IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Truly Social Games, LLC v. East Side Games Group Ltd.,* 2024 BCSC 1260

Date: 20240715
Docket: S231406
Registry: Vancouver

Between:

Truly Social Games, LLC and Truly Social Games Vancouver, Inc.

Plaintiffs

And

East Side Games Group Ltd., East Side Games Inc., Jason Bailey, Joshua Nilson, Andrew Bernard, Muhammed Bin Khalid, Beamable Inc., and Hashbang Inc.

Defendants

And

Patrick Tougas, Cooper Dubois, Craig Williams, Joe Bonar and John Doe

Defendants by way of Counterclaim

Before: The Honourable Justice Francis

Reasons for Judgment

Counsel for the Plaintiffs and Defendants by Counterclaim:	T.M. Cohen, K.C. P. Mueller
Counsel for the Defendants, East Side Games Group Ltd., East Side Games Inc., Jason Bailey, and Joshua Nilson:	D.L. Cayley J. Mansfield
No other appearances:	
Place and Date of Hearing:	Vancouver, B.C. June 3–4, 2024
Place and Date of Judgment:	Vancouver, B.C. July 15, 2024

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Overview

[1] The defendants, East Side Games Inc. (“ESG”), East Side Games Group Ltd. (“ESGG”), Jason Bailey, and Joshua Nilson, have applied for summary judgment dismissing some of the claims brought against them by the plaintiffs, Truly Social Games, LLC (“TSG”) and Truly Social Games Vancouver Inc. (“TSGV”). They also seek security for costs from the plaintiffs.

[2] The plaintiffs and the corporate defendants are companies that develop and publish video games. The issues in the summary judgment application concern a video game called “Archer: Danger Phone” based on the animated television series “Archer” (the “Archer Game”), which the parties agreed to work together to develop and exploit by way of a publishing agreement dated April 1, 2020 (the “Archer Publishing Agreement”). The Archer Publishing Agreement was one of a number of agreements that the plaintiffs entered into with the corporate defendants for the purpose of developing different video games. On June 16, 2021, the parties entered into a Membership Interest Purchase Agreement (the “MIPA”) whereby ESGG acquired an interest in TSG on certain terms.

[3] By late 2022, the relationship between the parties had broken down. In February 2023, the plaintiffs commenced an action against the defendants alleging breach of contract and other causes of action. One of the material facts alleged by the plaintiffs in the amended notice of civil claim is that the corporate defendants wrongfully terminated the Archer Publishing Agreement. A number of legal consequences flow from this alleged termination.

[4] The applicants submit that it is plain and obvious that the Archer Publishing Agreement was never terminated. As a result, they seek summary judgment dismissing the claims pleaded in the amended notice of civil claim that relate to the termination of the Archer Publishing Agreement.

[5] Additionally, the applicant defendants seek security for costs on the basis that neither of the plaintiffs would have the means to pay the defendants’ costs if the

claims against them are ultimately dismissed, given that TSG is an Oregon company and TSGV has now been dissolved.

[6] For reasons discussed below, I have determined that both applications must be dismissed. I am satisfied that there is a genuine issue for trial with respect to whether the Archer Publishing Agreement was terminated by the defendants. However, even if it was incontrovertible on the evidence that the agreement remains in force as the defendants claim, this would not resolve any claim advanced in the amended notice of civil claim, because none of the plaintiffs' claims, including the breach of copyright claim, is predicated solely on the termination of the Archer Publishing Agreement.

[7] Further, I find that the applicants have failed to make out a *prima facie* case that the plaintiff companies will be unable to pay the defendants' costs if the action fails and, as a result, the applicants have failed to satisfy the first branch of the test for granting security for costs.

Application for Summary Judgment

Relevant Facts

Archer Publishing Agreement

[8] The Archer Publishing Agreement was the result of negotiations between the corporate defendants and the plaintiffs about developing the Archer Game. On April 1, 2020, the parties entered into the Archer Publishing Agreement, along with a separate publishing agreement in respect of a game called "Fantasy Idle".

