



[2022] 3 F.C.R. D-2

COPYRIGHT

PRACTICE

Appeal by Bell from order of Case Management Judge (CMJ) striking portions of Bell's amended statement of defence and counterclaim without leave to amend — Underlying action, first of its kind, commenced by group of film studios (Millennium Producers or plaintiffs) against Bell for alleged failure to deliver notices to potential defendants under Notice and Notice regime of *Copyright Act*, R.S.C., 1985, c. C-42 — Impugned paragraphs included allegations that Millennium Producers, together with their counsel Aird & Berlis LLP (AB), other AB clients, have abused Notice and Notice regime and misused their copyright (a novel defence), abused process, engaged in champerty and maintenance and unlawful means conspiracy through their use of copyright enforcement program (CEP) to enforce Notice and Notice regime — Bell also argued that if statutory damages could be awarded on “per notice” basis, such provisions contrary to *Canadian Charter of Rights and Freedoms*, ss. 7, 12 — At issue was whether CMJ erred in striking these allegations, and whether Bell should have been granted leave to amend its pleading — Allegations made by Bell in support of misuse of copyright defence raised policy concerns with application of Act, ss. 41.25, 41.26, its impact on ISPs — It was an error for CMJ to suggest that because arguments raised involved matters of policy, they could not be asserted in support of misuse of copyright defence — Also an error for CMJ to conclude that doctrine of misuse of copyright could never extend to Act, s. 41.26 action — However, facts alleged by Bell did not sufficiently set out how CEP was set up to intimidate, harass alleged infringers, claim exorbitant amounts from ISPs — Pleading did not provide sufficient foundation for what constitutes alleged improper behaviour — Bell therefore not establishing that CMJ erred in law or made palpable and overriding error in finding there were insufficient material facts to support misuse of copyright defence — With respect to allegations against AB, was noted that , subject to a few well-established exceptions , claim cannot be made against opposing party's solicitor for acting within their scope as lawyer — Actions Bell attributing to AB in managing CEP consistent with steps counsel would take in solicitor-client relationship — Such actions without more detail not providing sufficient support for assertion that AB unreasonably, unfairly and/or disproportionately shared in any profits of CEP, that AB has fostered frivolous and improper litigation, or that AB induced such activities by the plaintiffs — Where plain, obvious that cause of action, even novel one, cannot succeed, it may be properly struck — Bell not establishing that CMJ erred with respect to allegations involving AB — Turning to champerty and maintenance, it operates, achieves its purpose by rendering agreement tainted by maintenance and champerty unenforceable — Bell did not plead that it sought to nullify any form of agreement, nor did its pleading outline how any purported agreement between AB, plaintiffs is fundamentally different from contingency agreement (which is not champertous) — Bell not establishing CMJ erred in striking that allegation either — As to abuse of process and unlawful means conspiracy allegations, none of Bell's allegations purported to assert how, in advancing statutory right under Act, 41.26(3) on behalf of the Millennium Producers, action advanced illegal purpose — Alleged abusive conduct was with respect to generation of notices against alleged infringers, not Bell — Bell not pleading it suffered damage from action — Bell not establishing that CMJ erred in finding that there were no material facts alleged to establish torts of abuse of process and unlawful means conspiracy — With respect to Charter allegations, CMJ struck them out on basis corporations cannot avail themselves of protections provided under Charter — CMJ did not err in striking Charter allegations — Full nature of

any constitutional challenge Bell might opt to allege, authority for doing so, not established — Finally, with respect to whether leave to amend should have been granted, Bell did not indicate how it would cure the deficiencies in its pleadings — Rather, its argument focussed on fact allegations novel, should be given leeway — This did not overcome necessity for party who needs to respond to pleading to understand foundation for allegations made — Bell knew of plaintiffs' concerns — No basis to suggest further amendment would cure defects noted — Decision to deny leave justified, CMJ not erring in that regard — Appeal dismissed.

MILLENNIUM FUNDING, INC. V. BELL CANADA (T-1062-21, 2023 FC 764, Furlanetto J., reasons for order dated May 31, 2023, 35 pp. + 8 pp.)