Court File No. CV-16-11272-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N :

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

COSTS SUBMISSIONS OF THE DEFENDANT, BRANDON MOYSE

September 2, 2016

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto ON M5V 3H1
Fax: 416.646.4301

Robert A. Centa (LSUC# 44298M)
Tel: 416.646.4314
robert.centa@paliareroland.com

Kris Borg-Olivier (LSUC# 53041R)
Tel: 416.646.7490
kris.borg-olivier@paliareroland.com

Denise Cooney (LSUC# 64358R)
Tel: 416.646.74908
denise.cooney@paliareroland.com

Lawyers for the defendant, Brandon Moyse

A. Overview

1. The Catalyst Capital Group Inc. ("Catalyst") brought this action against one of its former junior employees, Brandon Moyse, who was 26 years old at the time the action was commenced. Catalyst sought general damages against Mr. Moyse for spoliation, the quantum of which it did not particularize until closing submissions. It also sought, but did not pursue at trial, injunctive relief with respect to Mr. Moyse's employment with his co-defendant, West Face Capital Inc. ("West Face"). On August 18, 2016, Justice Newbould dismissed Catalyst's action in its entirety, and ordered that the defendants are entitled to their costs.[1]

2. Mr. Moyse seeks his legal costs against Catalyst on a substantial indemnity scale in the amount of $499,335.85, inclusive of HST and disbursements, or in the alternative, on a partial indemnity scale in the amount of $339,500.18, inclusive of HST and disbursements. A bill of costs supporting both of these amounts is attached at **Tab 2**. The "actual amount" set out in the bill of costs (on which the substantial and partial indemnity calculations are based) is significantly less than the costs actually billed. The reduced amount reflects Mr. Moyse's candid recognition that he could have protected his legitimate privacy concerns in ways that might have reduced the likelihood of Catalyst responding in the way that it did.[2]

3. Mr. Moyse adopts and relies on the submissions of West Face that the court should exercise its discretion and award the defendants their costs on a substantial indemnity basis. If West Face is entitled to costs on a substantial indemnity basis, which Mr. Moyse

---

[1] *Catalyst Capital Group Inc. v Moyse*, 2016 ONSC 5271, at para 169 ["*Reasons*"], **Tab 3**.

[2] Mr. Moyse candidly admitted that it was a mistake to send the initial memos to West Face marked "Confidential" (**Tab 4A:** Affidavit of Brandon Moyse, sworn June 2, 2016, p. 41, para 116; Moyse Examination-in-Chief, June 1374:19-1375:2), and then deleting that email was a further mistake (**Tab 4B**: Moyse 2016 Affidavit, p. 42, para 117; Moyse Examination-in-Chief, 1375:19-1375:22). Mr. Moyse also admitted that wiping his Blackberry was a mistake (**Tab 4C:** Moyse Examination-in-Chief, 1390:17-1391:14).

submits it is, then Mr. Moyse should also receive costs on that basis. Mr. Moyse was the individual employee in what commenced as a garden variety employment law dispute regarding the enforceability of a restrictive covenant, but which Catalyst then distorted into a $500 million lawsuit based on its entirely speculative, but very serious, allegations that Mr. Moyse had traded on Catalyst's confidential information for personal gain. After Catalyst determined it would pursue West Face and its profits associated with the WIND transaction, Mr. Moyse was inescapably caught up in Catalyst's egregious manner of pursuing this litigation. Mr. Moyse acknowledged that West Face was paying his legal expenses. But for that, Mr. Moyse would have been financially ruined by this meritless litigation. He would not have been able to afford to clear his name and to disprove the very serious, but baseless allegations made against him. Catalyst's conduct is deserving of judicial sanction, and both defendants are entitled to their costs on a substantial indemnity basis.

4. The quantum of costs Mr. Moyse seeks on either scale is fair and reasonable given the seriousness of the allegations Catalyst made against him, the technical nature of the forensic computer evidence marshalled, and the manner in which Catalyst pursued this action. Catalyst must have expected that Mr. Moyse would defend himself vigorously against allegations that he intentionally destroyed relevant evidence and traded on Catalyst's confidential information, particularly where it repeatedly made submissions that he had misled the court. The costs Mr. Moyse seeks are fair and reasonable, reflect the work necessary for Mr. Moyse to defend this action, the complete success he achieved, and are proportionate to the issues at stake.