[9] The plaintiffs claim that the Archer Publishing Agreement was an agreement between TSG and ESG. The defendants assert that it was TSGV, not TSG, that was a party to the Archer Publishing Agreement. It is not necessary for me to resolve this dispute for the purposes of this application and, in these reasons, I will simply refer to the parties to the Archer Publishing Agreement as ESG and "the plaintiffs".

[10] Under the Archer Publishing Agreement, the plaintiffs were to develop and provide ongoing programming for the Archer Game, which ESG would market and

publish. The agreement granted ESG certain rights in the Archer Game, including an exclusive publishing grant (described at paragraph 3.1(a) as a "royalty-free, exclusive, limited, irrevocable and sub-licensable right and license" to, among other things, publish, market and sell the game) and a license to use the TSG's intellectual property in connection with the game for the purpose of marketing the game (at paragraph 3.1(b)). The license granted by the plaintiffs to ESG was limited to marketing rights; the plaintiffs did not grant ESG a license to use the plaintiffs' intellectual property for game development.

[11] Under the Archer Publishing Agreement, the plaintiffs were entitled to receive compensation that was dependent on the performance of the game.

[12] Section 8 of the Archer Publishing Agreement addresses termination:

> This Agreement shall become effective as of the Effective Date, and unless terminated earlier pursuant to Section 12 below, shall be in force and effect for an initial term ending two (2) years following the Launch Date (the "Initial Term"). This Agreement shall automatically be renewed for successive one (1) year terms (each, a "Renewal Term" and together with the initial term, the "Term"), unless either Party notifies the other Party in writing of its intent not to renew this Agreement within one hundred and eighty (180) days of the end of the then-current Term.

[13] Section 12 sets out other circumstances in which the Archer Publishing Agreement may be terminated, such as if either party breaches the agreement and does not correct it within 15 days of receiving notice from the other party (s. 12.1), if the plaintiffs fail to deliver agreed-upon milestones within 30 days of a deadline (s. 12.3), or if the game underperforms after its first year by bringing in less than $400,000 in gross receipts in the preceding quarter (s. 12.5). Pursuant to s. 12.6, once the Archer Publishing Agreement terminates or expires, all licenses granted under it will terminate, all confidential information must be returned or destroyed, and the Archer Game must be discontinued, at which point ESG will have no further right or obligation to use, exploit, publish, market, or promote the Archer Game.

[14] Section 17 of the Archer Publishing Agreement addresses notice. It states that notice may be provided to TSG by email to Joe Bonar at joe@trulysocialgames.com.

[15] The Archer Publishing Agreement contains an “entire agreement” clause stating that the agreement is the sole and entire agreement of the parties with respect to the subject matter contained therein.

The MIPA

[16] On June 16, 2021, ESGG, TSG, TSGV, and various other parties entered into the MIPA. ESG was not a party to the MIPA. The MIPA was an agreement whereby ESGG agreed to purchase a portion of TSG. Pursuant to s. 2.1(a) of the MIPA, ESGG acquired an immediate 20% interest in TSG. In consideration of this interest, ESGG agreed to provide funding to the plaintiffs to develop the Archer Game, the Fantasy Idle game and two other games. The MIPA further contemplates that, upon certain financial targets being reached, ESGG will acquire further shares of TSG, with ESGG ultimately owning all of the shares of TSG.

[17] Section 11.2 of the MIPA deals with notice. It requires any notice under the agreement to be sent to Patrick Tougas, one of the principals of TSG. The MIPA also contains an “entire agreement” clause.

Events following the execution of the MIPA

[18] Later in 2021, ESG and TSG entered into two software development services agreements relating to two other video games (the “SDSA”s). The first was dated September 29, 2021 and related to a game titled “Bud Master”. The second was dated December 22, 2021 and related to a game titled “Trailer Park Boys: Merge”. Ultimately, neither of these games was launched globally. On June 7, 2022, ESG terminated the Bud Master SDSA.

