IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Delaney & Friends Cartoon Productions Ltd. v.
Radical Entertainment Inc. et al
2005 BCSC 371

Date: 20050317
Docket: S042646
Registry: Vancouver

Between:

Delaney & Friends Cartoon Productions Ltd.,
Christopher Delaney and
John Delaney

Plaintiffs

And

Radical Entertainment Inc. and
Radical Games Ltd.

Defendants

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

Counsel for the plaintiffs	T. Delaney
Counsel for the defendants	R.B. Fraser and T. Galbraith
Date and Place of Trial/Hearing:	October 7 - 8, 2004; January 21, 2005 Vancouver and Chilliwack, B.C.

BACKGROUND AND NATURE OF THE APPLICATION

[1] The plaintiff, Delaney & Friends Cartoon Productions Ltd. (“Delaney & Friends”), is a company that is engaged in the computer animation business. Christopher and John Delaney are animators and principals of Delaney & Friends.

[2] The defendant Radical Games Ltd. (“Radical Games”) is in the business of designing and developing computer games and animation for films and television. Radical Games is owned by the defendant, Radical Entertainment Inc. (“Radical Entertainment”).

[3] The plaintiffs allege that in 2003, Radical Entertainment entered into an agreement with Delaney & Friends to purchase the assets of Delaney & Friends, and that Radical Games entered into employment contracts with Christopher and John Delaney. The plaintiffs allege that the defendants breached these contracts. On May 12, 2004, the plaintiffs commenced this action seeking specific performance of the contract of purchase and sale of the assets of Delaney & Friends, damages for breach of the contract of purchase and sale and damages for breach of the employment contracts.

[4] The defendants apply under Rule 19(24) for an order that the statement of claim be struck out and the action be dismissed on the grounds that the statement of claim discloses no reasonable claim and that the proceeding is an abuse of process because, to the knowledge of the plaintiffs, there are no facts to support the allegations. The defendants also seek special costs of the application.

APPLICABLE RULES AND GOVERNING PRINCIPLES

[5] Before dealing with the substance of the application, I will set out the rules of court that apply and review the governing legal principles.

1. Pleadings Generally

[6] Rule 19(1) sets out the basic requirements for pleadings:

> 19(1) A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.

[7] Rule 19(11) sets out when particulars must be pleaded:

> 19(11) Where the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or where particulars may be necessary, full particulars, with dates and items if applicable, shall be stated in the pleading. If the particulars of debt, expenses or damages are lengthy, the party may refer to this fact and instead of pleading the particulars shall deliver the particulars in a separate document either before or with the pleading.

[8] In ***Homalco Indian Band v. British Columbia*** (1998), 25 C.P.C. (4th) 107, [1998] B.C.J. No. 2703 (S.C.) (cited to C.P.C.) at pp. 109 -110, K. Smith J. (as he then was) summarized the basic function of pleadings:

> The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action: ***Troup v. McPherson*** (1965), 53 W.W.R. 37 (B.C.S.C.) at 39. …
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> A useful description of the proper structure of a plea of a cause of action is set out in J.H. Koffler and A. Reppy, *Handbook of Common Law Pleading*, (St. Paul, Minn.: West Publishing Co., 1969) at p. 85:
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> > Of course the essential elements of any claim of relief or remedial right will vary from action to action. But, on analysis, the pleader will find that the facts prescribed by the substantive law as necessary to constitute a cause of action in a given case, may be classified under three heads: (1) The plaintiff's right or title; (2) The defendant's wrongful act violating that right or title; (3) The consequent damage, whether nominal or substantial. And, of course, the facts constituting the cause of action should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, to wit, the right, the wrongful act and the damage.
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> If the statement of claim is to serve the ultimate purpose of pleadings, the material facts of each cause of action relied upon should be set out in the above manner. As well, they should be stated succinctly and the particulars should follow and should be identified as such: ***Gittings v. Caneco Audio-Publishers Inc.*** (1988), 26 B.C.L.R. (2d) 349 (B.C.C.A.) at 353.

[9] There is a distinction between material facts and particulars. A material fact is one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded. Particulars, on the other hand, are intended to provide the defendant with sufficient detail to inform him or her of the case he or she has to meet (***Bruce v. Odhams Press, Limited***, [1936] 1 K.B. 697 (C.A.)). Particulars are provided to disclose what the pleader intends to prove. How that party intends to prove the material facts and particulars is a matter of evidence. The pleading party is not required to, and indeed, is not entitled to set out in the pleadings the evidence that he or she intends to adduce at trial to prove the facts that have been pleaded.

