CITATION: Re: Mid-Bowline Group Corp, 2016 ONSC 669
COURT FILE NO.: CV-15-11238-00CL
DATE: 20160126

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended, Section 182

AND IN THE MATTER OF Rule 14.05(2) of the *Rules of Civil Procedure*

AND IN THE MATTER OF a proposed arrangement involving Mid-Bowline Group Corp., its shareholders and optionholders, Shaw Communications Inc., and 1503357 Alberta Ltd.

BEFORE: Newbould J.

COUNSEL: *Kent E. Thomson and Matthew Milne-Smith*, for the Applicant

Rocco DiPucchio and Lauren P.S. Epstein, for The Catalyst Capital Group Inc.

Michael Schafler and Ara Basmadjian, for Shaw Communications Inc.

Robert A. Centa, for Brandon Moyse

HEARD: January 25, 2016

REASONS FOR JUDGMENT

[1] This is an application by Mid-Bowline Group Corp. pursuant to section 182 of the Ontario *Business Corporations Act* for approval of a proposed plan of arrangement. The arrangement contemplates that a subsidiary of Shaw Communications Inc. will acquire all of the

outstanding shares of Mid-Bowline, the owner of WIND Mobile Corp., for approximately $1.6 billion.

[2] WIND is a private Ontario company. It is Canada's fourth largest wireless carrier, currently serving approximately 940,000 subscribers in British Columbia, Alberta and Ontario. WIND was formed in 2008. The majority of its voting shares were held by Globalive Capital Inc. ("Globalive Capital"), while the majority of its total equity was held by Orascom Telecom Holdings S.A.E. ("Orascom"). In 2011, Orascom's majority equity stake in the company was acquired indirectly by VimpelCom Ltd. ("VimpelCom").

[3] Mid-Bowline is an Ontario private, closely-held company that indirectly owns 100 percent of WIND. The shareholders of Mid-Bowline include, among others, funds managed by West Face Capital Inc. ("West Face"), Tennenbaum Capital Partners, LLC (Tennenbaum"), Globalive Capital and 64NM Holdings, LP (together the "Investors").

[4] The plan is opposed by The Catalyst Capital Group Inc. by reason of its claim that one of the shareholders of Mid-Bowline, West Face, acquired confidential information belonging to Catalyst that was used by West Face in its acquisition of an interest in WIND through Mid-Bowline. Catalyst claims a constructive trust over the Mid-Bowline shares owned by West Face. The terms of the plan of arrangement would release any constructive trust claim that Catalyst has over the shares of Mid-Bowline owned by West Face that are being sold to Shaw.

[5] The plan of arrangement, as amended, provides that Shaw shall acquire the shares of Mid-Bowline free of any claim against those shares, including the shares of West Face, but that Catalyst shall continue to have the right to claim against West Face the profits earned by West Face from the sale to Shaw. That is, the claim by Catalyst for a constructive trust over the shares of Mid-Bowline owned by West Face is released in order to permit Shaw to acquire the shares of Mid-Bowline free of any claim against those shares but the right of Catalyst to pursue its claims for the profit earned by West Face on those shares survives.

[6] The only reason that this transaction is proceeding by way of plan of arrangement is to provide Shaw with clear title to the shares of WIND. Had this not been required because of the

Catalyst claim, the shareholders of Mid-Bowline were prepared to proceed by a share purchase agreement without any requirement of Court approval. During negotiations with Shaw, Mid-Bowline disclosed the claim of Catalyst to a constructive trust over the shares of Mid-Bowline owned by West Face. Shaw made clear that it would not acquire WIND unless it acquired the shares free and clear of any claim to them.

[7] So far as the requirements of section 182 of the OBCA are concerned, I am satisfied that the statutory procedures in section 182 have been met and that the application has been put forward in good faith. Trying to deal with the Catalyst claim in the manner proposed by Mid-Bowline in the circumstances of this case was not, as claimed by Catalyst, an exercise of bad faith. It was put forward in an open and transparent manner and designed to protect any legitimate right that Catalyst may have.

[8] The third requirement of section 182 is that the arrangement is fair and reasonable. Catalyst says that it is not and that this Court has no authority under section 182 to exterminate the substantive or procedural rights of third parties.