[19] The business relationship between TSG and ESG was not a successful one. On October 12, 2022, Mr. Tougas of TSG sent a lengthy email to Jason Bailey of ESG, in which he provided a “list of issues” that have “contributed to the discord between ESG and TSG”. These included complaints of lack of analytics support, lack of reporting, and failure by ESG to comply with the spirit of the agreement between the companies.

[20] In response to the October 12, 2022 email from Mr. Tougas, a call was arranged between the senior staff of TSG and the senior staff of ESG for October 13, 2022. Mr. Tougas deposes that Mr. Bailey did not attend this call, whereas Mr. Bailey deposes that he did indeed participate. In any event, Mr. Tougas deposes that during the October 13, 2022 telephone call, Josh Nilson of ESG told Mr. Tougas and Cooper Dubois (Chief Executive Officer of TSG) that ESG was terminating its agreement with TSG.

[21] The defendants have disclosed Slack messages from October 13, 2022 in which employees of ESG discuss the fact that ESG's relationship with TSG was severed on the morning of October 13, 2022.

[22] Later in the day on October 13, 2022, Mr. Nilson sent an email to Mr. Tougas and Mr. Dubois. The email states, in part:

> As per our earlier phone call.
>
> We regret to inform and notify you that we are terminating our partnership with Truly Social Games ("TSG") and the work TSG is completing for Eastside Games ("ESG") under the *Membership Interest Purchase Agreement* signed on June 16, 2021 and the *Software Development Services Agreement* dated December 22, 2021.
>
> …
>
> Regarding the [Archer Publishing Agreement], TSG is expected to continue to run this game and any royalties earned from this agreement will be deducted from the prepaid royalty. We are willing to reduce the 180 day notice period to 30 days notice on this game should you wish to terminate this agreement. Upon termination TSG will repay any remaining prepaid royalty balance.

[23] Following the October 13, 2022 email, there has been no further reporting by ESG to TSG about the Archer Game, nor have any of the amounts payable to TSG by ESG under the Archer Publishing Agreement been paid.

The Claim that the Applicants Seek to have Summarily Dismissed

[24] The amended notice of civil claim pleads a number of claims against the defendants arising from the various commercial agreements between the parties. The plaintiffs plead that they were induced to enter into the MIPA and the Archer Publishing Agreement by representations made by the defendants that turned out to

be false. The plaintiffs plead that after they expended time and effort to develop, launch and maintain games for the defendants, the defendants wrongfully terminated their relationship and remaining agreements, including the Archer Publishing Agreement.

[25] In the notice of application, the defendant applicants describe their application for summary judgment as pertaining to "the plaintiffs' claims in copyright, and ancillary relief, as those claims relate to the mobile game titled '*Archer: Danger Phone'".*

[26] The specific order sought in the notice of application is to "dismiss" certain paragraphs of the amended notice of civil claim "as they relate to the plaintiffs' claims pursuant to the Archer Publishing Agreement". The sheer number of paragraphs of the amended notice of civil claim implicated by the relief sought is telling of the extent to which the claims on which the defendants seek summary judgment are intertwined with the rest of the claim. In the notice of application, they are listed as:

a) paragraphs 45,46, 57, 66(n), 66(p), 68, 81, 84, 86, 87, 89(a), 89(b), and 89(e) of part 1;

b) paragraphs 106(a),106(c), 106(d), 106(e), 106(f), 106(g), 106(j), 106(k), and 106(l) of part 2; and

c) paragraphs 111, 113, 130, 122, 123, 126, 127, 128, 130, 131, 132, 133, 134, 135, 137, 147, 148, 149, 150, 151, 152, 153, 154 and 155 of part 3.

[27] As one example, the first paragraph that the applicants ask the Court to dismiss is paragraph 45, which pleads that the plaintiffs performed services under the Archer Publishing Agreement and MIPA and designed, developed, and created the games as required. The plaintiffs plead that the intellectual property and confidential information created as a result of that work included proprietary information, technical data, trade secrets, or know-how. The plaintiffs go on to plead

that ESG used TSG's intellectual property in a manner contrary to their legal and/or equitable obligations to the plaintiffs (at paras. 86, 87 and 89).