[10] Pursuant to Rule 19.1, conclusions of law may be pleaded only if the material facts supporting them are pleaded.

2. Applications under Rule 19(24)

[11] Rule 19(24) provides when a pleading may be struck. It reads:

> 19(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition, or other document on the ground that:
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> (a) it discloses no reasonable claim or defence as the case may be,
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> (b) it is unnecessary, scandalous, frivolous or vexatious,
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> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
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> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceedings to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[12] ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321 sets out the test for striking all or part of a pleading under Rule 19(24)(a): assuming the facts asserted in the statement of claim can be proved, is it plain and obvious that the statement of claim discloses no reasonable cause of action? Only if the action is certain to fail because it contains a radical defect should the statement of claim be struck (***Triathlon Ltd. v. Kirkpatrick*** (2003), 33 C.C.E.L. (3d) 290, 2003 BCSC 1575 (Cited to C.C.E.L.)).

[13] Evidence is not admissible in an application under Rule 19(24)(a).

[14] Under Rule 19(24)(b) – (d), the test is the same. The question here is whether it is clear or plain and obvious that the allegations in the statement of claim are unnecessary, scandalous, frivolous, vexatious or otherwise an abuse of the process of the court (***347202 B.C. Ltd. v. Canadian Imperial Bank of Commerce***, [1995] B.C.J. No. 449 (S.C.); ***Triathlon Ltd. v. Kirkpatrick***).

[15] The defendants submit that where it is plain and obvious that there are no facts to support the plaintiffs' claim, the defendant is entitled to rely on Rule 19(24)(d) to have the statement of claim struck and the action dismissed as an abuse of process. A pleading is an abuse of process if made knowing there is no factual basis for the allegations made or if made for some improper collateral purpose (***Flavelle Estate v. Mahood*** (1980), 25 B.C.L.R. 236, [1980] B.C.J. No. 1945 (S.C.)).

[16] The defendants submit further that that evidence is admissible for this purpose, i.e. to demonstrate a complete lack of merit to the plaintiffs' claim. In support, they refer to ***Caterpillar Tractor Co. v. Babcock Allatt Ltd.*** (1982), 67 C.P.R. (2d) 135, [1983] 1 F.C. 487 (T. D.) (cited to C.P.R.). In that case the plaintiff sued the defendant for patent infringement. The defendant alleged that the plaintiff's patent was invalid, but did not set out the material facts in support of this affirmative defence. The plaintiff applied to strike these allegations. Addy J. found that it was clear from the answers given by the defendant on discovery that it did not know of any material facts which could support a claim that the patent was invalid for lack of compliance with the Act.

[17] At p. 138, when referring to the Federal Court Rule that is analogous to Rules 19(24)(b) – (d), Addy J. said:

> Rule 419 specifically provides that the court may "at any stage of an action order any pleading or anything in any pleading to be struck out" on, among other grounds, the grounds that it is frivolous or vexatious or may prejudice or embarrass a fair trial or may otherwise constitute an abuse of the court. If a party has no grounds for making an allegation in a pleading, then, there is no basis for maintaining the allegation. It is not an answer to an application to strike out, for the party to say that, if he had unrestricted discovery of his opponent, he might then be in a position to sustain the allegation.

[18] The defendants also refer to ***Larsen Estate v. Schaber***, [1995] B.C.J. No. 2377 (S.C.), which I decided when I was a master of this court. In that case, the plaintiff sought damages for the alleged conversion by the defendants of assets belonging to the estates of her deceased parents. The plaintiff had been the sole executrix and sole beneficiary of those estates. In the statement of claim, the plaintiff repeatedly stated that she did not have the particulars of the allegations therein but that the particulars were well known to the defendants. Her counsel conceded that he was unaware of any evidence which might tend to establish the claim and that the claim was being advanced on the basis of the plaintiff's suspicion. The defendants applied for an order striking out the plaintiff's statement of claim on grounds that it was vexatious, frivolous or an abuse of process or, alternatively, for

an order that she provide further and better particulars of her claims.

