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BETWEEN:

WONDER BAKERIES LIMITED ..... PLAINTIFF;

AND

MAX FURMAN, WILLIAM FURMAN AND AARON  
 FURMAN, CARRYING ON BUSINESS AS PARTNERS UNDER  
 THE FIRM NAME AND STYLE OF TIP TOP BAKING  
 COMPANY ..... DEFENDANTS.

*Practice—Pleadings—General Denials—Application to strike out defence—  
 Exchequer Court General Rules and Orders, rr. 88, 95—Particulars  
 —R. 42 and Rules of the Supreme Court of England, O. XIX, r. 7B—  
 Trade Marks Act, S. of C. 1952-53, c. 49, s. 7.*

The plaintiff company by its statement of claim alleged that it was the owner of three registered trade marks which by use in connection with the plaintiff's goods had become well known in identifying them; that the defendants had infringed the plaintiff's exclusive rights in these trade marks by using them in association with their goods; and that the defendant's had adopted and used the word "Tip Top" in association with their goods for the purpose of directing public attention to them in such a way as to cause confusion with the plaintiff's goods, contrary to s. 7 of the *Trade Marks Act*. Para. 1 of the defence stated: "The defendants deny each and every allegation made by the plaintiff in its Statement of Claim as if the same were herein set forth and denied seriatim and put the plaintiff to the strict proof thereof". Para. 2: "The defendants deny that the plaintiff is the owner of specific trade mark "Tip-Top" referred to in para. 4 of the plaintiff's Statement of Claim". The plaintiff applied to have para. 1 of the defence struck out on the ground that it was contrary to rr. 88 and 95 of the General Rules and Orders of the Exchequer Court in that the paragraph was merely a general denial of the facts alleged in the statement of claim, raised no defence to the action, and did not deal specifically with each allegation of fact of which the defendants did not admit the truth. The second branch of plaintiff's application was for an order requiring the defendants to deliver particulars of para. 2 of the defence, setting forth the names of the persons alleged to be the owners of the trade mark referred to therein. Finally the plaintiff asked for an order requiring the defendants to deliver particulars of the grounds on which they relied in support of their allegation in their counter-claim that one of the plaintiff's trade marks was invalid.

*Held:* That the mere fact that the defence did not contain affirmative allegations was not a contravention of r. 88.

2. That the defendants were within their rights under r. 95 in pleading only denials, and the decision as to whether or not to plead any further facts was entirely for them. *Woon v. Minister of National Revenue* [1950] Ex. C.R. 327; *John Lancaster Radiators Ltd. v. General Motor Radiator Co. Ltd.* 176 L.T. 178.

3. That the general rule is that the Court never orders a defendant to give particulars of facts and matter which the plaintiff has to prove in order to succeed. *Weimberger v. Inglis* [1918] 1 Ch. 133 at 137. Here the onus of establishing title to the trade marks was clearly upon the plaintiff. There was no onus on the defendants to allege or prove title in themselves or in any other party and the Court would not require them to give such particulars.
4. That r. 42 provides that where, as here, there is no specific provision in the rules of this Court relating to the ordering of particulars in cases of this kind (trade mark) the English rules and practice shall apply, and by O. XIX, r. 7B of such rules, particulars of a claim shall not be ordered under r. 7 to be delivered before defence unless the Court or Judge be of opinion that they are necessary or desirable to enable the defendant to plead or ought for any other reason to be so delivered.
5. That as the Court was of the view that no injustice would result to the plaintiff by a refusal to order particulars at this stage, and as no sufficient reason had been shown for regarding the matter as falling within the exception to r. 7B, the application was refused but without prejudice to a further application at a later stage of the proceedings. *La Radiotechnique v. Weibaum* [1928] 1 Ch. 1 at 9, and *The Queen v. The Ship M/V Island Challenger et al.* [1956] Ex. C.R. 334, referred to.

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MOTION for an order to strike out para. 1 of the defence; for further particulars of para. 2 of the defence, and for further particulars of defendants' counterclaim.

*W. B. Rest* for the motion.

*M. M. Kertzer contra.*

THURLOW J. now (March 11, 1958) delivered the following judgment:

This is an application on behalf of the plaintiff for an order

- (1) striking out paragraph 1 of the defence;
- (2) requiring the defendants to deliver particulars of paragraph 2 of the defence; and
- (3) requiring the defendants to deliver particulars of their counter-claim.