[28] While the defendants contend that these claims rely on the "single factual assertion" that ESG terminated the Archer Publishing Agreement in October 2022, a fact they claim is demonstrably false, they have made no effort to demonstrate how these claims are in fact predicated on the termination of the agreement. On their face, the claims at paras. 86, 97, and 89(b) and (e) appear to be standalone claims that do not depend on the Archer Publishing Agreement having been terminated in the manner described. While the use of the plaintiffs' IP in the face of the alleged termination of the Archer Publishing Agreement is likely a component of the wrong alleged by the plaintiffs in these paragraphs, the plaintiffs plead other independent breaches of the Archer Publishing Agreement relating to the use of TSG's intellectual property and confidential information: see paras. 66(n) and 89(a) of the amended notice of civil claim and ss. 3.2 and 13.1 of the Archer Publishing Agreement.

[29] I emphasize that this is but one example. I refer to it only to illustrate the difficulty with the defendants' submission that the relief sought is a clean and surgical attempt to eliminate a single claim that is bound to fail.

Issues on Summary Judgment Application

[30] Pursuant to Rule 9-6(4), a responding party may apply for judgment dismissing all or part of a claim in the claiming party's original pleading. On hearing such an application, if the court is satisfied that there is no genuine issue for trial with respect to a claim, the court must dismiss the claim accordingly.

[31] The issue in this application is therefore whether there is no genuine issue for trial with respect to the plaintiffs' claims in copyright and ancillary relief as those claims relate to the Archer Game.

Authorities

[32] The burden on an applicant seeking summary judgment is high. It is not enough to show that the claim has little merit. Rather, the applicant must show that the claim presents no genuine issue for trial and is bound to fail: *Zheng v. Bank of China (Canada) Vancouver Richmond Branch,* 2023 BCCA 43 at para. 31.

[33] While other jurisdictions, such as Ontario, allow some scope for a chambers judge to grapple with evidence to make findings of fact on a summary judgment application (see *Hryniak v. Mauldin*, 2014 SCC 7 at para. 49), this is not the case in British Columbia. In British Columbia, the summary judgment procedure is distinct from the summary trial procedure. The weighing of evidence is not permissible on an application for summary judgment, beyond determining whether it is incontrovertible: *Beach Estate v. Beach,* 2019 BCCA 277 at para. 49; *Century Services Inc. v. LeRoy*, 2014 BCSC 702 at paras. 82–88.

[34] The courts have historically cautioned against granting summary judgment on only a portion of a party's claim. This is because doing so can give rise to what Madam Justice Southin famously described as "litigating in slices": *Coquitlam School District No. 43 v. T.W.D.,* 1999 BCCA 164 at para. 35. Litigating in slices can be problematic because it may give rise to multiple appeals within one action, carries a risk that factual findings will be made without the benefit of the full evidentiary record, and risks duplicative or inconsistent findings at later stages of the litigation: *Century Services Inc.* at paras. 89–90.

Analysis

[35] The applicants ask the Court to summarily dismiss the plaintiffs' claims as they relate to the Archer Game. Their reasoning is that the plaintiffs' claims for breach of copyright and other causes of action are premised on the Archer Publishing Agreement having been terminated, and the evidence does not support that the Archer Publishing Agreement ever was terminated. They point out that the October 13, 2022 email expressly states that, while the other agreements between the parties are terminated, the Archer Publishing Agreement was being kept alive.

Further, there are specific provisions in the Archer Publishing Agreement and the MIPA as to how these agreements may be terminated. The October 13, 2022 email does not satisfy the requirements for termination of the Archer Publishing Agreement.