[19] In ***Larsen Estate***, I remarked that the court will not permit a party to abuse its process by bringing actions which are clearly frivolous or vexatious but that such an order should be made only. At paras. 20 – 21, I said:

> [20] While ordinarily a party is not required to tender evidence in support of her pleadings prior to trial (or an application under Rules 18 or 18A) and while in many cases one might reasonably suppose that not all of the facts upon which the plaintiff might rely at trial would be known to the plaintiff prior to discovery and that some of them may be known only to the defendants, one would expect the plaintiff to have some factual basis for alleging the conversion of or interference with estate assets. The plaintiff is the executrix of the estates. She probated the wills. She knows what assets there were at that time. She must know what she did with these assets and which of them remain. If the allegation is that the defendants converted or interfered with these assets, she must have some basis for that allegation, even if she does not know precisely what it is that the defendants did. If the allegation is that the defendants converted some estate assets prior to probate then again she must have some rational factual basis in order to make that allegation.
>
> [21] If the plaintiff is unable at this stage to provide any particulars of the assets which were allegedly converted or interfered with and any particulars of the date and manner of the interference then, in my opinion, she ought not to be entitled to continue this action. A party should not be put to the time and expense of defending a claim which amounts to nothing more than a bald assertion of conversion of some undefined nature based upon suspicion only with any reasonable factual support for that suspicion.

[20] In the end, the plaintiff was given the opportunity to provide further and better particulars while the defendants were granted leave to renew the application once the particulars were provided and were found to be inadequate.

[21] While evidence is admissible under subrules (b) to (d), the court is not to engage in an assessment of the relative merits of the parties' cases through a detailed analysis of the evidence. As Gray J. said in ***Triathlon Ltd. v. Kirkpatrick*** at paras. 31 – 32:

> Evidence is admissible with respect to an application under Rule 19(24)(b) through (d). See ***Teachers Investment & Housing Cooperative Ltd. v. Jennings***, [1991] B.C.J. No. 3597 (B.C.S.C.), at p. 4. However, the court should not weigh the merits of the parties' claims. If the issues are so clear that they could be resolved on the merits on the basis of affidavit evidence only, the parties can pursue their remedies under Rule 18A.
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> The purpose of the evidence is only to determine whether the court is satisfied that the pleading falls within a category described in Rule 19(24)(b) through (d).

ANALYSIS

1. Abuse of Process – application under Rule 19(24)(d)

[22] In my view, it is appropriate to consider this part of the application first because if it is successful there will be no need to dissect the statement of claim for deficiencies.

[23] The defendants submit that it is clear from a review of the evidence that there are no facts to support the plaintiffs' allegations and, consequently, the statement of claim should be struck as an abuse of process. The defendants have filed a number of affidavits, including two sworn by Mr. Ian Wilkinson, the president of Radical Entertainment and Radical Games, which set out in considerable detail the defendants' version of the dealings between representatives of the defendants on the one hand and Christopher and John Delaney on the other hand. The plaintiffs in turn filed a lengthy affidavit sworn by Christopher Delaney, which sets out the plaintiffs' version of events.

[24] I do not intend to review, in detail, the evidence relied on by the respective parties because I am satisfied, from the authorities to which I referred earlier, that an application under Rule 19(24)(d) does not permit the court to engage in the determination of disputed facts by weighing contradictory evidence of the parties.

[25] The essence of the dispute in relation to the alleged contract of purchase and sale is whether the matter

ever progressed beyond the state of negotiation. It is not disputed that beginning in about May 2003 Mr. Wilkinson had discussions with Christopher Delaney about Radical Entertainment purchasing the assets of Delaney & Friends, including certain computer animation projects that were in the works. It is also not disputed that on or about June 2, 2003, Radical Entertainment and Delaney & Friends executed a document referred to as a "Non-Binding Term Sheet". The document states that it is a preliminary term sheet,

> ... that outlines certain non-binding understandings between Radical Entertainment Inc. ("Buyer"), and Delaney & Friends Cartoon Productions Ltd. ("Seller"), with respect to the possible acquisition of certain assets (the "Assets") of the Seller.

[26] It is the position of the defendants that, as a gesture of good faith while negations were proceeding, Radical Games entered into fixed term temporary employment contracts with Christopher and John Delaney.

[27] The defendants say that on or about June 27, 2003, they prepared a draft final agreement but say that the contract was never finalized and never accepted by the plaintiffs. They say that by May 7, 2004, Radical Entertainment decided not to pursue further negotiations towards a final agreement and Radical Games thereupon terminated the temporary employment contracts with Christopher and John Delaney.