In the statement of claim, it is alleged that the plaintiff is the owner of three registered trade marks which, by use in connection with the plaintiff's goods, have become well known in identifying them, that the defendants have infringed the plaintiff's exclusive rights in these trade marks by using them in association with their goods, and that the defendants have adopted and used the word "Tip Top" in association with their goods for the purpose of directing

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public attention to them in such a way as to cause confusion with the plaintiff's goods, contrary to s. 7 of *The Trade Marks Act*.

Paragraphs 1 and 2 of the defence are as follows:

1. The defendants deny each and every allegation made by the plaintiff in its Statement of Claim as if the same were herein set forth and denied seriatim and put the plaintiff to the strict proof thereof.

2. The defendants deny that the plaintiff is the owner of specific trade mark "Tip-Top" referred to in paragraph 4 of the plaintiff's Statement of Claim.

In paragraphs 3 and 4, the defendants deny that they have used the trade marks referred to in the statement of claim or sold their goods in such a manner as to be confusing with the plaintiff's goods, and in paragraph 5 they deny that the plaintiff has suffered damages.

The application to strike out paragraph 1 is made on the ground that it is contrary to Rules 88 and 95 of the General Rules and Orders of the Exchequer Court in that the paragraph is merely a general denial of the facts alleged in the statement of claim, raising no defence to the action, and does not deal specifically with each allegation of fact of which the defendants do not admit the truth. The rules referred to are as follows:

#### RULE 88

##### Pleadings, how to be drawn—Signature of Counsel

Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence; such statement being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation. Dates, sums and numbers shall be expressed in figures and not in words. Signature of Counsel shall not be necessary, except as regards informations, petitions of right and statements of claim. Pleadings may be drawn in conformity with Forms 19, 20, 21 and 22 in the Appendix to these Rules.

#### RULE 95

##### Allegations of fact must not be denied generally

It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the information, petition of right or statement of claim, but he must deal specifically with each allegation of fact of which he does not admit the truth.

The plaintiff submitted that paragraph 1 of the defence is contrary to Rule 88, because it does not contain any statement of the facts on which the defendants rely, and that it is contrary to Rule 95 in that it is a general denial and does not deal specifically with each allegation of the statement

of claim of which the defendants do not admit the truth, and in that it unnecessarily requires the plaintiff to prove facts which it is said the defendants could admit.

In my opinion, the defendants are well within their rights in pleading only denials, and the decision as to whether or not they will plead any further facts is entirely for them. What they may be entitled to prove at the trial under bare denials is, of course, another matter, but I see no contravention of Rule 88 in the mere fact that the defence does not contain affirmative allegations.

The objections under Rule 95 are, in my view, answered by two cases, one of which is a judgment of this Court and the other a judgment of the Court of Appeal in England. In *Woon v. Minister of National Revenue*<sup>1</sup> a similar application was made to strike out two paragraphs of a defence, each of which contained a denial of several paragraphs of the previous pleading. The denials were no less general than the paragraph attacked in the present application and possibly less general, for, while here the whole defence is denied rather than specific paragraphs, the denial is of "each and every allegation made by the plaintiff . . . as if the same were set forth and denied seriatim." In the *Woon* case, Cameron J. said at p. 330:

Paragraphs 5 and 8 of the statement of defence, in my view, cannot be deemed "general denials" of the facts alleged in the statement of claim. They are specific in denying each and every one of the allegations referred to in the specifically named paragraphs of the statement of claim. The appellant is not left in any doubt as to what is meant by these clauses in the defence. They mean that he will be required to prove each statement of fact which is so denied.

And at p. 331:

The issue of estoppel is raised by the appellant and clearly met by the respondent in his denial that the respondent is estopped. No doubt objection will be taken to any evidence as to what was said or done by either of the two gentlemen referred to and the question of estoppel as against the Crown will be argued. But those matters are clearly raised in the proceedings and can cause no surprise to appellant's counsel.

If, for example, the respondent desired to rely at the trial on the fact that the officials named had given rulings or offers other than those put forward by the appellant, that would be a fact or circumstance that the respondent would have to refer to in his statement of defence. But he has not chosen to do so, and as admitted by Mr. Mason, could not introduce evidence on that point in the present state of the pleadings.

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On the facts of this particular case I find that the statement of defence is in conformity with the rulings of this Court.

<sup>1</sup>[1950] Ex. C.R. 327.