[36] The difficulty with this position is twofold. First, it construes too narrowly the claim being brought by the plaintiffs against the defendants. The plaintiffs are not simply suing the defendants for wrongful termination of the Archer Publishing Agreement, in which case conclusive evidence that the Archer Publishing Agreement was *not* terminated could potentially give rise to summary judgment. Rather, the plaintiffs have claimed numerous wrongs related to the "TSG Intellectual Property and Confidential Information," not all of which depend on the Archer Publishing Agreement being terminated. For example, the plaintiffs claim that the defendants have breached their obligations not to use TSG's intellectual property outside the limited scope allowed under the Archer Publishing Agreement, such as by receiving information from, and disclosing information to, third parties: paras. 66(n), 84, and 89(a). This claim would survive even if the Archer Publishing Agreement were never terminated.

[37] Second, I do not accept the applicants' submission that there is no triable issue as to whether ESG terminated the Archer Publishing Agreement. The email relied on by the defendants, in the context in which it was sent, is not without some ambiguity. Mr. Tougas has deposed that the email was preceded by a phone call in which Mr. Nilson advised that the agreement between TSG and ESG was being terminated by ESG. Further disclosure has shown that in the days leading up to October 13, 2022, ESG employees were taking steps to gain administrative access and control to the code and art for the Archer Game so they could continue to publish the game after they (in the words of one employee) "fired TSG". Further, after October 13, 2022, ESG spent no money on the Archer Game, delivered no reports to TSG, and did not act in any manner as if the Archer Publishing Agreement were alive. In the circumstances of this factual matrix, I cannot find that there is no

triable issue as to whether the Archer Publishing Agreement was terminated by ESG in October 2022.

[38] The applicants argue that I must not consider the factual matrix in construing whether triable issues exist as to the termination of the Archer Publishing Agreement, and I should restrict my review to the plain language of the email. They rely on the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, to support the proposition that, where the terms of a contract are clear, one need not look to the surrounding circumstances as evidence.

[39] There are two fatal flaws in this submission. First, the applicants appear to misunderstand the holding in *Sattva.* In *Sattva,* the Supreme Court of Canada held that courts interpreting contracts "must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (at para. 47). In other words, while contract interpretation must be rooted in the words of the contract itself, the Court confirmed that an examination of the "factual matrix" should also be conducted.

[40] Second, I am not interpreting a contract. Communications or actions that purportedly terminate a contract are not subject to the rules of contractual interpretation. In the same way, the fact that the Nilson email does not comply with the notice requirements set out in the Archer Publishing Agreement is not relevant, since the plaintiffs allege that the agreement was terminated wrongfully.

[41] I must interpret the correspondence between the parties, along with other evidence, to determine whether it is plain and obvious that the plaintiffs' claim that the Archer Publishing Agreement was terminated is bound to fail. The burden is on the applicants to demonstrate this. To argue that this burden is met, but only if I decline to consider highly relevant communications between the parties is, with respect, a problematic position to take on a summary judgment application.

[42] As such, I cannot find that the plaintiffs' claim that the Archer Publishing Agreement was terminated is bound to fail.

[43] There is a second reason why the summary judgment application should not succeed. While summary judgment on a single claim in a complex proceeding may be expeditious and serve the interests of justice in many cases, this is not one of those cases. Indeed, this is precisely the kind of case that gives rise to the concerns raised in the jurisprudence about litigating in slices. The claims on which the applicants seek summary judgment are neither discrete nor easily excisable from the remaining claims. There is a high risk of factual findings being made in the absence of a complete evidentiary record, particularly given that the parties are in the early stages of document discovery. This could lead to inconsistent findings of fact. In these circumstances, summary judgment risks complicating, rather than simplifying, this proceeding.

[44] In light of my findings above, I need not consider the additional argument raised by the plaintiffs: specifically, that summary judgment should not be considered in the face of inadequate document disclosure from the defendants.

[45] In all the circumstances, I decline to grant the order for summary judgment sought by the applicants.

Application for Security for Costs

[46] The defendants are seeking security for costs on the basis that the plaintiffs will be unable to pay costs if the action fails.

Relevant Facts

[47] TSG is an Oregon company and TSGV is a British Columbia company that is presently dissolved. Neither TSGV nor TSG own any real property in BC.

[48] The plaintiffs continue to own intellectual property associated with the Archer Game and other games they have developed. However, the precise value of this intellectual property is unknown.