[28] The plaintiffs say the documents prepared by the defendants on June 2 and June 27, 2003 set out the essential terms of the agreement. They say the terms were subsequently agreed to by all parties, through communications, oral and written, between the parties and by their conduct.

[29] Mr. Christopher Delaney's evidence, in brief, is that a form of agreement was prepared and presented to the plaintiffs on June 27, 2003; that the parties negotiated some minor amendments to the form of agreement; that in July and August 2003 Mr. Wilkinson assured him that Radical Entertainment would be proceeding with the contract as negotiated and that the parties took steps pursuant to the agreement. It is the position of the plaintiffs that a final agreement was reached and that signing the document was a mere formality.

[30] I cannot conclude, at this stage, that the plaintiffs are bound to fail. The question is not whether, on the evidence, the plaintiffs' case appears weak; it is whether it is plain and obvious that they have no case to make. I am not able to conclude that is so. I am not satisfied that it would be an abuse of process for the plaintiffs to continue with their action. I therefore dismiss the application under Rule 19(24)(d).

2. Deficiencies alleged in the statement of claim – application under Rule 19(24)(a)

[31] This part of the application requires an examination of almost the entire statement of claim because the defendants submit that there are fatal deficiencies in nearly every paragraph of it. Accordingly, I will set out the pleading in its entirety:

> 1. The Plaintiff, Delaney & Friends Cartoon Productions Ltd. ("D&F"), is a company extra provincially registered in the Province of British Columbia with an address for delivery at 1800 – 401 West Georgia Street, Vancouver, British Columbia.
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> 2. The Plaintiff, Christopher Delaney, is a businessman and animator, with an address at 2661 Fortress Drive, Port Coquitlam, British Columbia. Christopher Delaney is a principal of D&F.
>
> 3. The Plaintiff, John Delaney, is a businessman and animator, with an address at 541 Yale Street, Port Moody, British Columbia. John Delaney is a principal of D&F.
>
> 4. The Defendant, Radical Entertainment Inc., is a body corporate incorporated pursuant to the laws of Canada and has its registered office at 1300 – 777 Dunsmuir Street, Vancouver, British Columbia.
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> 5. The Defendant, Radical Games Ltd. is a body corporate incorporated pursuant to the laws of Canada and has its registered office at 1300 – 777 Dunsmuir Street, Vancouver, British Columbia. Radical Entertainment and Radical Games, inter alia, design and develop computer games and animation for film and television.
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> 6. In or about 2003, the Defendants desired to acquire an animation business to enhance and supplement its existing business. In or about 2003 D&F was operating an animation business in Vancouver, British Columbia. In or about 2003 the Defendants approached D&F for the purpose of

acquiring D&F's business.

7. In or about 2003, the Defendants entered into an agreement with the Plaintiffs, to acquire the assets of D&F as a going concern (the "purchase and sale agreement"), which provided for, inter alia:

(a) Radical Entertainment would purchase all assets of D&F including, but not limited to, all intellectual property belonging to D&F and all the goodwill of D&F;

(b) The purchase price would be $35,000.00 plus an "Earn Out Amount" (defined in the contract) and an assumption of certain liabilities of D&F, valued at approximately $200,000.00;

(c) the portion of the purchase price of $350,000.00 would be paid to the Plaintiff, D&F, by issuing common shares of Radical Entertainment to D&F;

(d) The Earn Out Amount would be paid each year, over a period of three years, based on the revenues generated by the animation productions of Radical Entertainment. The Earn Out Amounts were to be paid by issuing common shares of Radical Entertainment to D&F, up to a maximum of value of $2,500,000.00;

(e) The Plaintiffs, Christopher Delaney and John Delaney, were defined as "key employees" who were required to enter into employment contracts with Radical Games. It was a term of the agreement, express or implied, that the employment contracts would be for three (3) years commencing June 1, 2003;

(f) Christopher Delaney was to be employed as the Director of TV and Film Production at Radical Games Ltd.

(g) John Delaney was to be employed as Creative Director and Designer of TV and Film Production at Radical Games Ltd.