B. General principles in fixing costs

5. Pursuant to s. 131 of the *Courts of Justice Act*[3] and rule 57.01 of the *Rules of Civil Procedure,*[4] costs are within the discretion of the court. In determining costs, the court is to take into account the factors listed in rule 57.01 and make a costs award "in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding".[5] In *Andersen v St. Jude Medical Inc.*, the Divisional Court described several principles the court is to consider in fixing costs:[6]

(a) the discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1);

(b) a consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant;

(c) the reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable (rule 57.01(1)(0.b));

(d) the court should seek to avoid inconsistency with comparable awards in other cases; and

(e) the court should seek to balance the indemnity principle with the fundamental objective of access to justice.[7]

---

[3] RSO 1990, c C.43, s 131.

[4] RRO 1990, Reg 194, r 57.01 ["*Rules of Civil Procedure*"].

[5] *Clarington (Municipality) v Blue Circle Canada Inc.*, 2009 ONCA 722, at para 52 ["*Clarington*"], **Tab 6**; *Boucher v Public Accountants Council for the Province of Ontario*, [2004] OJ No 2634 (ONCA) at para 37, **Tab 7**.

[6] The Court of Appeal has directed that these are the factors to be considered: *Clarington, supra* at para 51, **Tab 6**.

[7] Andersen v St. Jude Medical Inc., [2006] O.J. No. 508 (Ont Div Crt) at para 22, leave to appeal to the Court of Appeal refused, May 12, 2006 [2006 CarswellOnt 7749], **Tab 8**, cited with approval in *Clarington, supra,* at para 51, **Tab 6**.

C. The principle of indemnity (rule 57.01(1)(0.a))

6. Rule 57.01(1)(0.a) provides that, in fixing costs, the court may consider "the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer".[8]

7. Mr. Moyse's bill of costs identifies the lawyers, law clerks, and students who worked on his file, and the time they spent on the various steps in the litigation. Mr. Moyse submits that the rates and hours claimed are reasonable given the nature of this proceeding.

1. Mr. Moyse's representation in this proceeding

8. By way of background, Grosman Grosman & Gale ("GG&G") represented Mr. Moyse between May 2014 and February 2015. The majority of GG&G's costs, including those incurred on an interlocutory injunction heard before Justice Lederer,[9] and a motion to strike heard before Justice Spence,[10] have been dealt with. Mr. Moyse does not seek any costs with respect to GG&G's fees.

9. Mr. Moyse retained Paliare Roland Rosenberg Rothstein LLP ("Paliare Roland") in February 2015, shortly after Catalyst brought a motion to have Mr. Moyse found in contempt of court, and sought to have him imprisoned. Mr. Moyse's costs of the contempt motion, and the costs of Catalyst's unsuccessful attempts to appeal that decision, have been dealt with in previous costs decisions.[11]

---

[8] *Rules of Civil Procedure*, *supra* r 57.01(1)(0.a).

[9] Justice Lederer ordered that Catalyst's costs of that motion were payable to Catalyst in the cause: *The Catalyst Capital Group Inc. v Moyse*, 2015 ONSC 1146, at para 5 ["*Interlocutory Motion Costs Decision*"], **Tab 9**.

[10] The parties settled the matter of costs of Justice Spence's order.

[11] On the contempt motion, Mr. Moyse reduced the costs sought in recognition of the fact he had retained new counsel, who required additional time to familiarize themselves with the matter. Justice Glustein's costs award on the contempt motion covered the costs of Mr. Moyse's forensic expert, Kevin Lo's, two affidavits, on which Mr. Moyse relied at this trial.

2. Steps taken in the action in a compressed time frame

10. In February 2016, the court ordered that the matter be set down for trial four months later, in May 2016. This trial was ultimately heard over seven days in June 2016. At the time the trial was scheduled, Mr. Moyse had not yet delivered a statement of defence, and Catalyst had not yet produced its relevant documents, though Mr. Moyse had disclosed approximately 850 documents in July 2014 pursuant to an order of Mr. Justice Firestone.[12]

11. In order to proceed to trial, the parties completed virtually all steps necessary to prepare for trial over the span of four months:

(a) Pleadings:

(i) Catalyst served its amended amended amended statement of claim on February 25, 2016, in which it added to the relief sought against Mr. Moyse general damages for spoliation;

(ii) Mr. Moyse served his statement of defence on March 16, 2016;

(b) Documentary productions:

(i) Mr. Moyse's counsel ultimately reviewed close to 7,800 documents;

(ii) Catalyst produced a total of almost 3,400 documents between late March 2016 and May 2016. Catalyst's initial productions in late March were clearly deficient, and it required a significant amount of work for counsel to review the documents and identify specific deficiencies;

(iii) Mr. Moyse made supplementary productions in April and May 2016, as did West Face;

(c) Examinations for discovery:

(i) Examinations of Mr. Moyse and West Face and Catalyst's representatives took place shortly after documentary productions, over three days on May 10, 11, and 12, 2016;

---

[12] GG&G prepared Mr. Moyse's initial documentary production in July 2014, pursuant to the order of Justice Firestone. Mr. Moyse does not seek any costs with respect to those fees.