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In *John Lancaster Radiators, Ltd. v. General Motor Radiator Co., Ltd.*<sup>1</sup>, Morton L.J. said of a defence similar to that here in question, at p. 179:

Apart from authority, my impression of this defence would have been as follows. I strongly suspect that of the numerous allegations of fact set out in the statement of claim there may be some as to which there is no real controversy. I strongly suspect that to that extent the defendants might have limited the issues or admitted some of the allegations of fact, but this court, at the present moment, has no knowledge as to that. The defendants have chosen to plead in a manner which alleges, in effect, that the statement of claim and every allegation of fact in it is incorrect from beginning to end; in other words, that it is a tissue of lies. We do not know whether that is so or not. No doubt, when the matter comes to a hearing, if the court thinks that the statement of defence has involved the plaintiffs in unnecessary expense, the court will know how to deal with the matter by way of costs; but I am unable, on the material before us, which consists simply of the statement of claim and the defence, to say that this defence tends to prejudice, embarrass or delay the fair trial of the action. The plaintiffs are left, as I see the matter, in no doubt as to what the attitude of the defendants is in regard to every single allegation in the statement of claim. They deny every one of them, and, for all we know, every one of them may be false.

I do not propose to express any view, unless and until the matter arises, on a defence consisting simply of one paragraph: "The defendants and each of them deny each and every allegation in the statement of claim contained as fully as if the same were herein set forth and denied *seriatim*." In this case the defendants have at least gone further than that; they have started by answering in unambiguous terms what seems to be the point of substance in the statement of claim, that is, the alleged conspiracy. They go on to deny, in par. 2, all the acts which they are alleged to have done in pursuance of the alleged conspiracy, and they go on, in par. 3, to deny every item of damage and to raise a further defence that the alleged damage, if it has been suffered, is not the result of any act or default of the defendants. Thus, the plaintiffs know that it is for them to prove every allegation in the statement of claim. It is, of course, open to them, if they think fit, to serve a notice to admit facts on the defendants, or any of them, or to make use of interrogatories, but that is entirely a matter for them.

Although I strongly suspect that the defendants could well admit certain facts in the statement of claim, the court has no knowledge of that at this stage, and I cannot see that any useful purpose would be served at all if the defendants, instead of this form of defence, denied one by one each allegation in the statement of claim, setting out that allegation sufficiently fully to deny it specifically. It seems to me that such a defence would be extremely long in the present case, and would give rise to a good deal of expense in printing. Nor has the court hitherto interpreted rule 17 as making such a form of defence obligatory.

Tucker L.J. also said at p. 180:

The plaintiffs' real complaint, I think, is that it unnecessarily denies a number of allegations in the plaintiffs' statement of claim which it is thought are not really in dispute. This is not the stage at which to pass

<sup>1</sup> (1946) 176 L.T. 178.

judgment upon that, and it may well be (I do not know) that when this case comes to trial the learned judge may think that the attitude taken up by the defendants has been, in substance, an abuse of the process of the court, or he may consider them to have been guilty of the kind of conduct which tends to bring litigation into disrepute, the kind of thing that the rules are designed to prevent. If the learned judge should come to that conclusion, he will know how to deal with the matter with regard to costs.

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See also *Annual Practice*, 1958, p. 472.

In view of these authorities, paragraph 1 of the defence will be allowed to stand.

The second branch of the plaintiff's application is for an order requiring the defendants to deliver particulars of paragraph 2 of the defence, setting forth the names of the persons alleged to be the owners of the trade mark referred to therein. The rule applicable to this situation is stated thus by Astbury J. in *Weinberger v. Inglis*<sup>1</sup> at p. 137:

As a general rule the Court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to succeed, and this is especially the case where a defendant has confined himself to putting the plaintiff to the proof of allegations in the statement of claim, the onus of establishing which lies upon him.

The title of the plaintiff to the trade marks is the very foundation of its claim, and the onus of establishing that title is clearly upon the plaintiff. There is no onus on the defendants to allege or prove title in themselves or in any other party, and in my opinion they are not required to give such particulars. The application for them will, therefore, be refused.

The third branch of the plaintiff's application is for an order requiring the defendants to deliver particulars of their counter-claim. In the counter-claim, the defendants allege that one of the trade marks referred to in the statement of claim is invalid in that it is not distinctive, and they ask that it be expunged. The particulars sought are of "all grounds upon which the defendants will rely in support of their allegation" that the trade mark is invalid in that it is not distinctive. This is a matter on which, in my opinion, particulars may be ordered at the proper time. See *La Radiotechnique v. Weinbaum*<sup>1</sup> where Clauson J. says at p. 9:

If this were a case in which the plaintiff was seeking to restrain infringement of his trade mark, the position would, as it seems to me, be quite different. Where a plaintiff is seeking an injunction to restrain the defendant from infringing a registered trade mark, there is no onus on the

<sup>1</sup>[1918] 1 Ch. 133.

<sup>1</sup>[1928] Ch. 1.

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plaintiff to prove anything, except that the trade mark is registered. It may often happen that in such a case the defendant is minded to dispute the validity of the registration and may do so on various grounds, one being that the mark ought never to have been registered as being common to the trade and not distinctive. In such a case the defendant must, of course, give particulars of the allegations which he is bound to prove, and there are a number of cases in which he has been directed to deliver them.

But is this the proper time for making such an order? Rule 42 of the rules of this Court provides as follows:

In any proceeding in the Exchequer Court respecting any patent of invention, copyright, trade mark or industrial design, the practice and procedure shall, in any matter not provided for by any Act of the Parliament of Canada or by the Rules of this Court (but subject always thereto) conform to, and be regulated by, as near as may be, the practice and procedure for the time being in force in similar proceedings in Her Majesty's Supreme Court of Judicature in England.

As there is no specific provision in the rules of this Court or in the *Trade Marks Act* relating to the ordering of particulars in cases of this kind, and as I am not aware of any other Act of the Parliament of Canada dealing with the question, in my opinion the English rules and practice are applicable. Rule 7B of Order XIX of the English rules is as follows:

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.

In *The Queen v. The Ship M/V Island Challenger et al.*<sup>1</sup>, Thorson P. said at p. 338:

In general, the cases indicate that the object in ordering particulars is twofold: (1) for purposes of pleading, i.e., to enable the opposite party to plead intelligently; (2) for purposes of trial, i.e., to define the issues to be tried, so as to save the expense of calling unnecessary witnesses and to prevent the opposite party from being taken by surprise: *vide* Holmsted & Langton's Ontario Judicature Act, Fifth Edition, page 675. In some cases the first purpose is paramount, in others the second.

Here the learned District Judge expressed the opinion that the particulars ordered by him were desirable to enable the defendants to plead.

I am unable to agree. The defendants do not require the particulars demanded by them in order to enable them to plead. They are just as able to admit or deny the allegations in the statement of claim without having the further particulars demanded as they would be if they were furnished.

Where particulars are not required to enable the defendants to plead they should not be ordered when their effect would be to hamper the plaintiff in the prosecution of his claim and prevent him from obtaining full discovery from the defendants: *vide* *Dixon v. Trusts and Guarantee*

<sup>1</sup>[1956] Ex. C.R. 334.

*Co.*, (1914) 5 O.W.N. 645; *Mexican Northern Power Co. v. Pearson Ltd.*, (1914) 5 O.W.N. 648; *Somers v. Kingsbury*, (1923) 54 O.L.R. 166 at 169. This is particularly true where the facts alleged lie within the knowledge of the defendants rather than within that of the plaintiff: *vide Millar v. Harper*, (1888) 38 Ch. D. 110, where Bowen L.J. said, at page 112:

“It is good practice and good sense that where the Defendant knows the facts and the plaintiffs do not, the Defendant should give discovery before the Plaintiffs deliver particulars.”

What I have said applies in the present case. It would be unfair to the plaintiff to require particulars at this stage for it would unjustly restrict the scope of what should be permissible examination for discovery and the refusal of particulars at this stage does not work any injustice against the defendants.

In the present case, the situation is that the defendants have asserted a counter-claim, the basis of which is the allegation that the plaintiff's trade mark is not distinctive. To this claim the plaintiff has not yet filed a defence. Lack of distinctiveness may consist in matters apparent on the face of the mark or on matters not ascertainable from the mark itself, such as facts pertaining to its use. If such facts exist, some of them may and some of them may not be within the knowledge of the defendants. But one would expect that some, if not all, of them are within the knowledge of the plaintiff. And, even if they are not all known to the plaintiff, the plaintiff in my opinion is not likely to be hampered in pleading a defence to this counter-claim by the lack of knowledge of such facts as are unknown to it and on which the defendants may intend to rely. At a later stage before trial the defendants may be required to state such facts, if there are any.

On the other hand, the defendants are entitled to rely on facts not within their present knowledge and to ascertain such facts by discovery before trial. To require them to give particulars of such facts at this stage would be to require them to do the impossible and, in the words of Thorson P., “would unduly restrict the scope of what should be permissible examination for discovery.” In my view, no injustice to the plaintiff is involved in refusing to order such particulars at this stage, and no sufficient reason has been shown for regarding the matter as being within the exception of Rule 7B. The application for these particulars will, accordingly, be refused, but without prejudice to any further application which the plaintiff may see fit to make at a later stage of the proceedings.

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The plaintiff's application having failed on all three branches, it will be dismissed with costs to the defendants in any event of the cause.

*Order accordingly.*