8. Christopher Delaney and John Delaney entered into employment contracts which were partly written and partly oral, with the Defendant, Radical Games Ltd., effective June 1, 2003. In the circumstances, Christopher Delaney and John Delaney were employed by both Defendants. Alternatively, Christopher Delaney and John Delaney were employed by Radical Games and Radical Entertainment is also liable to these Plaintiffs for any debts or damages arising from their employment.

9. The employment contract of Christopher Delaney provided that he would be paid an annual salary of $135,000.00 plus benefits, particulars of which are known to the Defendants. In addition, Christopher Delaney was entitled to earn Creator's Fees based on a percentage of the production budget, for all animation projects developed by Christopher and John Delaney.

10. The employment contract of John Delaney provided that he would be paid an annual salary of $120,000.00 plus benefits, particulars of which are known to the Defendants. In addition, John Delaney was entitled to earn Creator's Fees based on a percentage of the production budget, for all animation projects developed by Christopher and John Delaney.

11. It was a term of the contracts, express or implied, that both employment contracts were for three years fixed terms. Alternatively, both employment contracts were for indefinite terms.

12. The purchase and sale agreement and the employment contracts, or portions thereof, were evidenced in writing and drafted by the Defendants or their agents.

13. The Plaintiffs transferred the assets of D&F to the Defendant, Radical Entertainment Inc. The Plaintiffs, Christopher and John Delaney, commenced their employment for Radical Games Ltd. in or about June 2003.

14. The Defendant, Radical Entertainment Inc., on account of the purchase price, paid a portion of the liabilities of D&F, amounting to approximately $40,000.00. The balance of approximately $150,000.00 remains outstanding.

15. The Defendants have failed to transfer the shares and pay the balance of the purchase price

to the Plaintiffs.

16. On or about May 7, 2004 the Defendants, or either of them, terminated the employment contracts of the Plaintiffs, Christopher Delaney and John Delaney, without cause. The Defendants breached the employment contracts by not paying the salary and benefits, to the end of the fixed term, or alternatively, by not providing the Plaintiffs with any, or any reasonable, notice.

17. The Defendants, or either of them, have breached the contract of purchase and sale by failing to pay the balance of the purchase price owing, and by their conduct and breach of the employment contracts, prevented the Plaintiffs from earning the Earn Out Amounts and the Creator's Fees.

18. In the circumstances, the Plaintiffs have suffered loss, damage and expense.

19. The Defendants' conduct both in breaching the purchase and sale agreement and the employment contracts, has been done in bad faith and amounts to unfair dealing. In the premises, the Plaintiffs seek increased, aggravated and/or punitive damages.

WHEREFORE the Plaintiffs claim:

(a) Specific Performance against the Defendant, Radical Entertainment Inc., to transfer to D&F common shares valued at $35,000.00, on account of a portion of the purchase price under the purchase and sale agreement;

(b) General and Special Damages against both Defendants;

(c) Increased Damages against both Defendants;

(d) Aggravated and Punitive Damages against both Defendants;

(e) Interest;

(f) Costs of this action;

(g) Such further and other relief as to this Honourable Court may deem meet.

[32] I agree with the defendants that there are a number of deficiencies in the statement of claim. I will deal with each of the impugned paragraphs in turn, but state my conclusion as to the appropriate disposition of the application at this point. I am not persuaded that the deficiencies are sufficiently serious, either taken individually or collectively, to justify an order that the whole of the statement of claim be struck as disclosing no cause of action. In my opinion, this is a case where the plaintiffs should be given the opportunity to amend their statement of claim in order to correct the deficiencies.

Paragraph 6

[33] The defendants submit that the plaintiffs must plead the date on which the defendants approached Delaney & Friends and must plead the facts that explain how both Radical Entertainment and Radical Games approached the plaintiffs together.

[34] In my opinion, neither of those facts are necessary to plead a cause of action for specific performance or breach of contract. They are part of the evidence that will presumably be led as to how the parties came together prior to allegedly entering into binding contracts.

Paragraph 7

[35] The defendants say that paragraph 7 of the statement of claim fails to properly plead the material facts relating to the making of the alleged contract of purchase and sale and its essential terms. The defendants refer to the following passage at pp. 345 - 346 of *Bullen & Leake & Jacob's Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975) setting out the requirements for pleading a claim for breach of contract:

> Where the action is brought upon an agreement not under seal, the Statement of Claim should show whether the agreement relied on is in writing or made by word of mouth or is to be implied or inferred from the conduct of the parties. In all cases, the date, the parties, and the general substance and effect of the agreement so far as is material, must be set out in the Statement of Claim.

