

BETWEEN:

RELIABLE PLASTICS COMPANY }
LIMITED

PLAINTIFF;

1953
Oct. 15
Oct. 19

AND

LOUIS MARX & COMPANY INCOR- }
PORATED and LOUIS MARX & }
COMPANY OF CANADA LIMITED }

DEFENDANTS.

Practice—General Rules and Orders, Rule 114—Motion to strike out allegations in statement of claim—Impertinent or irrelevant matter in pleadings—Rule 114 not applicable in doubtful cases.

Held: That on a motion under Rule 114 for an order to strike out certain paragraphs in a statement of claim as being impertinent or irrelevant, if it is far from clear that the allegations complained of are impertinent or irrelevant the Court, at this stage of the proceedings, ought not to make such an order and determine issues which should be ruled on at the hearing of the action, when all the facts are before the Court. *Rothschild et al v. The Custodian of Enemy Property* [1945] Ex. C.R. 44 referred to and followed.

MOTION under Rule 114 to strike out paragraphs in a statement of claim as being impertinent or irrelevant.

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

Eric L. Medcalf for the motion.

Gordon F. Henderson contra.

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

FOURNIER J. now (October 19, 1953) delivered the following judgment:

This is a motion by counsel for the defendants for an order to strike out paragraphs 7, 8, 9, 10, 11, 12 and paragraphs (c) and (d) of the prayer of the statement of claim on the grounds that they are impertinent or irrelevant, that they disclose no reasonable cause of action in this Court and that they tend to prejudice, embarrass and delay the fair trial of this action.

The motion repeats the terms of Rule 114 of the General Rules and Orders of the Exchequer Court of Canada.

The action is brought for a declaration by the Court that letters patent 494,447 are invalid and have always been null and void, that the said letters patent have not been

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infringed by the plaintiff, who claims damages for reasons alleged in paragraphs 7 and 9 of his statement of claim and an injunction enjoining defendants, servants, agents and employees from threatening under said letters patent, his customers and purchasers.

Fournier J.

At the hearing of argument it was agreed that plaintiff would amend paragraph 7 by adding that the letters written to the customers of and purchasers from the plaintiff were written in bad faith or male fide. The plaintiff consented also to strike out of paragraph 9 the following words: "which had not at that time been affirmed by the Court".

A lengthy argument was heard in support of the motion. The contention of counsel for defendants was that the Court lacked jurisdiction to hear cases based on the Statute of Monopolies, (1624) 21 Jac. I, c. 3—section 4—and if the Court had jurisdiction, plaintiff was barred by section 6 of said statute to seek the remedy provided for in section 4: that the jurisdiction of this Court was to be found in section 22, paragraph (c), of the Exchequer Court Act. It was also argued that the paragraphs complained of were frivolous and irrelevant.

Decisions and authorities cited were at such variance that the Court has real doubts about the questions raised. It is far from clear that the allegations in paragraphs 8, 9, 10, 11 and 12 are impertinent, irrelevant and immaterial—or that the Court lacks jurisdiction. It should be left to the Court to determine at the hearing of the action the "bien-fondé" of the arguments of both parties, when all the facts are before the Court.

The guiding decision in motions of this nature may be found in *Rothschild et al. v. The Custodian of Enemy Property* (1), in which it was held:

That while the Exchequer Court Rule 114 provides that the Court or a Judge may, upon application, order to be struck out or amended any matter in the pleadings which may be deemed impertinent or irrelevant or which may tend to prejudice, embarrass or delay the fair trial of the action, such an order should not be made unless the matter complained of is clearly impertinent or irrelevant or is clearly a breach of the rules of pleading.

2. That impertinent matter in a pleading is such matter as is not pertinent to the questions in issue and can have no bearing upon them. Matter ought not at the commencement of a suit to be treated as impertinent which may at the hearing be found relevant.

3. That disputed issues of law are not to be tried on a motion under Rule 114.

On this motion, the Court cannot agree that at this stage of the proceedings, it should declare that the allegations complained of are impertinent or irrelevant and determine issues which should be ruled on at the hearing of the action.

As mentioned above, paragraphs 7 and 9 will be amended.

Paragraphs 8, 10, 11, 12 and paragraphs (c) and (d) of the prayer of the statement of claim will stand.

The plaintiffs are to file their amended statement of claim within five days from the date hereof. The defendants will have ten days from the filing and delivery of the statement of claim as amended within which to file their statement of defence herein.

This application is therefore dismissed.

The order will be with costs in the cause.

Judgment accordingly.

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