CITATION: The Catalyst Capital Group Inc. v. VimpelCom Ltd., 2018 ONSC 2471
COURT FILE NO.: CV-16-11595-00CL
DATE: 20180418

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

BETWEEN:	)	
THE CATALYST CAPITAL GROUP INC. Plaintiff/Responding Party	)	*Rocco DiPucchio, Andrew Winton, Brad Vermeersch* and *David Moore* for The Catalyst Capital Group Inc.
– and –	)	
VIMPELCOM LTD., GLOBALIVE CAPITAL INC., UBS SECURITIES CANADA INC., TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP, LG CAPITAL INVESTORS LLC, SERRUYA PRIVATE EQUITY INC., NOVUS WIRELESS COMMUNICATIONS INC., WEST FACE CAPITAL INC., and MID-BOWLINE GROUP CORP. Defendants/Moving Parties	)	*Kent Thomson, Matthew Milne-Smith* and *Andrew Carlson*, for West Face Capital Inc. *James D.G. Douglas, Caitlin R. Sainsbury* and *Graham Splawski*, for Globalive Capital Inc. *Orestes Pasparakis, Rahool Agarwal* and *Michael Bookman*, for VimpelCom Ltd. *Michael Barrack, Kiran Patel* and *Daniel Szirmak*, for Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP, LG Capital Investors LLC *Junior Sirivar* and *Jacqueline Cole*, for Novus Wireless Communications Inc. *Daniel S. Murdoch*, for UBS Securities Canada Inc. *Jameel Madhany*, for Serruya Private Equity Inc.
	)	**HEARD:** August 16-18, 2017 and April 16, 2018

HAINEY J.

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REASONS FOR DECISION

Overview

Nature of the Motions

[1] The defendants move to dismiss, permanently stay, or strike the statement of claim of The Catalyst Capital Group Inc. ("Catalyst") on the basis of:

(a) Issue Estoppel;

(b) Cause of Action Estoppel; and

(c) Abuse of Process.

[2] The defendants, VimpelCom Ltd. ("VimpelCom") and UBS Securities Canada Inc. ("UBS") also move to dismiss Catalyst's claim on the ground that it is barred against them by a court-ordered release.

[3] UBS and Globalive Capital Inc. ("Globalive") also move to strike Catalyst's statement of claim for breach of contract on the ground that it discloses no reasonable cause of action against them.

[4] Although Globalive challenged Catalyst's jury notice this was not argued on the motion and I do not intend to deal with it.

[5] Catalyst's claim in this action arises from its efforts to purchase Wind Mobile Corp. ("Wind") from VimpelCom in 2014. Catalyst alleges that certain of the defendants committed the torts of inducing breach of contract, conspiracy, and breach of confidence which prevented it from acquiring Wind. It also alleges that VimpelCom breached its exclusivity agreement and confidentiality agreement with respect to Catalyst's negotiations with VimpelCom to acquire Wind which was ultimately purchased from VimpelCom by a consortium of purchasers in September 2014 ("Catalyst's Current Action").

Parties

[6] Catalyst is a Toronto-based investment firm that specializes in investments in distressed and undervalued Canadian businesses.

[7] The defendants fall into two categories: (1) shareholders of Wind in 2014 ("2014 Wind Shareholders") and their advisors, and (2) the consortium that bought Wind in September 2014 ("Consortium").

[8] The 2014 Wind Shareholders are as follows:

(a) VimpelCom, a telecom company based in Amsterdam; and

(b) Globalive, an investment company based in Toronto.

[9] UBS is an investment bank that provided advisory services to VimpelCom with respect to the Wind transaction.

[10] The Consortium includes the following defendants:

(a) West Face Capital Inc. ("West Face"), a private equity corporation headquartered in Toronto;

(b) Tennenbaum Capital Partners LLC ("Tennenbaum"), an investment management firm based in Los Angeles; 64NM Holdings GP LLC ("64NM GP"), the general partner of 64NM Holdings LP ("64NM LP"), a limited partnership organized in Delaware and headquartered in New York (together "64NM"). 64NM was formed by LG Capital Investors LLC ("LG"), an investment firm in New York (collectively referred to as the "US Investors");

(c) Serruya Private Equity Inc. ("Serruya"), a private equity investment fund headquartered in Markham; and

(d) Novus Wireless Communications Inc. ("Novus"), a telecommunications provider based in Vancouver.

Allegations

[11] The main allegations in Catalyst's Current Action are as follows:

(a) Globalive and UBS owed a duty of confidence to Catalyst and breached that duty by communicating confidential information to the Consortium;

(b) The Consortium conspired amongst themselves, Globalive and UBS to induce VimpelCom to breach its exclusivity agreement with Catalyst and to enter into negotiations with them instead; and

(c) VimpelCom breached its confidentiality agreement and its exclusivity agreement with Catalyst and negotiated with the Consortium.

[12] Catalyst claims damages in the amount of $1.3 billion, which is the estimated profit that the Consortium generated from the subsequent sale of Wind to Shaw Communications ("Shaw") in January 2016.

Facts

The Wind Transaction

[13] Wind is a Canadian telecommunications provider formed in 2008 by Globalive and Orascom Telecom Holdings ("Orascom"). In 2011, VimpelCom bought Orascom's interest in Wind. Because VimpelCom is both a Dutch-headquartered and mostly Russian-owned company, Globalive, a Canadian company, held the majority voting equity in Wind and VimpelCom held the majority of the total equity. This was to satisfy the federal government's Canadian ownership requirements.

[14] In 2012, the Canadian government relaxed restrictions on foreign control of small telecommunication companies such as Wind. VimpelCom saw this as an opportunity to buy-out Globalive to gain full control of Wind. VimpelCom and Globalive entered into a share purchase agreement whereby VimpelCom was to purchase Globalive's equity in Wind. However, the federal government refused to approve the takeover, notwithstanding the relaxed foreign ownership restrictions. In early 2013, frustrated by its experience in Canada, VimpelCom decided to sell its interest in Wind. It engaged UBS to find a buyer. VimpelCom's asking price for the sale of its interest in Wind was based upon a $300 million enterprise value for the entire company. This was well-known within the industry. VimpelCom also made it known that if it could not sell its interest in Wind at this price it would commence proceedings under the *Companies' Creditors Arrangement Act*[1] ("CCAA") to recover its interest through Wind's insolvency.

[15] In late 2013, Catalyst began negotiating with VimpelCom for the potential purchase of Wind. On March 22, 2014, Catalyst executed a confidentiality agreement with VimpelCom ("Confidentiality Agreement"), in which VimpelCom agreed to provide Catalyst with Wind's business plan, enterprise value and VimpelCom's equity structure. The Confidentiality Agreement provided, among other things, that the existence and content of the negotiations between Catalyst and VimpelCom were confidential as follows:

> Each Party agrees that ... without the prior written consent of the other Party, such Party will not, and will cause its Authorised Persons not to, disclose to any person other than the other Party and its Authorised Persons (a) the fact that discussions or negotiations are taking place with the other Party concerning the Project, (b) any of the terms, conditions or other facts related to the other Party's participation in the Project, including the status thereof, or (c) the existence of this Agreement, the terms hereof or that Confidential Information has been made available pursuant to this Agreement.

[16] On May 6, 2014, after prolonged negotiations, Catalyst agreed to purchase Wind based upon an enterprise value of $300 million, with a closing date of no later than May 30, 2014. A share purchase agreement was not completed, but negotiations between Catalyst and VimpelCom continued.

[17] While Catalyst was negotiating with VimpelCom, VimpelCom was also negotiating with other parties including Tennenbaum and West Face.

[18] During June and July 2014, Catalyst continued to negotiate with VimpelCom to purchase Wind and made progress in the negotiations. According to Catalyst, it understood that the fact and content of its negotiations with VimpelCom were confidential pursuant to the Confidentiality Agreement.

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[1] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36.

[19] On July 23, 2014, believing that they were close to a deal, Catalyst and VimpelCom entered into an agreement pursuant to which VimpelCom could only negotiate with Catalyst until July 29, 2014 ("Exclusivity Agreement").

[20] By July 30, 2014, it appeared that VimpelCom and Catalyst were close to a deal. They agreed to extend the Exclusivity Agreement to August 5, 2014. On August 1, 2014, VimpelCom confirmed to Catalyst that the share purchase agreement was "substantially completed" subject to any settling details in the schedules. By August 3, 2014, Catalyst and VimpelCom agreed that the deal was "substantially settled", subject to approval from VimpelCom's directors. This automatically extended the Exclusivity Agreement an additional five business days.

[21] On August 6, 2014 the Consortium sent VimpelCom a "superior proposal" to purchase Wind which provided as follows:

> (a) Our proposal will be superior to any other offer as our proposal will <u>not</u> require regulatory approval...
>
> (b) Our transaction will not be a change of control of [Wind], and as a result requires no engagement with the regulatory authorities.
>
> (c) [O]ur proposal will be economically superior to any other proposal...

[22] On August 7, 2014, Globalive entered into a support agreement with VimpelCom in which it agreed to sell its interest in Wind to a buyer of VimpelCom's choosing or alternatively to support VimpelCom commencing CCAA proceedings with respect to Wind if the sale did not proceed. At the time, Globalive believed the proposed Catalyst transaction was the only realistic alternative to insolvency proceedings for Wind.

[23] On August 8, 2014, VimpelCom and Catalyst extended the Exclusivity Agreement to August 18, 2014.

[24] On August 11, 2014, VimpelCom and Catalyst held a joint conference call with Industry Canada to advise that their deal "was done".

[25] On August 15, 2014, VimpelCom advised Catalyst of the following two new demands: (1) it insisted on shortening the regulatory approval period from three months (with an automatic one-month extension) to two months, and (2) it asked for a $5-20 million break fee if the deal did not close. These new demands were the result of VimpelCom's concerns about the risk that regulatory approval for the sale of Wind to Catalyst would either not be obtained or would be significantly delayed.

[26] Catalyst refused to agree to VimpelCom's two new demands and stopped negotiating with it. The exclusivity period between Catalyst and VimpelCom terminated on August 18, 2014 without a deal being concluded. As a result, VimpelCom seriously considered proceeding with CCAA proceedings.

[27] On August 25, 2014, VimpelCom and the Consortium entered into an exclusivity agreement. On September 16, 2014, the Consortium concluded a deal with VimpelCom to

purchase Wind for $300 million through a corporation called Mid-Bowline Group Corp. ("Mid-Bowline").

[28] The benefit to VimpelCom of this transaction was that the Consortium, which included Wind's controlling shareholder, Globalive, only acquired VimpelCom's non-controlling interest in Wind. As there was no change in the control of Wind, there was no risk that the transaction would not receive regulatory approval, as none was required.

The Previous Litigation

[29] In early 2014, Brandon Moyse ("Moyse") was working as a junior analyst at Catalyst. In March 2014, Moyse was assigned to Catalyst's internal "telecom" deal team following the departure of another Catalyst analyst. At the time, Catalyst's partners were considering pursuing an acquisition of Wind. Moyse worked on Catalyst's potential acquisition of Wind.

[30] On May 24, 2014, Moyse resigned from Catalyst to work for West Face. Catalyst became concerned that Moyse might pass confidential information to West Face concerning the Wind opportunity and commenced an action against him and West Face on June 25, 2014 to enforce Moyse's non-competition clause in his employment agreement with Catalyst ("Moyse/West Face Action").

[31] In September 2014, when the Consortium concluded its deal to purchase Wind, Catalyst amended its statement of claim in the Moyse/West Face Action to allege that Moyse had communicated confidential information to West Face about Catalyst's acquisition strategy with respect to Wind. Catalyst alleged that West Face used the confidential information it received from Moyse to successfully pursue its acquisition of Wind from VimpelCom.

[32] Catalyst again amended its statement of claim in the Moyse/West Face Action in December 2014 to add claims for a constructive trust over West Face's interest in Wind and for a tracing remedy.

[33] In January 2015 Catalyst brought a motion for injunctive relief to enjoin West Face from exercising any management role in Wind and to appoint a supervising solicitor to inspect West Face's computers to determine whether it had received any of Catalyst's confidential information concerning Wind from Mr. Moyse. The motion was dismissed by Glustein J. in July 2015. Catalyst's motion for leave to appeal Glustein J.'s decision was dismissed in January 2016.

The Plan of Arrangement Proceeding

[34] In December 2016 the Consortium agreed to sell Wind to Shaw for $1.6 billion. Because Catalyst's claim for a constructive trust over West Face's interest in Wind had to be eliminated to enable Shaw to acquire clear title to Wind, the sale was structured to proceed by a plan of arrangement pursuant to s. 182 of the *Business Corporations Act (Ontario)* ("OBCA").

[35] The plan of arrangement proceeding began before Newbould J. on January 25, 2016.[2] Catalyst took the position that the plan should not be approved so that Catalyst could amend its statement of claim in the Moyse/West Face Action because of information it's Chief Operating Officer, James Riley, had just recently obtained from the plan of arrangement application material. During oral argument that day counsel to Catalyst advised for the first time that the proposed amendment to its statement of claim was to allege that West Face had induced VimpelCom to breach the Exclusivity Agreement.

[36] Justice Newbould rejected Catalyst's request. He concluded that it had known about the information since early 2015. He concluded that the plan of arrangement was fair and reasonable but he did not approve it at the time because he ordered an expedited trial of an issue as to whether Catalyst had a right to a constructive trust over West Face's interest in Wind. In his reasons for judgment in the plan of arrangement proceeding he referred to Catalyst's proposed claim against West Face for inducing the breach of the Exclusivity Agreement as follows at paras. 59 and 61:

> 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.
>
> ...
>
> 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.

[37] On January 31, 2016, Catalyst withdrew its claim for a constructive trust. The trial of an issue was therefore abandoned. Justice Newbould approved the plan of arrangement on February 3, 2016. Shaw's acquisition of Wind closed on March 1, 2016.

Catalyst's Current Action

[38] On June 1, 2016 Catalyst provided West Face with its statement of claim in this proceeding. This was five days before the commencement of the trial in the Moyse/West Face Action. West Face's counsel immediately wrote to Catalyst's counsel to complain that this new

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[2] *Mid-Bowline Group Corp. (Re),* 2016 ONSC 669, [2016] O.J. No. 434.

action was litigation by installment and an abuse of process. Catalyst's counsel responded that para. 61 of Newbould J.'s reasons for judgment in the plan of arrangement proceeding barred Catalyst from alleging that West Face had induced a breach of the Exclusivity Agreement in the Moyse/West Face Action.

The Moyse/West Face Trial

[39] Catalyst's claim against Moyse and West Face was tried before Newbould J. for six days commencing on June 6, 2016. In his reasons for judgment [3] Newbould J. described the nature of the action as follows at paras. 1-5:

> The Catalyst Capital Group Inc. ("Catalyst") brings this action against West Face Capital Inc. ("West Face") for an alleged misuse of confidential Catalyst information regarding WIND Mobile Inc. ("WIND") that Catalyst claims was obtained by West Face from the defendant Brandon Moyse who had previously worked for Catalyst before joining West Face. Catalyst claims that West Face used that confidential Catalyst information to successfully acquire an interest in WIND.
>
> Both Catalyst and West Face are Toronto-based investment management firms and have been competitors on potential deals. They were competitors in the chase for WIND.
>
> West Face was part of a consortium that acquired WIND. Before it did so, Catalyst was a bidder for WIND and had an exclusive right for a period of time to negotiate a purchase. When Catalyst failed to conclude a purchase of WIND, West Face and its consortium partners acquired an indirect interest in WIND on September 16, 2014 based on an enterprise value of WIND of $300 million.
>
> Mr. Moyse was an analyst at Catalyst for a little under two years. He left Catalyst in May 2014 and worked at West Face for three and a half weeks from June 23 to July 16, 2014. It is alleged that at some time between March 14, 2014 when Mr. Moyse first spoke to West Face and July 16, 2014 when he stopped working at West Face he gave West Face confidential information regarding Catalyst's strategy to acquire WIND that was used by West Face to structure its bid for WIND.
>
> The consortium in which West Face was a member later sold [WIND] to Shaw Communications for approximately $1.6 billion. Catalyst claims an accounting of the profits made by West Face.

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[3] *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, [2016] O.J. No. 4367, [*Moyse/West Face decision*"].

[40] At the outset of the trial counsel for West Face set out a series of findings of fact that he asked Newbould J. to make at the conclusion of the trial. Counsel for Catalyst did not suggest that the proposed findings of fact were not relevant or were outside of the scope of the matters that were in issue in the trial. The defendants rely upon the following four proposed findings of fact that counsel for West Face asked Justice Newbould to make:

(1) Catalyst would not have completed the acquisition of Wind in 2014 without obtaining regulatory concessions, including to permit it to sell Wind or its wireless spectrum to an incumbent after five years;

(2) The Canadian government gave Catalyst no indication that it was willing to grant Catalyst its required regulatory concessions. Instead, the government made clear that the concessions sought by Catalyst would not be granted;

(3) Catalyst intended to sign a Share Purchase Agreement with VimpelCom and then engage in a course of conduct that the Agreement specifically precluded in the period prior to closing; and

(4) Catalyst failed to acquire Wind because it refused to meet VimpelCom's demands for a break fee to protect VimpelCom from regulatory risk. Catalyst made that choice based on its own assessment and on the advice of senior corporate counsel from Faskens and investment bankers from Morgan Stanley.

[41] Newbould J. dismissed the Moyse/West Face Action in its entirety. He made the following findings at paras. 126-130 of his reasons for judgment:

> *Did Catalyst suffer any detriment or compensable damage?*
>
> Even if a case of misuse of confidential Catalyst information were made out, I cannot find that it caused Catalyst any detriment or damage.
>
> Catalyst has failed to establish that it suffered any detriment by any misuse of Catalyst confidential information. There is no evidence that the bid of the Consortium of August 7, 2014 was even looked at by the board of VimpelCom during the period of exclusivity with Catalyst, or that it played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst. It was that position taken by VimpelCom that caused Catalyst to terminate discussions with VimpelCom.
>
> On August 11, 2014, the Chairman of the Board of VimpelCom advised Mr. De Alba [Catalyst's Managing Director] that the Board was concerned about the Government's behaviour and wanted protection in case the Government did not approve the transaction. The Chairman advised Catalyst that VimpelCom insisted on a new term that provided for a $5-20 million break fee if regulatory approval was not granted within 60 days. Mr. Glassman [Catalyst's Managing Partner] was furious and told his people on August 11, 2014 as well as Mr. Levin of Faskens who was advising Catalyst that VimpelCom had to announce the deal publicly that day or else there would be no deal. He stated: "I am fed up. I do not want to

> hear a single more excuse from them." On August 14, 2014 Mr. Glassman told his people that the deal was technically dead or in deep trouble. The next day Mr. Levin advised that VimpelCom was "out to lunch and I think we should tell them." Mr. Babcock of Morgan Stanley, Catalyst's financial advisor, advised Catalyst to tell VimpelCom that "and then down communication. This needs to go past the exclusivity time and [VimpelCom] needs to see his alternatives and their terms."
>
> Catalyst then told VimpelCom that the request for a break fee was unacceptable and it shut down communications and let the period of exclusivity expire. It was after that that VimpelCom and the consortium, including West Face, concluded a deal. Mr. Glassman acknowledged in his evidence that the reason the deal between Catalyst and VimpelCom fell through was because of the break fee that VimpelCom requested that Catalyst would not agree to.
>
> For the same reason, Catalyst has not established that it suffered any damages. Catalyst has not established that but for the misuse by West Face of the confidential Catalyst information that it says West Face was given by Mr. Moyse it would have acquired WIND from VimpelCom. It was Catalyst's refusal to agree to a break fee requested by VimpelCom that caused Catalyst to end negotiations with VimpelCom.

[42] In his costs endorsement,[4] in which costs were awarded to West Face on a substantial indemnity scale against Catalyst, Newbould J. stated as follows at para. 10:

> This law suit [sic] was driven by Mr. Glassman. He was not able to accept that he lost his chance to acquire Wind by being outsmarted by someone else. He set out to prove his belief that the West Face witnesses were lying and that West Face had obtained confidential Catalyst information from Mr. Moyse that they used to defeat Catalyst's bid to acquire Wind. He was certainly playing hardball attacking the reputation and honesty of West Face. However, in spite of the best efforts of Catalyst's very able and skilled lawyers, he utterly failed.

[43] Newbould J.'s decision was appealed to the Court of Appeal for Ontario. Counsel suggested and I agreed to delay finalizing my decision until the Court decided the appeal. The Court of Appeal released its decision on March 22, 2018.[5] The Court dismissed Catalyst's appeal. Following the release of its decision counsel requested an opportunity to make further submissions regarding the *Court of Appeal's decision.* I agreed to receive limited written submissions and I heard oral submissions on April 16, 2018. I have taken those submissions into account in my analysis of the issues raised on these motions.

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[4] *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 6285, [2016] O.J. No. 5210.

[5] *The Catalyst Capital Group Inc. v. Moyse*, 2018 ONCA 283, 130 O.R. (3d) 675, [*Court of Appeal's decision*].

Issues

[44] The issues I must decide are as follows:

(1) Is Catalyst's Current Action barred by the doctrine of issue estoppel?

(2) Is Catalyst's Current Action barred by the doctrine of cause of action estoppel?

(3) Is Catalyst's Current Action barred by the doctrine of abuse of process?

(4) Are the US Investors and Globalive privies to West Face for the purposes of the doctrines of issue estoppel and cause of action estoppel?

(5) Can VimpelCom and UBS rely upon the plan of arrangement to bar Catalyst's Current Action against them?

(6) Should Catalyst's breach of contract claims against Globalive and UBS be struck as disclosing no reasonable cause of action?

Positions of the Parties

The Defendants

[45] West Face submits that Catalyst's Current Action is barred against it because of the following:

(a) Catalyst's claims turn on issues that were decided against Catalyst in the Moyse/West Face Action and are barred by the doctrine of issue estoppel;

(b) Catalyst's claims arise from the same causes of action as those asserted in the Moyse/West Face Action and are barred by the doctrine of cause of action estoppel; and

(c) To allow Catalyst's Current Action to proceed would be manifestly unfair to West Face and would bring the administration of justice into disrepute. The action is therefore barred by the doctrine of abuse of process.

[46] The US Investors and Globalive submit that they are privies of West Face and adopt West Face's submissions which they maintain apply to them as well.

[47] Globalive also submits that Catalyst's breach of contract claim against it should be struck as disclosing no reasonable cause of action.

[48] Novus and Serruya submit that Catalyst's Current Action is an abuse of process as it seeks to re-litigate issues that were already determined in the Moyse/West Face Action. Further, it asks the court to make findings of fact that directly contradict and are inconsistent with findings of fact made by Newbould J. in the Moyse/West Face Action.

[49] VimpelCom and UBS submit that Catalyst's Current Action is an abuse of process for the same reasons. They also submit that the action is barred by a court-ordered release contained in Newbould J.'s order dated February 3, 2016 in which he approved the plan of arrangement with respect to Wind.

[50] Globalive and UBS also submit that Catalyst's Current Action does not disclose a cause of action against them for breach of contract as there is no privity of contract between Catalyst and them to support such a cause of action.

The Plaintiff

[51] Catalyst submits as follows:

(a) The factual findings made by Newbould J. in the Moyse/West Face Action that are relied upon by the defendants are *obiter* and were not fundamental to the determination of the Moyse/West Face Action and therefore do not satisfy the test for issue estoppel;

(b) Justice Newbould expressly prohibited Catalyst from asserting its inducing breach of contract claim in the Moyse/West Face Action;

(c) Catalyst's Current Action will turn on the reason why VimpelCom requested the break fee after it had previously told Catalyst that the share purchase agreement was "substantially settled";

(d) The causation issue in Catalyst's Current Action is entirely different from the causation issue determined by Newbould J. in the Moyse/West Face Action. The causation question in this action will boil down to whether Catalyst could have concluded a deal with VimpelCom absent VimpelCom's breach or the Consortium's interference;

(e) Justice Newbould's finding that VimpelCom would not agree to a deal with Catalyst that was conditional on receiving regulatory concessions was not fundamental to his decision;

(f) This action is not an attempt to impose a new legal theory of wrongdoing on the same facts. It is a new claim that arises out of different legal relationships and conduct by West Face acting in concert with others, which give rise to distinct and separate causes of action;

(g) This action is not an effort to recast the Moyse/West Face Action. It is about whether the Consortium, Globalive and UBS conspired to induce VimpelCom to breach the Exclusivity Agreement and misused confidential information they received about Catalyst's negotiations with VimpelCom;

(h) The US Investors and Globalive are not privies of West Face because they had no "skin in the game" because an adverse result in the Moyse/West Face Action would not have affected their own interests;

(i) This action is not an abuse of process because it is not oppressive, vexatious or a scandal to the administration of justice;

(j) The plan of arrangement does not extinguish Catalyst's claims against VimpelCom and UBS. This determination cannot be made on a motion pursuant to Rule 21.01(1)(a) of the *Rules of Civil Procedure*;[6] and

(k) Catalyst's breach of contract claims against Globalive and UBS should not be struck because it is not plain and obvious that they cannot succeed.

Analysis

West Face's Motion

[52] West Face relies upon the following three doctrines in support of its motion: (1) issue estoppel, (2) cause of action estoppel, and (3) abuse of process. In *Danyluk v. Ainsworth Technologies*[7] Binnie J. summarized the principles underlying these three doctrines at para. 18 as follows:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry ... An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[53] West Face submits that Catalyst was required to put its best foot forward in the Moyse/West Face Action on the issue of whether West Face had improperly deprived it of the opportunity to acquire Wind and to advance all of its related claims, causes of action and allegations against West Face in the one proceeding. West Face argues that Catalyst was not entitled to "lie in the weeds" to reserve to itself a second "bite at the cherry" on these issues.

Is Catalyst's Current Action barred by issue estoppel?

[54] The Supreme Court of Canada reaffirmed the following three-part test for issue estoppel in *Danyluk* at para. 25:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,

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[6] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
[7] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, [*Danyluk*].

> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[55] In *Martin v. Goldfarb*[8] Perell J. described issue estoppel at para. 59 as follows:

> Issue estoppel precludes a litigant from asserting a position that is inconsistent or contrary to a fundamental point decided in a past proceeding in which the litigant or his or her privies participated.

[56] In *Danyluk*, the Supreme Court of Canada recognized that issue estoppel promotes the principles of finality and judicial efficiency noting at para. 54 as follows:

> Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.

Has the Same Question Been Decided?

[57] The first part of the test in *Danyluk* requires me to determine whether the same questions were decided in the Moyse/West Face Action as must be decided in Catalyst's Current Action. Any right, question or fact determined directly by Newbould J. in the previous action may form the basis of issue estoppel. MacKenzie J. made this clear in *Dableh v. Ontario Hydro*[9] at para. 16 as follows:

> The case law cited above provides that the question must be fundamental to the decision in the earlier proceeding and that the question can be any right, question or fact distinctly put in issue and directly determined by the court in the earlier proceeding.

[58] West Face makes the following submissions at para. 77 of its factum:

> ... Justice Newbould made critical findings of fact in deciding the Moyse action that are flatly inconsistent with and fatal to the claims asserted by Catalyst against West Face in the case at bar. Those findings were fundamental to Catalyst's claims in the Moyse action for breach of confidence. They defeated the causation and damages element of those claims. They were 'distinctly put in issue and directly determined by the court'. The causes of action pleaded against West Face in this action are breach of confidence, conspiracy and inducing breach of contract. All three of these torts include the requirement that the defendant's

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[8] *Martin v. Goldfarb*, [2006] O.J. No. 2768, [2006] O.T.C. 629 (Ont. S.C.).

[9] *Dableh v. Ontario* Hydro, [1994] O.J. No. 2771, 51 A.C.W.S. (3d) 836 (Gen. Div.), [*Dableh*].

conduct actually caused damage to the plaintiff. That is, no doubt, why Catalyst pleaded in the case at bar that the conduct of the defendants did, in fact, cause it loss or harm.

[59] West Face relies upon the fact that Newbould J. concluded that the members of the Consortium did not cause Catalyst to suffer any loss or harm because:

(a) He found that "the reason the deal between Catalyst and VimpelCom fell through was because of the break fee that VimpelCom requested that Catalyst would not agree to."[10]

(b) He also found that there was no evidence "that the bid of the consortium of August 7, 2014 was even looked at by the board of VimpelCom during the period of exclusivity with Catalyst, or that it played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst. It was that position taken by VimpelCom that caused Catalyst to terminate discussions with VimpelCom."[11]

(c) He also found that "Catalyst had no intention of closing a deal with VimpelCom if it could not obtain the concessions it was looking for from the Government"[12] and concluded that he had "considerable doubt of the plausibility of any theory that the Government would change its position on granting concessions based on Mr. Glassman's statements to Industry Canada or anyone else in Government."[13]

(d) Justice Newbould did not accept Mr. Glassman's evidence that he expected that the Government would soften its position. He concluded that "It is difficult to accept that based on his (Mr. Glassman's) analysis the Government would soften its position. The Government never said that it would. Mr. Drysdale, the Government relations expert retained by Catalyst made clear to Catalyst that the Government had said it would not grant concessions to Catalyst and that Industry Canada, the PCO/PMO and Prime Minister Harper were entrenched on this. Mr. Acker of Faskens, Catalyst's lawyers, an experienced communications lawyer advised Catalyst on July 25, 2014 that the current Government had made it clear that any proposed transfer of commercial mobile spectrum to an incumbent would be subject to very close scrutiny and, in the current climate, most unlikely to succeed."[14]

(e) Justice Newbould further concluded as follows at para. 131 of his reasons for judgment:

> There is another reason why Catalyst has not established any damages from misuse of confidential Catalyst information. It is clear that VimpelCom would not agree to any deal that carried any risk of the Government not approving the deal. Mr. Glassman's evidence throughout was that Catalyst would not agree to a deal

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[10] *Moyse/West Face decision, supra* note 3 at para. 129.
[11] *Ibid* at para. 127.
[12] *Ibid* at para. 124.
[13] *Ibid* at footnote 13.
[14] *Ibid.*

> without Government concessions permitting the sale of spectrum to an incumbent in five years. Mr. Riley in his affidavit of February 18, 2015 stated that during the exclusivity period, the only point over which VimpelCom and Catalyst could not agree was regulatory approval risk. Catalyst wanted to ensure that its purchase was conditional on receiving regulatory concessions from Industry Canada, but VimpelCom would not agree to the conditions Catalyst sought. Given that evidence, and VimpelCom's refusal to agree to a deal that contained any such condition, there was no chance that Catalyst could have successfully concluded a deal with VimpelCom.

[60] Catalyst submits that these findings by Newbould J. were *obiter* and not fundamental to the determination of the Moyse/West Face Action. I do not agree with this submission for the following reasons.

[61] Catalyst's failure to acquire Wind and its acquisition by the Consortium is at the heart of Catalyst's Current Action. Paragraphs 63-65 of Catalyst's Amended Amended Amended Statement of Claim ("Catalyst's Statement of Claim") allege that the Consortium formed a conspiracy "to prevent Catalyst from successfully acquiring Wind". Paragraphs 126 and 127 provide as follows:

> 126. As a result of the misconduct of the Conspirators, VimpelCom and UBS breached the Exclusivity Agreement and breached their duty of good faith during its negotiations with Catalyst. As a result, the Consortium was able to purchase Wind to Catalyst's detriment.
>
> 127. On or about January 2016, Shaw Communications ("Shaw") acquired Mid-Bowline, the corporation formed after the Consortium's acquisition of VimpelCom's interest in Wind, for $1.6 billion. As a result, the Consortium received profit of over $1,300,000,000. thereby crystallizing Catalyst's damages as a result of the Conspirators' and VimpelCom's wrongful conduct, as described above.

[62] Paragraph 133 of Catalyst's Statement of Claim further describes its damages as the loss of profits from the sale of Wind to Shaw as follows:

> 133. As a result of the Consortium's inducement of breach of contract and VimpelCom's breach of the Exclusivity Agreement, Catalyst has suffered damages, which are crystallized in the form of profits realized by the Conspirators from the sale of Wind to Shaw, which Catalyst estimates to [be] $1,300,000,000.

[63] The damages claimed clearly flow from Catalyst's failure to acquire Wind and its acquisition by the Consortium.

[64] I disagree with Catalyst's submission that this new action is "not an attempt to impose a new legal theory of wrongdoing on the same facts". In my view, that is exactly what Catalyst is attempting to do in this proceeding.

[65] Because Justice Newbould determined the reason why Catalyst did not acquire Wind in the Moyse/West Face Action, Catalyst cannot now pursue a new action alleging other misconduct by West Face and the other defendants that it alleges caused its failure to acquire Wind. To succeed in this proceeding Catalyst must ask the court to make findings that are inconsistent with Newbould J.'s findings. Catalyst's failure to acquire Wind was a central issue in the Moyse/West Face Action. It is also the central issue in Catalyst's Current Action. This issue has been decided by Justice Newbould. It cannot be re-litigated in this proceeding.

[66] The *Court of Appeal's decision* supports my conclusion.[15] At paras. 41 and 42 the Court described Newbould J.'s findings that Catalyst maintains were *obiter* as "germane" to Catalyst's claim and West Face's defence as follows:

> ... evidence of the dealings between West Face and the consortium on one side and the vendor of the Wind shares on the other side in August 2014 was germane to the appellant's claim and West Face's defence that it pursued its own strategies in seeking to purchase the Wind shares, which were very different from those employed by the appellant. That strategy was reflected, in part, in the unsolicited proposal to purchase the Wind shares made by West Face and the consortium in early August 2014.
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> The trial judge heard a great deal of evidence about the dealings between the vendor of the Wind shares and West Face and the consortium, particularly in August 2014. The appellant did not object to any of this evidence and, indeed, elicited most of it. In their closing arguments at trial, counsel for the appellant and the respondents urged the trial judge to make certain findings in respect of the dealings between West Face, the consortium and the vendor of the Wind shares. The trial judge's findings reflect those arguments and a preference for the position put forward by the respondents. We see no unfairness to the appellant in the manner in which these issues were litigated at trial. The judge's findings of fact in respect of these issues are supported by the evidence.

[67] In arriving at my view that Justice Newbould decided the same questions that would have to be decided in this proceeding I have relied upon the British Columbia Supreme Court's decision in *Foreman v. Niven.*[16] In that case, the plaintiff, Foreman, was interested in acquiring a property. He sought financing from Niven, who refused to provide the loan. Niven passed on the information he had received from Foreman about the property to a third party, Chambers, who ultimately acquired it for himself. Foreman unsuccessfully sued Chambers because the Court concluded that Foreman could never have acquired the property because he had insufficient assets to obtain the necessary financing. After the action against Chambers was dismissed, Foreman commenced a second action against Niven who successfully defended himself by relying on the doctrines of issue estoppel and abuse of process. The Court struck out Foreman's

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[15] *Court of Appeal's decision, supra* note 5.
[16] *Foreman v.* Niven, 2009 BCSC 1476, [2009] B.C.J. No. 2148.

statement of claim because the issue of whether Foreman could have acquired the property had been decided in the previous case. At para. 24 of his decision Savage J. held as follows:

> As I read both the decision of the trial judge and that of the Court of Appeal, both Courts accepted as made out that Niven rejected the loan application based on Foreman's lack of net worth. Both Courts also accepted that Foreman's claims against Chambers as a fiduciary failed because he could not make out that but for any breach he would have been able to acquire the lots. In short, the issue of his credit worthiness to obtain financing for the opportunity was a central issue in the action and Foreman was unable to show that he could have obtained financing and thus have availed himself to the alleged opportunity.

[68] In my view, the finding at the first trial that Foreman lacked the ability to obtain financing to buy the property is essentially the same as Newbould J.'s finding that Catalyst would never have acquired Wind because it would not agree to a break fee and it would never have received the concessions it required from the Government of Canada. This is the same question that would have to be determined in this proceeding.

[69] A second case that supports my conclusion is *Dableh.* In that case, Dableh, who was an employee of Ontario Hydro, was granted a patent relating to the operation of the Candu nuclear reactor. Another employee was granted a different patent which Dableh claimed infringed his patent. Dableh sued for breach of confidence and breach of fiduciary duty in the Ontario Court General Division over the patent dispute. He later commenced a patent infringement action in the Federal Court which proceeded to trial before the Ontario Court action. Dableh's Federal Court action was dismissed on the basis that the two patents were distinct from each other. The defendants moved to dismiss the Ontario Court action on the ground of issue estoppel. Notwithstanding that the legal issues in the two cases were different - breach of confidence in the Ontario Court action - and patent infringement in the Federal Court action - MacKenzie J. concluded at para. 16 that issue estoppel applied as follows:

> … I am of the view that the fundamental question in the earlier proceeding and in the present action is, who invented the LIM method and resulting apparatus. Muldoon J. found that Cenanovic was the inventor. This finding was essential or fundamental for the disposition against his interest of Dableh's claim in the Federal Court action.

[70] Newbould J.'s finding that Catalyst would never have acquired Wind was both essential and fundamental for the determination of the Moyse/West Face Action. It is equally essential and fundamental to the determination of Catalyst's Current Action.

[71] I am therefore satisfied that the first part of the *Danyluk* test has been met.

Was the prior decision final?

[72] The second part of the *Danyluk* test requires me to determine whether Justice Newbould's decision in the Moyse/West Face Action is final. When this motion was argued his decision was under appeal. As noted above, the Court of Appeal for Ontario dismissed Catalyst's appeal.[17]

[73] I am satisfied that the prior decision of Newbould J. relied upon by the defendants is now final. The second part of the *Danyluk* test has been satisfied.

Are the parties to both proceedings the same?

[74] West Face and Catalyst are parties to both proceedings. The third part of the *Danyluk* test is therefore satisfied.

Conclusion

[75] For these reasons I have concluded that Catalyst's Current Action is barred by issue estoppel. Further, I have not identified any manifest injustice in applying the doctrine in this case that would cause me to exercise my residual discretion not to apply it. Catalyst had its opportunity to put its best foot forward in the Moyse/West Face Action in which it complained that West Face had been responsible for its failure to acquire Wind. It is not entitled to a "second bite at the cherry" in this proceeding. To deny it one cannot be said to be unjust.

Is Catalyst's Current Action barred by Cause of Action Estoppel?

[76] West Face submits that Catalyst's Current Action is also barred by cause of action estoppel as a result of the rule in *Henderson v. Henderson.*[18] In that case the plaintiff was barred from asserting estate claims against his sister-in-law because he had failed to do so in previous estate litigation. Vice Chancellor Wigram of the U.K. Court of Chancery described the rule at p.319 as follows:

> I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of [a] matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in a special case, not only to points upon which the Court was

[17] *Court of Appeal's decision, supra* note 5.
[18] *Henderson v. Henderson* (1843), 67 E.R. 313 (Eng. V.-C).

> actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.

[77] A cause of action in the context of cause of action estoppel was described by Sharpe J. (as he then was) at para. 18 in *Las Vegas Strip Ltd. v. Toronto (City)*[19] as follows:

> It is apparent that analysis of [the] question must focus on the causes of action that were asserted in the prior proceedings. "Cause of action" does not appear to have been precisely defined in the authorities cited by the parties. Standard dictionary definitions, however, suggest that it refers to a set of facts giving rise to a legal claim or entitlement ... A claim in law sufficient to demand judicial attention; the composite of facts necessary to give rise to the enforcement of a right ... The factual circumstances which give rise to a right to sue ... The fact or set of facts which gives a person a right of action ... The fact or facts which give a person a right to judicial redress or relief against another.

Justice Sharpe's decision was upheld by the Court of Appeal for Ontario.[20]

[78] The set of facts which gives Catalyst a right of action in both the Moyse/West Face Action and Catalyst's Current Action is Catalyst's failure to acquire Wind and its acquisition by the Consortium. Justice Newbould determined this issue in the Moyse/West Face Action. Catalyst was required to bring forward its "whole case" in that proceeding. It did not do so and it is therefore now barred by the doctrine of cause of action estoppel in this proceeding.

[79] Catalyst submits that it was prohibited from advancing its claim for inducing breach of contract in the Moyse/West Face Action by Justice Newbould. However, I have concluded that Justice Newbould only prohibited Catalyst from asserting that claim in the trial of an issue in the plan of arrangement proceeding that was to be heard on an expedited basis in February 2016. The trial of an issue was abandoned when Catalyst withdrew its claim for a constructive trust over West Face's interest in Wind and the plan of arrangement was approved.