> In the case of a written agreement the document or documents containing it should be described sufficiently to identify it or them... In the case of an implied agreement the facts and circumstances from which the implication arises should be stated.
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> Where the agreement is to be implied from a series of letters, or conversations, or from circumstances, it is sufficient to allege the agreement as a fact, and to refer generally to the letters, conversations, or circumstances, without setting them out in detail…
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> …
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> After the terms of the agreement have been clearly stated the plaintiff must show whether his claim is founded under or by virtue of the terms of the agreement or whether it is founded upon a breach of the agreement, and in the latter event, the plaintiff must show that the defendant has failed to fulfil or to comply with or has broken the terms of the agreement and in what particulars. …
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> [Citations omitted]

[36] The defendants say paragraph 7 is deficient in that it:

(a) fails to set out the date on which the alleged agreement was made;

(b) fails to describe the assets that Delaney & Friends allegedly sold to Radical Entertainment;

(c) fails to set out the Earn Out amount;

(d) does not identify the liabilities that the defendants were to assume;

(e) does not specify the number of shares of Radical Entertainment that Delaney & Friends was to acquire in respect of the purchase price;

(f) does not set out the manner in which the Earn Out amount would be calculated or how that amount would be converted into shares of Radical Entertainment or when the amount would be paid;

(g) fails to plead any consideration paid by Radical Games for purchase of the assets.

[37] The plaintiffs submit that paragraph 7 contains a sufficient pleading of the material facts surrounding the making of the contract of purchase and sale and its essential terms. They say that what the defendants seek is evidence, to which they are not entitled.

[38] With regard to the formation of the contract, paragraph 7 alleges that a contract was made “in or about 2003”. It does not allege whether the contract was oral or in writing, partly oral and partly in writing, or was a contract to be inferred from the conduct of the parties. In my view, it is not sufficient for the plaintiffs merely to assert the formation of a contract without specifying the manner in which it was made. If it was made orally, then it is necessary to identify the oral communications by which it was made. If it was made in writing, it is necessary to identify the documents that form the contract. If the terms of the contract were accepted by one party through its conduct, it is necessary to identify that conduct.

[39] With regard to dates, I am not persuaded that it is necessary in all claims based upon breach of contract to specify in the pleading the precise date the contract was made. If the precise date is material to the cause of action, then of course it will have to be pleaded. However, it seems to me that in other cases, including this one, it will be sufficient to plead that a contract was in existence by a certain date. If a contract is not constituted by a document executed by both parties but its material terms are set out in writing and are accepted by the parties through oral communications or by conduct, then it may be difficult to determine the precise moment at which the parties became of one mind. That appears to be the situation alleged by the plaintiffs in this case.

[40] In my view, if the plaintiffs in this case were to plead the manner in which the contract was made and the date by which it was made, the purpose of pleading would be satisfied. The defendants would know the case that they have to meet and the plaintiffs would not be able to engage in a fishing expedition on discovery or have unlimited freedom with regard to what evidence is relevant at trial.

[41] I am further of the view that the plaintiffs would be entitled to plead dates in the alternative as provided by Rule 19(8). While it is obvious that the alleged contract of purchase and sale could not have been made on two different dates, there may be some difficulty in determining from the evidence the precise date it came into being. I

see nothing wrong in a party alleging alternative dates in the pleadings in such a case.

[42] In my opinion, it is not necessary for the plaintiffs to list in the statement of claim all of the assets of Delaney & Friends that Radical Entertainment allegedly agreed to buy. It is alleged that Radical Entertainment agreed to buy all assets owned by Delaney & Friends. It would be otherwise if the alleged agreement related to only some of Delaney & Friends' assets. I am satisfied that the identity of specific assets is a matter of evidence.

[43] I agree that the plaintiffs have not adequately pleaded the Earn Out Amount, but that is a matter for further particulars in my view. Paragraph 7(b) states that the purchase price includes an Earn Out Amount and says that amount is defined in the contract but does not say where one is to look to find the definition. There is no reference to any specific document that is said to define the term. In my view, the plaintiffs must provide particulars of the Earn Out Amount, either by stating within the statement of claim what it is or, if a definition is to be incorporated by reference, by identifying clearly what document contains the definition.

