

Court of Appeal File No. C62655
Court File No. CV-14-507120

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Appellant

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Respondents

SUPPLEMENTARY NOTICE OF APPEAL

The Appellant amends the Notice of Appeal dated September 13, 2016 in the following manner:

1. To replace the Preamble and the Relief Requested with the following:

THE PLAINTIFF APPEALS to the Court of Appeal from the Judgment of the Honourable Justice F. Newbould, which dismissed the Plaintiff's action, dated August 18, 2016 (the "Judgment"), made at Toronto and from the decision of the Honourable Justice F. Newbould, awarding costs of the trial to West Face Capital Inc. in the amount of \$1,239,965, dated October 7, 2016 (the "Costs Order"), both made at Toronto, Ontario.

THE APPELLANT ASKS that the Judgment and Costs Order be set aside and Judgment be granted as follows:

1. Ordering that a new trial be held before another Judge of the Superior Court of Justice;
2. An award of costs of the trial and this appeal in the Plaintiff's favour; and

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2. To add the following text after paragraph 30:

E. Denial of Procedural Fairness in Fact Findings

30. The trial judge deprived Catalyst of procedural fairness by barring Catalyst from advancing certain claims and leading facts about these claims but then making factual findings about these claims in any event.

31. Prior to the trial, the trial judge refused to permit Catalyst to amend its Statement of Claim to include allegations that West Face had induced VimpelCom to breach a contract that provided Catalyst with an exclusive negotiating period with VimpelCom (the "Exclusivity Agreement").

32. The trial judge held that Catalyst's allegations of inducing breach of contract against West Face would not form any portion of the trial between Catalyst, West Face and Moyse (the "Moyse Litigation").

33. Catalyst issued a new Statement of Claim prior to the trial in which it alleged, *inter alia*, that West Face and other parties that were part of the "Consortium" to purchase Wind (and that were not named in the Moyse Litigation) had induced VimpelCom to breach the Exclusivity Agreement and that VimpelCom had breached the Exclusivity Agreement ("VimpelCom Litigation"). Moyse was not named in the VimpelCom Litigation.

34. West Face brought the VimpelCom Litigation to the attention of the trial judge at the trial of the Moyse Litigation. It also objected to testimony during the trial of the Moyse Litigation on the basis that the testimony may impact the VimpelCom Litigation. The trial judge granted West Face's objection.

35. Despite his prior ruling and the ruling on the objection at trial, the trial judge made the following findings of fact concerning Catalyst's dealings with VimpelCom:

- (a) The trial judge concluded that no one at Tennenbaum Capital Partner LLC or 64NM Holdings GP LLC knew the details of any offer made by Catalyst to VimpelCom during the period of the Exclusivity Agreement;
- (b) The trial judge concluded that VimpelCom had no substantive communication with the members of the Consortium, including West Face, during the term of the Exclusivity Agreement; and
- (c) The trial judge concluded that there was no evidence that VimpelCom's board of directors looked at the Consortium's proposal during the exclusivity period with Catalyst or that the Consortium's proposal played any part in the decision of VimpelCom to demand a break fee from Catalyst.

36. The trial judge erred in law and fact and denied Catalyst procedural fairness by making these findings despite having barring Catalyst from advancing claims that relate to these facts and preventing Catalyst from leading evidence on these facts.

37. After the Judgment was released, the defendants in the VimpelCom Litigation, including West Face, sought to have the VimpelCom Litigation struck on the basis of the trial judge's findings.

F. Errors of Fact and Law in Determining Costs

38. Catalyst seeks this Court's leave to appeal the Costs Order.

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39. Leave to appeal should be granted to correct errors of law and errors of mixed fact and law that the trial judge made in rendering the Costs Order.

40. The trial judge erred by concluding that Catalyst's conduct in the litigation was reprehensible, scandalous or outrageous and warranted an award of costs on a substantial indemnity scale.

41. The trial judge made the following palpable and overriding errors of mixed fact and law in finding that West Face was entitled to costs on a substantial indemnity scale:

- (a) The trial judge erred in relying on the evidence given by Newton Glassman during trial to make determinations about Catalyst's conduct in the litigation;
- (b) The trial judge erred in concluding that it was improper for Catalyst to prosecute its action on the basis of the confidentiality wall that West Face erected after Moyse commenced his employment with West Face; and
- (c) The trial judge erred in concluding that Catalyst's prosecution of its action was based on unfounded allegations of West Face's conduct.

42. These palpable and overriding errors led the trial judge to improperly conclude that West Face was entitled to costs on a substantial indemnity basis.

43. The trial judge also erred in accepting the quantum of costs claimed by Moyse without deduction for excessive costs.

3. To amend the basis of the Appellate Court's Jurisdiction in the following manner:

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1. Sections 6(1)(b) and 133(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43;
2. The Judgment of Justice Newbould dismissing the Plaintiff's action is final;
3. Leave to appeal the Judgment is not required;
4. Catalyst requests that the appeal of the Costs Order be joined with the appeal of the Judgment; and
5. Leave to appeal the Costs Order is required.

October 21, 2016

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Plaintiff (Appellant)

-and- BRANDON MOYSE et al.
Defendants (Respondents)

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PROCEEDING COMMENCED AT
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