[49] The applicants estimate that their bill of costs will be between $693,650.90 and $911,950.10. These estimates depend on claiming the maximum amount of each applicable tariff item, plus retaining very expensive experts.

[50] The plaintiffs are currently operating at a loss. They do not hold sufficient liquid assets to satisfy an order for security for costs in the amounts sought by the applicants.

Authorities

[51] The court has the authority to make an order for security for costs against a foreign corporation under s. 236 of the *Business Corporations Act*, S.B.C. 2002, c. 57 or under its inherent jurisdiction: *Culp Investments LLC v. KPMG Inc.*, 2007 BCSC 451 at para. 3.

[52] The burden is on the applicant to make out a *prima facie* case that the corporate plaintiff has insufficient assets in the jurisdiction to pay costs if the action fails. If the applicants make out a *prima facie* case, the burden shifts to the plaintiff to show that:

a) it has sufficient assets to satisfy an award for costs;

b) the defendant has no arguable defence to its claims; or

c) an order for costs would cause undue hardship for the plaintiff, such that it would stifle the action and prevent the plaintiff's case from being heard.

Protea Consultax Inc. v. Air Canada, 2018 BCSC 995 at para. 5.

[53] In *Kropp v. Swaneset Bay Golf Course Ltd.* (1997), 29 B.C.L.R. (3d) 252, 1997 CanLII 4037, the Court of Appeal summarized the principles to be applied on an application for security for costs at para. 17:

> 1.The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;

> 2.The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;
>
> 3.The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;
>
> 4.The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;
>
> 5.The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;
>
> 6.Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and
>
> 7.The lateness of the application for security is a circumstance which can properly be taken into account.

Analysis

[54] The applicants submit that they have met the first branch of the test, insofar as they have made out a *prima facie* case that the plaintiff has insufficient assets in the jurisdiction to satisfy a costs award. I am not satisfied that this is the case. The only admissible evidence provided by the applicants is an exhibit containing the results of a land title search showing that the plaintiffs own no real property in BC. The applicants also sought to adduce affidavit evidence from Mr. Bailey deposing that copies of TSG's financial statements were shown to him in 2020 by "TSG personnel" and, at that time, TSG's financial circumstances were modest. I found this unattributed hearsay evidence to be of no evidentiary weight.

[55] The plaintiffs do own some intellectual property in the Archer Game and other games, though the value of this property is unknown. They also will, if the defendants are successful in establishing that the Archer Publishing Agreement was never terminated, be entitled to some amount of royalty stream under that agreement. While this matter was not completely fleshed out on the evidence, some documents that have been produced suggest that the Archer Game is generating approximately $20,000 a month in royalty payments.

[56] The applicants appear to acknowledge that they owe the plaintiffs a portion of the revenue from the Archer Game. They have held those payments back on the basis of an agreement called the “Archer Advances Agreement”, which has not been tendered into evidence. On the plaintiffs’ calculation, the amount owing to the plaintiffs is in excess of $258,000. In my view, this would be enough to satisfy a reasonable costs award against the plaintiffs.

[57] The applicants seek security for costs in the amount of $683,650–$911,950. In my view, this is exorbitant and does not bear any relation to the costs that would likely be awarded by a registrar if the defendants were successful in obtaining an order for costs. In their draft bills of costs, the applicants have claimed the absolute maximum number of units for every step in the proceeding, including steps such as serving interrogatories, which may not be taken by the defendants. Most significantly, the expert evidence is estimated by the applicants to cost between in the range of $600,000 to $800,000. In my view, these estimates are highly speculative at this early stage and appear disproportionate in the context of this claim.

[58] In the face of the applicants’ failure to satisfy me that there is a *prima facie* case of insufficient funds on the part of the plaintiff to pay a costs award, and considering the relevant factors—including the reasonable likely quantum of a costs award, which is considerably less than the amount cited by the applicants—I dismiss the application for security for costs.

[59] Since the plaintiffs have been successful in both applications, they should have their costs in the cause.

“Francis J.”