[44] With regard to the liabilities of Delaney & Friends, it is not all liabilities that Radical Entertainment was to assume, only "certain liabilities". In my view, the defendants are entitled to further particulars of which liabilities were to be assumed.

[45] With regard to paragraph 7(c), I understand the allegation to be that shares having a value of $350,000.00 were to be transferred. While the wording of the paragraph might be more precise, I do not see this as a fundamental defect in pleading the cause of action.

[46] With regard to paragraph 7(d), I have already said that the plaintiffs need to provide further particulars of the Earn Out Amount and how that amount was to be calculated. As to the manner of payment, by issuance of shares, my comments in the preceding paragraph apply.

[47] As to the defendants' submission that paragraph 7 does not plead any consideration moving from Radical Games, the allegation, so far as I understand it, is that Radical Games and the individual plaintiffs were parties to the purchase and sale agreement in the following respect: Radical Games agreed to hire the individual plaintiffs and they agreed to go to work for Radical Games in the capacities set out in paragraphs 7(f) and (g). Whether these were terms of an overall contract made amongst all the parties or were separate contracts or were contracts at all is to be determined at trial. However, I am not satisfied the manner in which the allegations have been pleaded are fundamentally defective.

Paragraph 8

[48] The defendants submit that paragraph 8 is deficient in that it fails to state which terms of the contracts of employment were written and which were oral, and fails to identify the documents that constitute the written portions or to identify the oral communications in which the parties reached agreement. While I agree with this submission, I think the plaintiffs should be given the opportunity to correct this deficiency by amending the paragraph, rather than striking it out in its entirety.

[49] I also agree with the submission that the plaintiffs have failed to plead any "circumstances" that would establish that Christopher and John Delaney were employed by both defendants. In other words, the plaintiffs do not set out any facts to support the alternative legal conclusion that Radical Entertainment is liable to Christopher and John Delaney for any debts or damages arising from their employment with Radical Games. The second and third sentences of paragraph 8 are therefore struck out.

Paragraphs 9 – 10

[50] I agree with the defendants that in order to claim damages based on loss of benefits the plaintiffs must plead and particularize the benefits they claim. Likewise, greater particularity is required with regard to the manner in which the Creator's Fees are to be calculated and paid. These are matters that can be remedied by amendment or the delivery of further and better particulars.

Paragraph 11

[51] In my view, if the plaintiffs allege that it was an express term that the employment contracts were for three year fixed terms, then they must say whether that term was agreed to orally or in writing. If in writing, they must specify the document in which it is contained. If the plaintiffs intend to plead, in the alternative, that it was an implied term that the contracts were for fixed terms of three years, they must set it out as an alternative pleading

and set out the facts from which such term is to be implied.

Paragraph 12

[52] The defendants say this paragraph is inconsistent with paragraph 8, which states that the employment contracts were partly written and partly oral. In my view this paragraph should be struck out. The plaintiffs will have leave to amend paragraphs 7 and 8 to make clear how they allege the contracts were made. To the extent it is alleged that the contracts were made in writing, the documents must be identified. To the extent it is alleged that the contacts were made orally, the circumstances of the oral communications must be set out in the pleadings.

Paragraph 13

[53] The defendants submit that it is of vital importance that the plaintiffs set out which assets were transferred. I cannot agree with this submission. The plaintiffs allege that the contract of purchase and sale provided for the transfer of all assets. Paragraph 13 contains no limiting words so it must refer to all assets. Whether or not the allegation is true or can be proven is not the point. I see nothing wrong with this paragraph.

Paragraph 15

[54] The defendants complain that it is not clear what shares were to have been transferred and what purchase price is referred to. I think it is perfectly clear when one reads this paragraph in conjunction with paragraph 7.

Paragraph 16

[55] The defendants say this paragraph is confusing as to which defendant is alleged to have wrongfully terminated the employment contracts, particularly given the allegation in paragraph 8 (in the alternative) that both defendants employed the plaintiffs. I agree that the plaintiffs must make it clear whether they allege Radical Games alone or both defendants breached the employment contracts. If it is the latter, the statement of claim must allege facts that would give rise to joint liability.

Paragraph 17

[56] The defendant says the pleading that both defendants breached an obligation to pay the balance of the purchase price is inconsistent with the allegation in paragraph 7 that it was Radical Entertainment that was to purchase the assets. I agree. The plaintiff must amend this paragraph to make it conform to paragraph 7.