(ii) The parties delivered answers to undertakings and further productions shortly after;

(d) Preparing trial affidavit:

(i) Evidence in chief for all witnesses was given by way of affidavits, exchanged before trial. This had the effect of creating a much larger evidentiary record than would normally be the case for a seven-day trial;

(ii) Catalyst delivered its trial affidavits ten days before the trial was scheduled to begin, on the evening of Friday, May 27, 2016. Catalyst breached the agreement to deliver its affidavits on Tuesday, May 24, 2016;

(iii) Mr. Moyse's counsel was left with a week to review Catalyst's evidence-in-chief and prepare Mr. Moyse's responding affidavit, which counsel delivered on Friday, June 3, 2016;

(iv) West Face delivered several of its witness statements on Friday ,June 3, 2016, and others over the following days.

12. In between these steps, there were several attendances required at 9:30 a.m. case conferences.

13. The trial took place over seven days commencing Monday, June 6, 2016. On most days, court commenced early and ended late. Mr. Moyse claims 156 hours with respect to counsel's and his law clerk's attendance at the trial. All three parties had a law clerk in attendance at the trial, whose attendance were necessary to facilitate this electronic trial.

14. Catalyst called three fact witnesses and its expert, Martin Musters. Mr. Moyse's counsel cross-examined each of Catalyst's witnesses. West Face called seven fact witnesses. Mr. Moyse testified on his own behalf, and called expert evidence from his forensic expert, Kevin Lo.

15. The parties made their closing submissions, and delivered their written closing arguments on Tuesday, June 14, 2016, approximately 16 hours after Mr. Moyse finished testifying. Mr. Moyse's written submissions were over 100 pages long. As requested by the court, those submissions were fully hyperlinked to the cited transcripts, documents, and cases relied on.

3. Hours spent and rates charged were reasonable

16. Given the accelerated and intense litigation process necessitated by the expedited timetable, and the ferocity of the litigation, the hours spent by Mr. Moyse's counsel were reasonable and appropriate.[13] It is not the court's function to second guess successful counsel for the amount of time spent, unless the time spent was obviously too much.[14] Mr. Moyse's counsel appropriately delegated the work between senior and junior counsel, and to law clerks and students. In particular, Mr. Moyse's law clerks' involvement throughout the file increased the efficiencies of this electronic trial.

17. The hourly rates charged by Paliare Roland are consistent with hourly rates charged by Toronto firms for litigation of this nature. Mr. Moyse seeks his substantial indemnity costs at a rate of 90% of counsel's hourly rates, and his partial indemnity costs at a rate of 60% of counsel's hourly rates, in accordance with the usual practice on the Commercial List.[15]

D. The complexity of the proceeding (rule 57.01(1)(c))

18. The proceeding was both legally and factually complex. This was the first case in which a free-standing cause of action in spoliation, in which the plaintiff sought damages, proceeded to trial. Mr. Moyse's counsel was required to lead evidence without knowing

[13] *Calpine Canada Energy Ltd., Re*, 2008 ABQB 537 at para 12, **Tab 10**.
[14] *Castillo v Xela Enterprises Ltd.,* 2015 ONSC 7978 (Commercial List), at para 10, **Tab 11**.
[15] *Ibid* at para 12, **Tab 11**.

whether the court would recognize the existence of the tort, and if it did, what legal test would apply.

19. The case was also factually complex. Though the circumstances of Mr. Moyse's departure from Catalyst and recruitment to West Face were relatively straightforward, Catalyst unnecessarily complicated the case with its increasingly desperate allegations that Mr. Moyse passed confidential information to West Face, and intentionally destroyed evidence of having done so. Catalyst pleaded that Mr. Moyse's deletion of his web browser history constituted spoliation.[16] However, through its evidence, Catalyst also alluded to other alleged acts of spoliation, though they were not pleaded. These included Mr. Moyse's alleged use of the Secure Delete program to delete files (based on the presence of the Secure Delete folder on his computer), the alleged deletion of emails in which he transmitted Catalyst confidential information to West Face, and the wiping of his Blackberry. Mr. Moyse was forced to respond to Catalyst's ever-changing theory of its case.

