

**Date: 20080620**

**Docket: T-394-04**

**Citation: 2008 FC 778**

**Vancouver, British Columbia, June 20, 2008**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**FILM CITY ENTERTAINMENT LTD.,  
L.S. ENTERTAINMENT GROUP INC.,  
MEI AH FILM PRODUCTION CO. LTD.,  
MEI AH DEVELOPMENT COMPANY LTD.,  
MATRIX PRODUCTIONS COMPANY LIMITED,  
MANDARIN FILMS LIMITED,  
UNIVERSE ENTERTAINMENT LIMITED,  
CHINA STAR PICTURES LIMITED,  
CHINA STAR WORLDWIDE DISTRIBUTION B.V., and  
ONE HUNDRED YEARS OF FILM COMPANY LIMITED**

**Plaintiffs  
(Defendants by Counterclaim)**

**and**

**CHINATOWN ELECTRONICS CENTRE LTD.,  
APC MUSIC & VIDEO INC., FENG CAI SHEN,  
CHO KWONG LAU a.k.a. PETER LAU, and  
WENDY YU HUANG**

**Defendants  
(Plaintiffs by Counterclaim)**

**REASONS FOR ORDER AND ORDER**

[1] Film City Entertainment Ltd., L.S. Entertainment Group Inc., Mei Ah Film Production Co. Ltd., Mei Ah Development Company Ltd., Matrix Productions Company Limited, Mandarin Films Limited, Universe Entertainment Limited, China Star Pictures Limited, China Star Worldwide Distribution B.V., and One Hundred Years of Film Company Limited (the “Plaintiffs”) bring this action against Chinatown Electronics Centre Ltd., APC Music & Video Inc., Feng Cai Shen, Cho Kwong Lau a.k.a. Peter Lau and Wen Yu Huang (the “Defendants”) alleging copyright infringement with respect to certain copyrights for which the Plaintiffs hold certain legal rights either by ownership, assignment or written license agreements. The alleged infringement acts are alleged to have occurred in relation to certain films that are referred to in the Further Amended Statement of Claim dated July 9, 2007 as “the Films”, as well as in the “Mei Ah Film”, the “Matrix Productions Film”, the “Mandarin Film”, the “Universe Entertainment Film”, the “China Star Film”, the “One Hundred Years of Films”.

[2] On August 8, 2007, the Defendants, other than Feng Cai Shen, (the “Responding Defendants”), filed their Defence to the Plaintiffs’ Further Amended Statement of Claim. By Notice of Motion submitted pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 (the “Rules”), the Plaintiffs sought the following relief:

1. That the Defendants shall have twenty-one (21) days from this Order to serve and file suitable particulars to support their various denials of the Plaintiffs’ copyright in their Amended Statement of Defence and Counterclaim, failing which: (i) those pleadings will be deemed to have been struck out pursuant to Rule 221 of the *Federal Courts Rules*, S.O.R./98-106 as am.; and (ii) the Plaintiffs have leave to bring an *ex parte* motion for default judgment in accordance with Rule 210;

2. That, in the event that the Defendants do serve and file suitable particulars within twenty-one (21) days, the time for service and filing of the Plaintiffs' Reply to the Statement of Defence is extended pursuant to Rule 8 and the Plaintiffs shall have 10 days after service of the said particulars to serve and file their Reply;

3. That, in the event that the Defendants do serve and file suitable particulars within twenty-one (21) days, the time for service and filing of the Plaintiffs' Defence to Counterclaim is extended pursuant to Rule 8 and the Plaintiffs shall have 30 days after service of the said particulars to serve their file their Defence to Counterclaim;

4. That the Defendants must, within seven (7) days of this Order, deliver copies of the documents referred to in the September 15, 2005 Supplemental Affidavit of Documents sworn by Mr. Cho Kwong Lau, a.k.a. Peter Lau, failing which the Plaintiffs may move to strike the Defendants' pleadings and for default judgment, pursuant to Rules 58 and 210; and

5. Granting the Plaintiffs their costs of this motion in any event of the cause, pursuant to Rule 401, payable forthwith in the amount of \$2,500.00;

[3] By Order dated October 9, 2007, Prothonotary Lafrenière struck out the Amended Defence and Counterclaim, filed on August 8, 2007, by the Responding Defendants, on the grounds that the Amended Defence and Counterclaim raised only bald denials of copyright that did not constitute either a proper defence to the Amended Statement of Claim, nor proper pleadings to establish a reasonable cause of action by counterclaim.