[57] The defendants also say that the plaintiffs have not set out what conduct, apart from the alleged breach of the employment contracts, prevented the plaintiffs from earning the Earn Out Amounts and the Creator's Fees. I agree that the pleadings are deficient in this respect. The deficiency is to be remedied by amending the paragraph or providing further particulars.

The claim for "increased" damages

[58] I understand this to be a claim for what are sometimes referred to as "Wallace damages" (***Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)***, [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1), based on the manner in which the individual plaintiffs were treated in connection with the alleged wrongful termination of the employment contracts. In my view, there are no allegations of fact in the existing statement of claim that would support such a claim. This claim is to be struck unless the plaintiffs can plead a factual foundation for it.

The claim for aggravated and punitive damages

[59] Aggravated damages are awarded to provide compensation for intangible injuries such as injured feelings. As such, the claim must be that of the individual plaintiffs and not the corporate plaintiff (see: ***Pinewood Recording Studios Ltd. v. City Tower Development Corp.*** (1998), 61 B.C.L.R. (3d) 110, 111 B.C.A.C. 175).

[60] In ***McKinley v. BC Tel***, [2001] 2 S.C.R. 161, 2001 SCC 38 at paras. 78 – 79, Iacobucci J. summarized the law relating to aggravated damages in the context of wrongful dismissal actions:

> The key principles for establishing the circumstances in which aggravated damages in wrongful dismissal actions may be awarded were set out by this Court in ***Wallace*** and in ***Vorvis v. Insurance Corp. of British Columbia***, [1989] 1 S.C.R. 1085. In ***Vorvis***, McIntyre J. (writing for the majority) highlighted that unlike punitive damages, aggravated damages serve the purpose of compensation for intangible injuries. He stated that such damages could be awarded where: (1) an employer's

> conduct was "independently actionable", (2) it amounted to a wrong that was separate from the breach of contract for failure to give reasonable notice of termination, and (3) it arises from the dismissal itself, rather than the employer's conduct before or after the dismissal (pp. 1103-4).
>
> These criteria were considered in ***Wallace***, where the majority also recognized that aggravated damages could be awarded for mental distress flowing from a wrongful dismissal. However, in ***Vorvis*** and ***Wallace*** alike, aggravated damages were denied to the plaintiff.

[61] The plaintiffs concede that the statement of claim does not plead the material facts to support a claim for aggravated damages and an amendment is required if the claim is to stand.

[62] With regard to the claim for punitive damages, in ***Vorvis*** the Supreme Court of Canada held that punitive damages may be recoverable in a breach of contract case provided the defendant's conduct said to give rise to the claim is itself "an actionable wrong". It may be that the expression "actionable wrong" is not yet fully defined and that there is a broader scope for awarding punitive damages in a wrongful dismissal case (see: ***Greenwood v. Ballard Power Systems Inc.***, [2004] B.C.J. No. 384, 2004 BCSC 266). Whatever the expression "actionable wrong" may mean, I am satisfied that the plaintiffs must set out in their pleadings the conduct, in addition to the dismissal itself, which they say constitutes the actionable wrong justifying the award of punitive damages. As Binnie J. said in ***Whiten v. Pilot Insurance Co.***, [2002] 1 S.C.R. 595, 2002 SCC 18 at para. 87:

> One of the purposes of a statement of claim is to alert the defendant to the case it has to meet, and if at the end of the day the defendant is surprised by an award against it that is a multiple of what it thought was the amount in issue, there is an obvious unfairness. Moreover, the facts said to justify punitive damages should be pleaded with some particularity. The time-honoured adjectives describing conduct as "harsh, vindictive, reprehensible and malicious" (*per* McIntyre J. in *Vorvis, supra*, p. 1108) or their pejorative equivalent, however apt to capture the essence of the remedy, are conclusory rather than explanatory.

[63] In my view, the statement of claim, as it stands, does not plead material facts upon which a claim for punitive damages could be sought at trial. Unless the body of the claim is amended to set out with some particularity the conduct said to give rise to the remedy, this item of relief must be struck from the statement of claim.

[64] The plaintiffs' action is stayed pending their filing an amended statement of claim and providing further and better particulars of their claims in accordance with these reasons.

[65] The costs of the application will be in the cause.

"B.M. Joyce, J."
The Honourable Mr. Justice B.M. Joyce