20. The case also required Mr. Moyse to marshal complicated expert forensic evidence to respond to Catalyst's expert, Martin Musters. Mr. Musters provided three affidavits, and Mr. Moyse's forensic expert, Kevin Lo, provided two.[17] Both were cross-examined at trial. As a result of the work done by Mr. Moyse's counsel and his forensic expert, Mr. Musters was compelled to acknowledge that his original conclusion that Mr. Moyse had run the "Secure Delete" program on his computer was incorrect, and that Mr. Moyse's forensic

---

[16] Catalyst's Amended amended amended statement of claim, para 34.21, **Tab 5.**

[17] The costs of Mr. Lo's affidavits were dealt with in Justice Glustein's order on the contempt motion. The disbursements sought with respect to Mr. Lo relate to his preparation for and attendance at trial.

expert was correct: there was in fact no evidence that Mr. Moyse had run the "Secure Delete" program, or used it to delete any files.[18]

21. As just one example of Catalyst's ever-shifting theory of its case, Mr. Musters nevertheless persisted at trial in his theory that Mr. Moyse had deleted evidence, on the basis that Mr. Moyse had purportedly deleted evidence that he had run the "Secure Delete" program. Mr. Moyse was placed in the difficult position of trying to prove a negative. Ultimately, the evidence of Mr. Lo and Mr. Musters diverged principally on the question of the relative ease or difficulty of using the Registry Editor on a computer to delete a Secure Delete Log.[19] The court concluded that it would be "sheer speculation unsupported by any forensic evidence" to find that Mr. Moyse had done so.[20]

E. The amount claimed and the importance of the issues (rules 57.01(1)(0.b), and 57.01(1)(d))

22. The issues raised in this proceeding were extremely important to Mr. Moyse. Catalyst made serious allegations of improper conduct (which garnered significant media attention) that were prejudicial to Mr. Moyse's character and reputation. As a result of this litigation, Mr. Moyse was off work from July 16, 2014 until December 2015, and had significant difficulties securing a new job.[21] The allegation that he passed Catalyst's confidential information regarding the potential WIND transaction to West Face was devastating for his prospects of employment in the financial industry. Catalyst alleged, without any direct evidence, that Mr. Moyse traded on confidential information, and that he

[18] *Reasons*, *supra*, at paras 153-155, **Tab 3**. Mr. Musters nevertheless persisted in his evidence that Mr. Moyse had run the Secure Delete program, based on speculation which the court described as being "outside of his expertise" and indicating "somewhat of a less than neutral observation and speculation": *Ibid* at para 156, **Tab 3**.
[19] *Ibid* at paras 159-162, **Tab 3**.
[20] *Ibid* at para 162, **Tab 3**.
[21] Moyse 2016 Affidavit, para 12, **Tab 4D**.

then intentionally destroyed relevant evidence in order to impede its ability to prove its case. Catalyst repeatedly alleged in court filings that Mr. Moyse had misled the court, an allegation which the court expressly rejected.[22]

23. Catalyst claimed "general damages" against Mr. Moyse for the tort of spoliation. The basis for Catalyst's claim against West Face was West Face's profit on the sale of WIND Mobile to Shaw Communications, a sale of approximately $1.6 billion. Catalyst did not particularize the damages it was seeking against Mr. Moyse until its closing submissions, when Catalyst advised for the first time that it was seeking damages equivalent to an award covering its costs of the case.[23] For an individual defendant of ordinary means, such as Mr. Moyse, the uncertainty of the amount claimed by Catalyst loomed large. Being required to pay Catalyst's costs of the case, though a fraction of the amount sought against West Face, would have been disastrous. Any individual facing a claim such as Catalyst's, and which was pursued in the manner which Catalyst did, would try to defend the case vigorously. Few individuals, and fewer 28-year olds, could afford to litigate with Newton Glassman and Catalyst. The fact that Mr. Moyse's legal bills were paid for should not alter the court's analysis of the appropriate scale and quantum of costs in a case like this where a Goliath decides to pick on David.