The Catalyst claim and its background

[9] In 2013, VimpelCom decided to divest its interest in WIND, and a number of interested potential buyers came forward. Ultimately, in September 2014, the Investors, acting through Mid-Bowline, acquired VimpelCom's debt and equity interest in WIND. The ownership structure of WIND was subsequently reorganized so that WIND became an indirect, wholly-owned subsidiary of Mid-Bowline.

[10] Catalyst was a bidder for WIND and from July 23 to August 18, 2014 VimpelCom conducted exclusive negotiations with Catalyst for Catalyst to buy WIND. No agreement was reached.

[11] The Catalyst litigation arises out of West Face's hiring of Brandon Moyse, then a 26 year-old junior analyst at Catalyst. Mr. Moyse applied for a job at West Face in March 2014 and received an offer of employment on May 26, 2014. He started work at West Face on June 23,

2014 and ceased working there three and a half weeks later, on July 16, 2014. Mr. Moyse was not recruited or otherwise solicited for employment by West Face. He applied to West Face on his own initiative.

[12] At the time of Mr. Moyse's hiring, West Face had already been pursuing an acquisition or financing of WIND for over six months, since November 2013. It was well-known throughout the industry that VimpelCom wanted to sell its interest in WIND because of the well-publicized regulatory challenges it had faced as a foreign owner. West Face conducted due diligence and made a series of offers to VimpelCom before Mr. Moyse was ever hired.

[13] Upon learning of Mr. Moyse's move to West Face, Catalyst immediately advised West Face of its position that Mr. Moyse was prohibited from working for West Face as a result of a non-competition clause in his employment agreement. Catalyst also advised West Face that Mr. Moyse had received access to confidential information regarding a "telecom file" during his employment with Catalyst. This was the first time, after it had already hired Mr. Moyse, that West Face learned that Catalyst had been pursuing what West Face assumed to be the WIND opportunity.

[14] The evidence of Mr. Griffin of West Face, which has not been denied in any way, is that upon learning of Catalyst's objections to Mr. Moyse's hiring, West Face took the position that Mr. Moyse's non-competition covenant was unenforceable, and denied receiving any confidential information from Mr. Moyse. Out of an abundance of caution, given Catalyst's express concerns about the "telecom file", West Face nonetheless established strict firewalls around West Face's own work on WIND. Mr. Moyse was denied access to computer files relating to that project, and all members of the WIND team at West Face were explicitly instructed not to speak to Mr. Moyse about that transaction.

[15] Two days after Mr. Moyse's departure from West Face on July 18, 2014, the strategic partner with whom West Face had been working on a potential acquisition of WIND for the previous month backed out. The WIND deal that West Face had been pursuing while Mr. Moyse had worked there became a dead end.

[16] The further evidence of Mr. Griffin, which has also not been denied, is that one week after Mr. Moyse left West Face, on July 23, 2014, VimpelCom informed West Face that it had entered into exclusive negotiations with another bidder, which West Face presumed to be Catalyst (and which Catalyst ultimately confirmed in this litigation). Nonetheless, West Face decided to join with a group of investors in the event that VimpelCom's preferred bidder was unable to reach an agreement during the period of exclusivity. This group ("New Investors") included Tennenbaum and 64NM who had themselves been pursuing the investment independently for a number of months.

[17] The further evidence of Mr. Griffin, which has also not been denied, is that on August 6, 2014, uncertain as to when the exclusivity period would end, the New Investors, which did not include Globalive Capital, submitted an unsolicited offer for WIND. A more formal proposal followed the next day, August 7. The proposal left Globalive Capital's voting majority voting interest in WIND undisturbed. On August 7 however, Globalive Capital agreed to a support agreement with VimpelCom, which obliged Globalive Capital to support VimpelCom in its exclusive negotiations with Catalyst.

[18] The further evidence of Mr. Griffin, which has also not been denied, is that upon the expiry of exclusivity, the New Investors revived their efforts with VimpelCom and, subject to VimpelCom's approval, with Globalive Capital. Ultimately a a definitive purchase agreement was signed by all parties and the purchase of WIND closed on September 16, 2014 pursuant to which Mid-Bowline became the owner of WIND.