[4] The Prothonotary determined that rather than allowing the Responding Defendants to provide particulars to rehabilitate the Amended Defence and Counterclaim, thereby potentially

leading to further motions to strike by the Plaintiffs, the pleadings should be struck and further, that the Responding Defendants should obtain leave to file an Amended Defence and Counterclaim.

[5] The Responding Defendants appeal the Order of Prothonotary Lafrenière and argue that he erred in law by finding that the Amended Defence and Counterclaim were based entirely upon a denial of the Plaintiffs' registered copyright. The Responding Defendants submit in the alternative that the Prothonotary erred in finding that the denials of copyright were "inextricably intertwined" with the other allegations raised in the Amended Defence and Counterclaim.

[6] Finally, the Responding Defendants argue that the filing of an Amended Defence and Counterclaim should be a matter of right, not requiring leave of the Court.

[7] For their part, the Plaintiffs submit that the Prothonotary committed no legal error in striking the Amended Defence and Counterclaim and further, that the requirement that the Responding Defendants obtain leave before filing a further Amended Defence and Counterclaim was a discretionary decision that was properly made by the Prothonotary in the discharge of his mandate as a Case Management judge.

[8] Rule 221 governs the striking out of pleadings. The test upon a motion to strike is whether the pleading raises a reasonable cause of action or defence, as the case may be. In the present matter, the issue is whether the Amended Defence and Counterclaim satisfy that test.

[9] The applicable standard of review relative to a decision of a prothonotary is set out in *Merck & Co., Ltd. v. Apotex Inc.*, [2004] 2 F.C.R. 459 (F.C.A.) at para. 19 where the Court said :

[19] .... The test would now read: "Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts."

[10] In the present case, the Order of the Prothonotary is not dispositive of the action and in any event, represents the exercise of the discretion conferred by Rule 221(1), as illustrated by the presence of the word "may" in the opening words of that provision. Any argument as to the application of the wrong legal test will be reviewable on the standard of correctness. The issue as to judicial exercise of discretion will be reviewed against the test set above in *Merck*, above, that is, whether the prothonotary based his exercise of discretion upon a wrong principle or misapprehension of the facts.

[11] The Prothonotary noted in his endorsement that the Amended Defence filed on behalf of the Responding Defendants was characterized by bald denials. He further found that bald denials were so entangled with other allegations of the pleadings that they could not be separated and that, in the circumstances, the entire pleading should be struck.

[12] It is well established that pleadings require allegations of fact, not merely bald denials. In this regard, I refer to *Chavali v. Canada* (2002), 291 N.R. 311 (F.C.A.), affirming 202 F.T.R. 166 and *Vojic v. Canada (M.N.R.)*, [1987] 2 C.T.C. 203 (F.C.A.).

[13] The requirement for a factual foundation applies to both the Amended Defence and Counterclaim filed by the Defendants. In my view, the Prothonotary applied the correct legal test in exercising his jurisdiction to strike the impugned pleadings. Where discretion is available, a discretionary order will not be reversed by a reviewing Court as long as the discretion has been exercised judicially; see *VISX Inc. v. Nidek Co.* (1996), 209 N.R. 342 (F.C.A.) at para. 10.

[14] The Prothonotary was also authorized to exercise discretion with respect to the filing of a further Defence and Counterclaim with or without leave. He elected to impose a leave requirement upon to the Responding Defendants. They say that this was erroneous and they submit they should be able to file a further Defence and Counterclaim as of right.

[15] Rule 221(1) clearly provides that the Court “may at any time, order that a pleading ... be struck out, with or without leave to amend.” In my opinion, this means that the imposition of a leave required is wholly with the discretion of the Court which in the present case, includes the Prothonotary. No evidence has been submitted to show that the Prothonotary improperly exercised his discretion in this regard.

[16] It is to be noted that pursuant to the Order of the Chief Justice dated July 6, 2005, Prothonotary Lafrenière was designated to assist Mr. Justice Hugessen in the case management of this proceeding. The definition of a “case management judge” in Rule 2 includes a prothonotary as follows:

**Definitions –**

...

“case management judge” means a judge assigned under paragraph 383(a) or rule 383.1 and includes a prothonotary assigned under paragraph 383(b).

**Définitions –**

...

« juge responsable de la gestion de l’instance » Tout juge affecté à ce titre en vertu de l’alinéa 383a) ou de la règle 383.1; y est assimilé le protonotaire affecté à une instance en vertu de l’alinéa 383b).

[17] In *Society of Composers, Authors and Music Publishers of Canada v. Landmark Cinemas of Canada Ltd.* (2004), 30 C.P.R. (4<sup>th</sup>) 257 (F.C.A.), the Federal Court of Appeal discussed the deference due to decisions of case management judges including prothonotaries at paras. 25 through 27. The Federal Court of Appeal confirmed, on the basis of the decision in *Sawridge Band v. Canada*, [2002] 2 F.C.R. 346 (F.C.A.), that discretionary decisions made by a prothonotary in the case management process attract a high level of deference. The Court went on to say that a discretionary decision of a case management prothonotary that demonstrates regard for “costs, efficiency and expeditiousness” will also attract a high degree of deference.

[18] In my opinion, the same reasoning applies here. Prothonotary Lafrenière struck out the Amended Defence and Counterclaim without leave to amend and imposed a leave requirement as a condition precedent to the filing of a further Defence and Counterclaim in order to circumvent the possibility of further motion for particulars on the part of the Plaintiffs. I see no error in the manner in which the Prothonotary exercised his discretion in this regard, particularly in light of Rule 3 of the Rules which provides as follows:

**General principle –**

These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

**Principe général –**

Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

[19] The appeal is dismissed with costs. In the exercise of my discretion pursuant to Rule 400(1), I set costs in the amount of \$2,000 inclusive of disbursements and G.S.T.



**ORDER**

**THIS COURT ORDERS AND ADJUDGES that** the appeal is dismissed with costs. In the exercise of my discretion pursuant to Rule 400(1), I set costs in the amount of \$2,000 inclusive of disbursements and G.S.T.

“E. Heneghan”

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Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-394-04

**STYLE OF CAUSE:** **FILM CITY ENTERTAINMENT LTD.  
L.S. ENTERTAINMENT GROUP INC.  
MEI AH FILM PRODUCTION CO. LTD.  
MEI AH DEVELOPMENT COMPANY LTD.  
MATRIX PRODUCTIONS COMPANY LIMITED  
MANDARIN FILMS LIMITED  
UNIVERSE ENTERTAINMENT LIMITED  
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and ONE HUNDRED YEARS OF FILM COMPANY  
LIMITED v. CHINATOWN ELECTRONICS CENTRE LTD.  
APC MUSIC & VIDEO INC., FENG CAI SHEN  
CHO KWONG LAU a.k.a. PETER LAU  
AND WEN YU HUANG**

**PLACE OF HEARING:** Vancouver, BC

**DATE OF HEARING:** December 3, 2007

**REASONS FOR ORDER  
AND ORDER:** HENEGHAN J.

**DATED:** June 20, 2008

**APPEARANCES:**

Brent B. Olthuis	FOR PLAINTIFFS
Edward G. Wong	FOR DEFENDANTS (except Defendant Feng Cai Shen)

**SOLICITORS OF RECORD:**

Michael Leung Richmond, BC	FOR PLAINTIFFS
Edward G. Wong Vancouver, BC	FOR DEFENDANTS (except Defendant Feng Cai Shen)