unless the contrary is proved, is presumed to be the owner of the copyright.

I think I may safely assume that in this case the defendant will put in issue either the existence of copyright or the title of the plaintiff thereto, or both; and therefore, in considering what are the material facts which the plaintiff must set forth in its claim, it is proper to take into account that the plaintiff may intend to rely on the presumption that copyright subsists in the play rather than setting out matters which would establish that fact. From that point of view, it is not material to its case to allege facts which establish the existence of copyright. While particulars as to Items 5, 6 and 7 would doubtless be of great assistance to the defendant in meeting the presumption as to the existence of copyright in section 20(3) of the Act, it must be remembered that the burden of proof on that point (under the circumstances I have mentioned) lies on the defendant. For that reason I do not think that the plaintiff is required to give particulars as to Items 5, 6 and 7.

But different considerations apply to Items 2, 3, 4 and 8. I think I may assume that the plaintiff is neither author or composer of the play, but that it holds whatever rights it possesses therein under assignments or licenses. By virtue of the presumption that, under the circumstances which I have mentioned, title to copyright is in the author, the plaintiff in order to succeed must establish that the title thereto is in it. The root of the plaintiff's title is in the author and composer, and it is material to the plaintiff's

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case that it establish the manner in which its title is derived from the author and composer. These being material facts on which the plaintiff necessarily relies, they must be pleaded, or, strictly speaking, the plaintiff could not give evidence in regard thereto (see *Phillips v. P.* (1)). If not so alleged in the claim, the defendant is totally unaware of the nature of the plaintiff's claim to title and unable satisfactorily to prepare a defence. The particulars asked for in Items 2, 3, 4 and 8 must be furnished by the plaintiff.

Item 9 is for particulars of all assignments and/or agreements whereby the plaintiff has parted with the public performing right in the copyright or has granted the right to license performances of the said work in Canada setting forth the dates of and parties to such assignments and/or agreements.

These particulars are no doubt asked for in the hope that they will indicate that the plaintiff has at some time parted with its right to reproduce the play—or some part of that right—in Canada. From material filed on the application to set aside the default judgment, it would appear that Station CHLP is a member of the Canadian Association of Broadcasters and holds certain licences from the Composers, Authors and Publishers Association of Canada (C.A.P.A.C.), a performing rights society; and that C.A.P.A.C. in turn has entered into certain agreements with S.A.C.E.M.—a performing rights society in France—in regard to the use of certain works in Canada. It is the duty of the plaintiff to set out the material facts on which it relies to establish its title to copyright, but it is not required to set out facts which would indicate whether or not it has parted with such title, or such facts as would assist the defendant in establishing the latter's title. These are matters which in my opinion are not necessary to enable the defendant to prepare its defence, but are matters which can be properly ascertained upon production or upon examination for discovery. I therefore refuse the motion as to Item 9.

Item 10 is for particulars of any registration of copyright and assignments thereof at Stationers Hall, London, England, under the provisions of the Imperial Copyright Act of 1842 or other relevant Imperial legislation.

As I understand the argument on this point, it is contended by the defendant that the existence of copyright in Canada may depend upon the question as to whether the work was registered at Stationers Hall under the Imperial Copyright Act, 1842 (see *Smiles v. Belford* (1)). Again, this appears to be a matter of the existence of copyright and for the reasons I have stated in regard to Items 5, 6 and 7, I shall not order the plaintiff to give particulars. If the assignments referred to in Item 10 are ones by which the plaintiff acquired copyright in the work, the details of such assignments will be furnished under the disposition I have made of Item 8. If the plaintiff does not rely on any registration at Stationers Hall, it is not required to set out particulars thereof. Such information as the defendant may require in regard thereto is properly to be obtained upon examination for discovery.

In the result, therefore, the motion for particulars will be granted in part. There will be an order requiring the plaintiff to deliver to the defendant particulars of the statement of claim as required in Items 1, 2, 3, 4, 8 and 11 of the notice of motion, within two months of the date of this order; and that all further proceedings be stayed until the delivery thereof.

It is further ordered that the time within which the defendant shall file and serve its statement of defence be extended; and that the defendant shall have leave to file and serve its statement of defence within twenty-one days of the service of the particulars to be delivered under this order by the plaintiff.

The cost of the motion will be to the defendant in the cause.

*Judgment accordingly.*

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