[19] On June 25, 2014 Catalyst commenced an action against Brandon Moyse and West Face. It claimed injunctive relief, including preventing Mr. Moyse from disclosing confidential information. An interlocutory motion by Catalyst regarding Mr. Moyse was heard on October 27, 2014 by Mr. Justice Lederer who on November 10 granted an interlocutory injunction enjoining Mr. Moyse from disclosing any confidential information belonging to Catalyst, or competing with Catalyst until December 22, 2014 (being the date six months after he left Catalyst's employment).

[20] On December 16, 2014, Catalyst delivered an Amended Amended Statement of Claim in which it alleged that Mr. Moyse while employed by Catalyst was a member of the team studying the WIND opportunity and privy to Catalyst confidential information concerning that opportunity. It alleged that West Face obtained that confidential information to obtain an unfair advantage over Catalyst in its negotiations with VimpelCom regarding WIND and that but for the transmission of the confidential information West Face would not have successfully negotiated a purchase of WIND. Catalyst claimed a constructive trust over West Face's interest in WIND and an accounting of all profits earned by West Face as a result of its misuse of confidential information obtained from Mr. Moyse.

Catalyst claims a need for a trial

[21] Catalyst claims that it requires the full panoply of a trial process in its action against West Face, saying that the action it started in June, 2014 is at an early stage and that there has been no discovery or production of documents. It says that on this application its rights are being decided without any witnesses. This ignores the history of the action and what has occurred to date.

[22] So far as the plan of arrangement application is concerned, a four day hearing was established on January 4, 2016 for four days beginning January 25, 2016. Catalyst had the draft material of Mid-Bowline in December and was served with the motion record on January 8, 2016 that included the affidavit of Mr. Griffin as well from the other investors in Mid-Bowline, being representatives of Globalive Capital, Tennenbaum and 64NM. Four days was scheduled for evidence and it was anticipated that the deponents of the affidavits at least would be examined and cross-examined. However, no evidence was filed by Catalyst to contradict the Mid-Bowline evidence, and no request was made by Catalyst to cross-examine any Mid-Bowline witness. As a result, the reporter was cancelled and the matter proceeded by oral argument on the material filed.

[23] I adjourned the hearing on Monday January 5 until 2 pm to give Mr. DiPuccio a chance to get instructions from Catalyst. Later in the morning Mr. DiPuccio delivered an affidavit of James Riley of Catalyst sworn that morning. It contained a statement that Mr. Riley understood from Mr. DiPuccio that the Plan hearing would not be decided on its merits as originally

scheduled pending a discussion on the terms on which the Plan might be amended so that West Face's proceeds from the sale to Shaw could be held in escrow pending an expedited trial of Catalyst's claim.

[24] This statement was allegedly based on discussions held earlier in January in chambers in which the parties discussed trying to agree on a term that would allow the plan of arrangement to be approved on some terms that would protect Catalyst's rights. At that discussion counsel for Mid-Bowline made clear that it would not agree to hold the funds for West Face in escrow for reasons he explained. It was left that the parties would try to negotiate some other protection for Catalyst. However it was never discussed that the hearing scheduled for four days starting January 25th would be put off or that the plan approval application would not be heard on its merits at that time. The failure of Catalyst to file any evidence in opposition to the plan of arrangement was a decision of its own choosing. Its decision not to cross-examine on any of the affidavits filed by Mid-Bowline was also of its choosing.

[25] There is a history of full document production by West Face in the claim against it by Catalyst and of cross-examination on affidavits. There has also been delay caused by Catalyst sitting on its hands.

[26] On July 16, 2014 a consent order of Justice Firestone ordered Mr. Moyse to turn his computer over to his counsel for the taking of a forensic image of the data kept by him on his computer, to be conducted by a professional firm. On November 10, 2014 Justice Lederer ordered that the forensic images that had been created were to be reviewed by an independent supervising solicitor ("ISS"). The ISS subsequently released a draft report on February 1 and its final report on February 17. As set out therein, the ISS found no evidence that Mr. Moyse had provided any of Catalyst's confidential information to West Face. It did, however, find evidence suggesting that Mr. Moyse had deleted his browser history.

[27] On January 13, 2015, Catalyst commenced a motion for interlocutory relief against West Face for an order prohibiting West Face from playing any role in the management of WIND and an order requiring West Face to provide electronic images of all of its computers to the ISS for review. One of the stated purposes of Catalyst's motion for the imaging order was to determine

"whether [Mr.] Moyse in fact communicated Catalyst's Confidential Information to West Face and what use West Face made of such information". Catalyst amended its notice of motion on February 6 to also seek an order jailing Mr. Moyse for contempt of the earlier interim consent order of Justice Firestone.

[28] Catalyst's motion was heard by Justice Glustein on July 2, 2015. Although West Face delivered its responding motion record on March 10, 2015, 20 days after receiving Catalyst's materials, Catalyst did not deliver its reply materials until May 1, 2015, almost two months after receiving West Face's materials.

[29] Justice Glustein rendered his decision five days after argument, on July 7, 2015, and dismissed Catalyst's motion in its entirety. With respect to the request that West Face provide electronic images of all of its computers to the ISS for review, Justice Glustein held that there was no evidence that West Face has failed to comply with its production obligations, let alone intentionally delete materials to thwart the discovery process or evade its discovery obligations. Justice Glustein noted that West Face had offered to turn over its own confidential information created, accessed or modified by Mr. Moyse to the ISS, but Catalyst has not accepted this offer. Regarding the productions of West Face, Justice Glustein stated:

> **56** Further, West Face has produced voluminous records relating to the allegations Catalyst has made, even before discovery, and in particular: (i) filed a four-volume responding motion record attaching 163 exhibits regarding WIND, the AWS-3 auction (since abandoned) and Callidus, (ii) produced a copy of the notebook Moyse used during his three and a half weeks at West Face, redacted only for information about West Face's active investment opportunities, (iii) produced all non-privileged, non-confidential emails sent to or from Moyse's West Face email account or known personal email accounts which were on West Face's servers, and (iv) produced 19 additional exhibits in response to undertakings given and questions taken under advisement at the cross-examination of Griffin on May 8, 2015.

[30] There was filed on the motion before Justice Glustein five affidavits of Mr. Riley of Catalyst, affidavits of Mr. Moyse, two affidavits of Mr. Griffin of West Face, an affidavit of Mr. Dea of West Face, an affidavit of Mr. Burt-Gerrans who was the computer expert who imaged the West Face computer records and an affidavit of Mr. El Shanawany who was the corporate

planning and control officer of WIND. There were also voluminous transcripts of the cross-examination of all of these persons.

[31] After receiving Justice Glustein's decision on July 7, 2015, Catalyst appealed the decision to the Court of Appeal, even though Justice Glustein's decision was interlocutory. Within two days of receiving the notice of appeal, on July 24, 2015 counsel to West Face immediately notified Catalyst's counsel that it was not entitled to appeal directly to the Court of Appeal. Catalyst ignored this advice, following which West Face served a notice of motion to quash Catalyst's appeal on August 5, and an amended notice of motion, factum and book of authorities on September 11, 2015. Catalyst never responded to this motion, but instead on November 5, 2015, consented to an order quashing the appeal. Catalyst then waited until December 10, 2015 to deliver a notice of motion to extend the time for it to seek leave to appeal to the Divisional Court.

[32] Catalyst's motion to extend the time to appeal to the Divisional Court and the appeal were heard together by Justice Swinton on January 21, 2016 and dismissed the following day. Justice Swinton was critical of Catalyst for appealing the decision of Justice Glustein to the Court of Appeal as the law was clear that interlocutory orders are appealable to the Divisional Court and Catalyst was represented by experienced litigation counsel. She also held that Catalyst had not given a reasonable explanation for the lengthy delay given the state of the law with respect to appeals to the Court of Appeal and the facts of this case. As to the merits of an appeal, Justice Swinton held there were none.

[33] I can only conclude that Catalyst has purposely delayed its claim against West Face for tactical reasons. As long as a claim for an order of a constructive trust against the shares of Mid-Bowline held by West Face is outstanding, Catalyst knows that West Face cannot realistically sell those shares. Catalyst had to understand that WIND might well be sold, taken the Canadian market for spectrum and the fact that Mid-Bowline is owned by financial interests and is not an operator in the wireless business. Catalyst has been deeply involved in that market, not only with its failed negotiations to acquire WIND from VimpelCom but also with its large financial position in Mobilicity, another regional wireless carrier that had filed for CCAA protection.