F. Conduct that tended to lengthen unnecessarily the duration of the proceeding, and refusal to admit anything that should have been admitted (rules 57.01(1)(f) and 57.01(1)(g))

24. Throughout the proceeding Catalyst relied on Mr. Riley's evidence that Mr. Moyse had engaged in "alarming" and suspicious conduct around the time of his departure from Catalyst, suggesting to the court that Mr. Moyse was gathering Catalyst confidential

[22] *Reasons, supra*, at paras 16 & 48, footnote 2, **Tab 3**.
[23] *Ibid* at para 135, **Tab 3.**

information to pass on to West Face. Yet Catalyst failed to do any basic due diligence to investigate Mr. Moyse's explanations for this conduct Mr. Riley described as "alarming", which would most likely have revealed that this conduct was entirely innocuous. For example, from Mr. Riley's initial affidavit in June 2014 through to trial, Catalyst continued to rely on evidence that Mr. Moyse had accessed information related to the Stelco transaction around the time he met with Greg Boland of West Face. Yet Mr. Riley neither reviewed the files which Mr. Moyse had accessed, nor produced these documents in the litigation.[24]

G. Amount the unsuccessful party could reasonably have expected to pay (rule 57.01(1)(0.b))

25. The amounts claimed by Mr. Moyse are certainly within the reasonable contemplation of this plaintiff, particularly given the manner in which it conducted the litigation. On the interlocutory injunction before Justice Lederer, Catalyst sought costs on a substantial indemnity scale in the amount of $155,295.40.[25] Having spent and then sought such an amount for an interlocutory injunction, Catalyst could very reasonably have expected to pay the amounts Mr. Moyse now seeks for his costs of the trial.

26. Catalyst is a sophisticated litigant. It has extensive experience in litigation, and appreciates how much complex litigation can cost. It retained prominent, experienced litigation counsel to sue Mr. Moyse. It made serious allegations against Mr. Moyse throughout this proceeding, and should reasonably have expected him to contest those allegations vigorously. It persisted in these allegations though there was no direct evidence to support them. The case was hard fought, as could be expected, and Catalyst had to know that Mr. Moyse would defend the action with the same intensity as Catalyst prosecuted it.

---

[24] Excerpt from Cross-Examination of James Riley at Trial, 634:25-635:18, **Tab 4E**.
[25] *Interlocutory Injunction Costs Decision, supra* at para 1, **Tab 9**.

27. The parties staffed their counsel teams in very similar ways. All three parties had a senior, mid-level and junior counsel who attended two days of examinations for discovery, and most days of the trial. All parties had at least one law clerk extensively involved in the matter, and who attended most of the trial to ensure the success of this electronic trial. The amounts claimed are fair and reasonable, and should have been within Catalyst's reasonable contemplation.

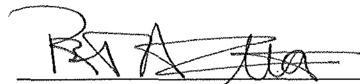
H. Step Back Analysis

28. Finally, the court must step back and decide if the costs are fair and reasonable. This is the overriding principle that must govern.

29. Mr. Moyse submits that the costs claimed are reasonable in the circumstances of this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

September 2, 2016



Robert A. Centa / Kris Borg-Olivier / Denise Cooney

Paliare Roland Rosenberg Rothstein LLP

Lawyers for the defendant, Brandon Moyse

SCHEDULE "A"

List of Authorities

1. *Catalyst Capital Group Inc. v Moyse*, 2016 ONSC 5271

2. *Clarington (Municipality) v Blue Circle Canada Inc.*, 2009 ONCA 722

3. *Boucher v Public Accountants Council for the Province of Ontario*, [2004] OJ No 2634 (ONCA)

4. *Andersen v St. Jude Medical Inc.*, [2006] O.J. No. 508 (Ont Div Crt)

5. *Catalyst Capital Group Inc. v Moyse*, 2015 ONSC 1146

6. *Calpine Canada Energy Ltd.*, Re, 2008 ABQB 537

7. *Castillo v Xela Enterprises Ltd.*, 2015 ONSC 7978 (Commercial List)

SCHEDULE "B"

Applicable Statutes / Regulations

Courts of Justice Act, RSO 1990, c C.43

. . .

Costs

131. (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Crown costs

(2) In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund.

Rules of Civil Procedure, RRO 1990, Reg 194

. . .

Costs of Proceedings – General Principles

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
>
> (a) the amount claimed and the amount recovered in the proceeding;
>
> (b) the apportionment of liability;
>
> (c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

> (i) improper, vexatious or unnecessary, or
>
> (ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

> (i) commenced separate proceedings for claims that should have been made in one proceeding, or
>
> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs.