ELECTROLYTIC ZINC PROCESS CO.....PLAINTIFF;

AND

FRENCH'S COMPLEX ORE REDUCTION CO. OF CANADA LIMITED... } DEFENDANT.

1925
Nov. 20.

Practice—Motion to strike allegation of defence as irrelevant and illegal.

Plaintiff by his action herein seeks to impeach the validity of certain of defendant's patents for invention. The defendant, by a paragraph of its defence alleges that the Consolidated Mining and Smelting Company of Canada (which is not a party to this action) is estopped from impeaching the validity of the patents in question herein by reason of having obtained an option to purchase the same from the defendant and that the plaintiff herein being only the apparent or nominal party (prête-non) to this action, and, being in fact the same entity as The Consolidated Mining and Smelting Co. of Canada, it is itself estopped from impeaching the validity of the patents herein.

Held, that the facts pleaded do not in law disclose any estoppel between the parties to this action. That the said allegations are irrelevant to the issues raised between the parties herein, and tend "to prejudice, embarrass or delay the trial of the action" within the meaning of Rule 117 of the Practice of this Court and should be struck from the defence.

APPLICATION to strike out an allegation of the defence as being irrelevant and as being embarrassing and prejudicial.

Ottawa, October 27, 1925.

Application now heard before the Honourable Mr. Justice Maclean.

Britton Osler, K.C. for plaintiff.

Gérin-Lajoie, K.C. and *Russel S. Smart* for defendant.

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ELECTRO-LYTIC ZINC CO. v. FRENCH'S COMPLEX ORE REDUCTION CO. OF CANADA LTD.

The facts are stated in the reasons for judgment.

MACLEAN, J. this 20th November, 1925, delivered judgment.

This was an application by way of summons for an order to strike out paragraph 6 of the statement of defence on the ground that the allegations and statements made therein are immaterial and irrelevant to the issues involved in this action, and tend to prejudice, embarrass and delay the fair trial of the action.

Apart from the substantial grounds upon which this application rests, it was objected by the defendant that as the issues were joined between the parties before the application to strike out was made, the application comes too late.

I find that the issues have only been joined between the parties for some six weeks, and I do not think that the defendant has in any way been prejudiced by the delay. Therefore I do not consider that this particular objection should interfere with my discretion to grant the application. On this point reference might be had to the case of *Cross* v. *Howe* (1).

The impugned paragraph of the defence as it stands would undoubtedly have been demurrable under the English practice prevailing before the Judicature Acts, and having regard to the ground it alleges in support of the allegation, namely, that the plaintiff is estopped from impeaching the patents, I think that is also bad pleading under Rule 117 of the Practice of this Court.

The ground so alleged in the 6th paragraph of the statement in defence shortly stated is that the plaintiff company is only the apparent or nominal party ("prête-nom") to the action and that in fact it is the same entity as the Consolidated Mining and Smelting Co. of Canada Ltd., a company having its principal place of business in the city of Montreal; and, furthermore, that the defendant has instituted against the last-mentioned company an action now pending before the Superior Court for the District of Montreal, for the infringement of one of the patents in dispute in this case before the Exchequer Court, in which action the defendant (The Consolidated Mining

(1) [1892] 62 L.J. Ch. 342.

and Smelting Company of Canada Ltd.) must be held to be estopped by its option to purchase, from impeaching the validity of the patent there in question.

Now it is clear that the court should not concern itself with relations existing between the plaintiff and persons or entities not before the court, nor should the plaintiff here be prejudiced or embarrassed by allegations of fact which are *res inter alios acta*. Then coming down to the controversy between the immediate parties to the case in the Exchequer Court it is not now incumbent upon me, I think, to decide whether the plaintiff is entitled as a matter of law to maintain an action by statement of claim to impeach the patents in question here. That is an issue which it may be necessary to decide at a later stage of the case. For the purposes of this application the plaintiff must be assumed to be properly before the court. In this connection it might be useful to recall what was said by Lord Buckmaster in *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co.* (1):—

> It not infrequently happens in the course of legal proceedings that parties who find they have a limited company as debtor with all its paid-up capital issued in the form of fully-paid shares and no free capital for working suggest that the company is nothing but an *alter ego* for the people by whose hand it has been incorporated, and by whose action it is controlled. But in truth the Companies Acts expressly contemplate that people may substitute the limited liability of a company for the unlimited liability of the individual, with the object that by this means enterprise and adventure may be encouraged. A company therefore, which is duly incorporated, cannot be disregarded on the ground that it is a sham, although it may be established by evidence that in its operations it does not act on its own behalf as an independent trading unit, but simply for and on behalf of the people by whom it has been called into existence.

I can reach no other conclusion than that paragraph 6 of the statement in defence is bad pleading in that it alleges matters which are irrelevant to the real issues raised between the parties, and may tend "to prejudice, embarrass, or delay the trial of the action" within the meaning of Rule 117 of the Practice of the Court. The facts pleaded do not in law disclose an estoppel between the parties here. See the case of *Gillette Safety Razor Co.* v. *A. W. Gamage Ltd.* (2).

There will be an order that all the words contained in the said paragraph of the statement in defence after the words

(1) [1921] 2 A.C. 465 at p. 475. (2) [1909] 25 T.L.R. 808.

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Maclean J.

La demanderesse est empêchée (estopped) d'invoquer la prétendue invalidité des dits brevets nos 136,341 et 140,402 ou d'aucun d'eux

be struck out. That will leave the plaintiff with the right to ask for particulars of the alleged estoppel if it desires to do so. It occurs to me to add that the interests of justice between the parties might be better served by allowing the defendant to substitute an entirely new paragraph for the one now attacked wherein any proper grounds of estoppel, if such there be on which the defendant might wish to rely at the trial may be pleaded.

If the defendant is advised to so amend his defence leave is hereby given for the purpose, with leave to the plaintiff to reply to the same. . . .

Judgment accordingly.