Fair and reasonable test

[34] In *BCE v. 1976 Debentureholders,* [2008] 3 S.C.R. 560 the Supreme Court of Canada held that determining whether a plan of arrangement is fair and reasonable involves two inquiries:

(a) whether the arrangement has a valid business purpose; and

(b) whether the arrangement resolves the objections of those whose legal rights are being arranged in a fair and balanced way.

[35] The valid-purpose inquiry is invariably fact-specific and the nature and extent of the evidence needed to satisfy this requirement will depend on the circumstances. See *BCE* at para. 146. The inquiry requires only the demonstration of a prospect of clearly identified benefits to the corporation that have a reasonable prospect of being realized if the proposed arrangement is implemented. See *Magna International Inc. (Re)* (2010), 75 B.L.R. (4th) 163 at para. 50 (Div Ct).

[36] The s. 192 process is generally applicable to change of control transactions that share two characteristics: the arrangement is sponsored by the directors of the target company; and the goal of the arrangement is to require some or all of the shareholders to surrender their shares to either the purchaser or the target company. See *BCE* at para. 126. This is precisely the situation here.

[37] The benefit to Mid-Bowline and its shareholders is obvious. The sale to Shaw is at a tremendous price and if the sale does not close, there is no guarantee that another transaction would come along with a price of $1.6 billion. The purpose in being able to sell the interest of West Face in Mid-Bowline free of any constructive trust claim of Catalyst is required for the sale to occur.

[38] Regarding the second part of the fair and reasonable test, whether the arrangement resolves the objections of those whose legal rights are being arranged in a fair and balanced way, it was stated in BCE:

> **147** The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arranged are being resolved in a fair and balanced way.
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> **148** An objection to a plan of arrangement may arise where there is tension between the interests of the corporation and those of a security holder, or there are conflicting interests between different groups of affected rights holders. The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. Often this will involve complex balancing, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec*, at para. 36:
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> > [T]he court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.

[39] I do not agree with Catalyst that there is no jurisdiction under section 192 to compromise rights of Catalyst. Section 192 is a flexible provision that has been broadly interpreted. In *BCE* it was stated:

> **124** In light of the flexibility it affords, the provision has been broadened to deal not only with reorganization of share capital, but corporate reorganization more generally. Section 192(1) of the present legislation defines an arrangement under the provision as including amendments to articles, amalgamation of two or more corporations, division of the business carried on by a corporation, privatization or "squeeze-out" transactions, liquidation or dissolution, or any combination of these.
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> **125** This list of transactions is not exhaustive and has been interpreted broadly by courts. Increasingly, s. 192 has been used as a device for effecting changes of control because of advantages it offers the purchaser: C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), at p. 76....

[40] In undertaking the fair and reasonableness inquiry, the interests of shareholders and other stakeholders is to be considered. See *BCE* at para. 115.

[41] In this case, the claim of Catalyst is that it is entitled to a constructive trust over the shares of Mid-Bowline owned by West Face. It is not an equity owner at the moment, but would be if a constructive trust were ordered in its favour. It is a stakeholder in West Face's interest in

Mid-Bowline to that extent. To say that a Court is powerless to make any order compromising the rights of Catalyst would be to give Catalyst a veto over the plan of arrangement merely by reason of its claim.

[42] The voluminous evidence filed by the parties on the previous motion before Justice Glustein and now on this application (which is largely the same as previously filed before Justice Glustein) has disclosed no confidential information of Catalyst regarding WIND provided by Mr. Moyse to West Face. It is clear that West Face has produced all of its relevant documents. The case of Catalyst at this stage looks weak.

[43] The provision added to the plan of arrangement to protect the right of Catalyst to damages is as follows:

> From and after the Effective Time: (i) this Plan of Arrangement shall take precedence and priority over any and all Purchased Shares or Options issued prior to the Effective Time; (ii) the rights and obligations of the Former Shareholders and the former holders of Options shall be solely as provided for in this Plan of Arrangement; and (iii) all actions, causes of action, claims or proceedings (actual or contingent and whether or not previously asserted) based on or in any way relating to any Purchased Shares or Options shall be deemed to have been settled, compromised, released and determined without liability except as set forth herein; provided, however, that nothing in this section 4.5 shall be construed to extinguish the right of The Catalyst Capital Group Inc. to continue to assert its claims against West Face Capital Inc. in Ontario Superior Court of Justice Court File No.: CV-14-507120 (provided that the potential liability of West Face Capital Inc. is limited to the net profit of West Face Capital Inc. in respect of this Arrangement), with the exception of any constructive trust or equivalent remedy which shall be deemed to have been settled, compromised, released and determined without liability, along with all other claims in this section 4.5. (Underlining added).

[44] Apart from releasing its constructive trust claim, Catalyst has a concern that this provision would prevent it from tracing money paid to West Face in the event it were entitled to a judgment against West Face. It also is concerned that the words "net profit" are unclear because what is meant by "net" is unclear. I would direct that the provision be amended to make clear that the provision does not prevent Catalyst from proceeding with a tracing claim of the

money received by West Face from the sale of its share interest in Mid-Bowline. I would also direct that the word "net" be removed.

[45] On the state of the record before me, and taking into account the interests of all concerned, including Catalyst, I am of the view that the plan of arrangement is fair and reasonable.

What should be done?

[46] Although Catalyst has not produced any evidence on this application, a decision of its own making, I would give Catalyst one last chance to call evidence, so long as it is done quickly. Shaw hopes to close the transaction on March 1, 2016 but this may be unlikely. The outside date for the closing of the transaction is July 1, 2016.

[47] Contrary to the argument of Catalyst, it does not have a right to a lengthy process leading to a trial. This is particularly the case when Catalyst has purposely delayed pursuing its claim against West Face and taken clearly inappropriate proceedings to appeal the interlocutory decision of Justice Glustein. Apart from that appeal process, it did nothing to further the action.

[48] The Supreme Court of Canada has made it clear that a cultural shift in the civil process is required. In *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 Karakatsanis J. stated:

> **2** Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
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> **27** There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense

> and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
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> **28** This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible -- proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[49] The reality in this case is that the issue needs to be decided quickly for all concerned. The wireless industry in Canada is in a state of flux and whether Shaw is or is not entitled to acquire WIND is important to that industry. This issue raised by Catalyst must be decided quickly. In light of all that has gone on in the past year and a half in its case against West Face and Mr. Moyse, that can be accomplished while protecting the rights of the parties.

[50] Taking into account appeal periods, a further hearing involving this application and the claim of Catalyst against West Face and Mr. Moyse should proceed quickly, and I set four days from February 22 to 26, 2016, with further steps in the interim as follows:

(i) The issue to be tried is whether Catalyst has a right to a constructive trust of the share interest of West Face in Mid-Bowline. Whether this includes the issue as to whether Catalyst has any claim for misuse of Catalyst confidential information is up to Mid-Bowline. Counsel are to attempt to agree on the language of the issue to be tried, failing which it shall be settled at a 9:30 a.m. appointment with me on February 1, 2016.

(ii) The pleadings to date will be used.

(iii) The affidavits to date in the Catalyst action against West Face and Mr. Moyse and in this application may be used at the hearing.

(iv) Any party may conduct further cross-examinations on the deponents of affidavits on matters not yet covered in the cross-examinations to date.

(v) Catalyst may cross-examine Messrs. Lockie, Burt and Leitner on their affidavits filed in this matter.

(vi) Mr. Moyse as a party has a right to participate.

(vii) Any further issues regarding the hearing are to be dealt with promptly at a 9:30 a.m. appointment with me.

Claim for inducing breach of contract

[51] On Monday, in his affidavit sworn that morning, Mr. Riley made a statement indicating Catalyst intends to seek as relief in the action an order tracing all of the proceeds of the sale, relief that would involve amendments to the existing claim and that would "at first" glance be precluded by the proposed plan. His statement was that "In lieu of a claim for a constructive trust and an order holding the West Face proceeds of the Transaction in escrow, Catalyst intends to seek as relief in the Action an order tracing all of the proceeds of sale".

[52] During argument, it became clear that the basis for this intended claim would be a claim for inducing breach of contract made against the parties that participated in the unsolicited bid to VimpelCom to acquire its interest in WIND during the period that Catalyst and VimpelCom were having exclusive discussions. Those parties apart from West Face were Tennenbaum and 64NM. This intended claim for tracing would be to trace all of the proceeds paid to all shareholder of Mid-Bowline and not just those paid to West Face. It would obviously require the addition of the other shareholders of Mid-Bowline.

[53] Mr. Riley stated in his affidavit that the information giving rise to this new claim came from "information learned for the first time through the materials filed on this application". What information he was referring to was not stated. In argument it was stated that what he learned was that others were involved besides West Face in the unsolicited bid. However, it is quite clear that the information regarding the unsolicited bid was known by Mr. Riley early in 2015. It was contained in Mr. Griffin's affidavit sworn March 7, 2015 in response to Catalyst's motion seeking interlocutory relief against West Face.

[54] On his cross-examination on May 13, 2015 Mr. Riley, the chief operating officer of Catalyst, discussed the notion of inducing a breach of contract when it was put to him that Catalyst had not sued VimpelCom for breach of the exclusivity terms between VimpelCom and Catalyst. He would not agree that VimpelCom had not breached its exclusivity clause and said further:

> However, when a contract is breached, as I recall, there's two—you can—under the theory of Lumley and Guy, and I'm not trying to play lawyer, you can go after one of the two parties, the party breaching or the party inducing a breach.

[55] Mr. Riley is a very experienced lawyer. He was aware of the case of *Lumley v. Guy*, (1853) 118 ER 749, a case in England in which an opera singer was induced by Covent Garden to leave another theatre at which the singer had an agreement to perform. It was in that case that the modern action for inducing breach of contract was established.

[56] Although Catalyst was aware on March 13, 2015 of the facts that Mr. Riley now asserts he wants to use in this intended inducing breach of contract action, and was aware of the nature of a breach of contract action as disclosed on his cross-examination, it was only on Monday of this week that anything was first said by Catalyst about that[1].

[57] The reason I believe why this was said was that late last week Mid-Bowline delivered its amended plan to permit Catalyst to continue with its damage claim against West Face but removing the right to continue with its constructive trust claim against West Face. Such a claim would not allow the proposed plan of arrangement to proceed and would give Catalyst leverage in any negotiations with Mid-Bowline.

[58] In his letter of January 6, 2016 written with prejudice, Mr. DiPuccio asserted that Catalyst was not interested in holding up a sale of the shares of WIND to Shaw. I have some

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[1] I do not accept Catalyst's contention that the letter of January 6, 2016 from Mr. DiPuccio to counsel for Mid-Bowline and Shaw disclosed any such intent. That letter dealt entirely with the claim of Catalyst against Mid-Bowline.

doubts about that statement. The terms put in the letter to West Face were terms that Catalyst had to know would not be agreeable to West Face, and indeed Catalyst was told that shortly after the letter was sent. The proposed action now is also intended to interfere with the sale to Shaw. The vendors are all financial concerns with fund investors and to hold up the proceeds of the sale or to require their tracing in the hands of their fund investors that would be claimed in the claim against them for inducing a breach of contract is something that Catalyst has to know would not be agreeable to them.

[59] This intended action has not been started. It could have been started in March, 2015 when the facts were disclosed and known to Catalyst. To lie in the weeds until the hearing of the application and assert such a right to stop the plan of arrangement is troubling indeed and not acting in good faith. Waiting and seeing how things are going in the litigation process before springing a new theory at the last moment is not to be encouraged. Apart from the statement of Mr. Riley that the information was first learned in the material in this application, which was not true, no evidence has been given by Catalyst to explain why this new intended claim was not brought sooner.

[60] The evidence on the record is that VimpelCom told the parties who made the unsolicited bid that it could not deal with it while under an exclusivity arrangement with Catalyst and it did not do so. The proposed claim of Catalyst looks weak on the strength of the record before me and Catalyst has done nothing to adduce evidence to support the intended claim.

[61] In the circumstances, I disregard the statement of Mr. Riley as to the intended claim Catalyst says it will bring. It is too late in the process and the provision in the amended plan of arrangement that would prevent such a claim being made is fair and reasonable. The trial of the issue I have ordered is not to consider any such claim.

Newbould J.

Date: January 26, 2016