[80] The full trial of the Moyse/West Face Action that proceeded in June 2016 was not subject to any prohibition by Justice Newbould with respect to Catalyst's claim for inducing breach of contract. My conclusion is supported by the *Court of Appeal's decision* at paras. 39 and 40 as follows:

> The appellant argues that the trial judge made a series of factual findings against the appellant in respect of the dealings between the vendor of the WIND shares and West Face and the consortium in August 2014. The appellant argues that these findings were made despite the trial judge having refused to allow the appellant to amend its claim to allege that West Face had induced the vendor of

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[19] *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286, [*Las Vegas Strip*].
[20] *Las Vegas Strip Ltd. v. Toronto (City)* (1997), 32 O.R. (3d) 651 (C.A.).

> the WIND shares to breach its agreement with the appellant in the course of those August dealings. The appellant contends that the trial judge's findings were beyond the scope of the claim as framed in the pleadings before him and were based on an inadequate evidentiary record.
>
> We do not accept this submission. The appellant did not move in this proceeding to amend its claim to include an allegation that West Face induced the vendor of the WIND shares to breach its contract with the appellant. The appellant did unsuccessfully seek to make that amendment in a related proceeding. That refusal had no impact on the conduct of this trial.

[81] I disagree with Catalyst's submission that this proceeding involves a different causation issue and different causes of action. They are essentially the same. Catalyst is attempting to re-litigate the same causes of action in this proceeding that it did in the Moyse/West Face Action. In my view, this proceeding amounts to litigation by installment. The Supreme Court of Canada made it clear that litigation by installment is barred by cause of action estoppel in the case of *Doering v. Grandview (Town)*.[21] Doering sued the Town of Grandview for flooding on his property caused by a dam. The first action he brought, which was based upon an allegation that repairs to the dam caused the flooding, was dismissed. Doering brought a second action based upon a different theory as to why the dam caused the flooding. The Supreme Court held that the second action was barred by cause of action estoppel because it could have been brought in the original action. At para. 118 Ritchie J. stated as follows:

> [A]ll the facts which are alleged to constitute tortious conduct by the town in the present case existed when the prior action went to trial and it was there found that these facts did not support the present respondent's action for damage to his crops by water. ... Nothing had changed between the bringing of the first action and the second one except that the respondent had received advice from a soil expert who expounded the aquifer theory.

[82] The same can be said about Catalyst's allegations in this proceeding. All of the facts that Catalyst relies upon in support of its claim for inducing breach of contract against West Face were well known to it long before the trial before Newbould J. In fact, Justice Newbould admonished Catalyst for choosing to "lie in the weeds" with respect to its knowledge of the facts giving rise to its claim for inducing breach of contract in his reasons for judgment in the plan of arrangement proceeding at para. 59 as set out above. I also disagree with Catalyst's submission that its current action "will turn on the reason why VimpelCom requested a break fee". Catalyst's theory as to why VimpelCom requested a break fee is based upon its allegation that VimpelCom demanded the break fee to deliberately terminate negotiations with Catalyst so that it could pursue the Consortium's proposal. To succeed Catalyst would have to ask the court to make inconsistent findings from Newbould J.'s findings because he found at para. 127 of his reasons for judgment that:

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[21] *Doering v. Grandview (Town)*, [1976] 2 S.C.R. 621.

> … There is no evidence that the bid of Consortium of August 7, 2014 was even looked at by the board of VimpelCom during the period of exclusivity with Catalyst, or that it played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst.

[83] This finding is entirely inconsistent with Catalyst's claim in this proceeding that VimpelCom demanded a break fee to terminate its negotiations with Catalyst so that it could accept the Consortium's proposal. This issue cannot be re-litigated in this proceeding.

Conclusion

[84] For these reasons I have concluded that Catalyst's Current Action is barred by cause of action estoppel because it is based upon the same facts as were alleged in the Moyse/West Face Action. Some facts may have been added in this proceeding, but the issue remains the same – whether West Face was responsible for Catalyst's failure to acquire Wind. Sharpe J. came to the same conclusion in *Las Vegas Strip* when he concluded as follows at para. 23:

> In my view, the present application cannot be said to be based upon a different set of facts for the purpose of *res judicata*. Las Vegas has, in effect, subtracted certain facts from the earlier claim, those concerning the prior use of the premises, but the issue remains whether its operation is illegal under the By-law.

Is Catalyst's Action barred by Abuse of Process?

[85] All of the defendants submit that Catalyst's Current Action is barred by the doctrine of abuse of process which is a more flexible doctrine than issue estoppel or cause of action estoppel and applies to all of them. The Supreme Court of Canada explained the doctrine in *Toronto (City) v. C.U.P.E., Local 79*[22] at para. 51 as follows:

> Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

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[22] *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local* 79, 2003 SCC 63, [2003] S.C.R. 77.

[86] In my view, these principles apply in this case for many of the same reasons that I have relied upon to conclude that issue estoppel and cause of action estoppel applies to Catalyst's Current Action. Catalyst unsuccessfully litigated its failure to acquire Wind in the Moyse/West Face Action. Justice Newbould made findings at trial that are determinative of its claims against the defendants in this proceeding. Catalyst's Current Action advances claims that it chose not to allege in the previous action. It also seeks findings that are entirely inconsistent with Justice Newbould's findings in the Moyse/West Face Action. In my view, this constitutes an abuse of process because it would result in the relitigation of the reason why Catalyst's bid to acquire Wind failed.

[87] My conclusion is supported by the Court of Appeal for British Columbia's decision in *Gonzalez v. Gonzalez*.[23] In that case Mrs. Gonzalez filed an affidavit in matrimonial proceedings that included financial information about her husband that she found on his computer. Mr. Gonzalez moved unsuccessfully before Butler J. in the matrimonial proceedings to strike those portions of her affidavit on the ground that his wife had violated his right to privacy. He later brought an action against his wife for breach of the British Columbia *Privacy Act*[24] alleging that she had breached his right to privacy by accessing the financial information on his computer. The Court of Appeal concluded that the new action constituted an abuse of process. Bennett J.A. stated as follows at paras. 25 and 32:

> In my view, the question of Mr. Gonzalez's privacy interest was the issue 'front and centre' in the litigation before Butler J. and was the issue before Wong J. The documents in both cases were alleged to have been obtained from a computer in Mrs. Gonzalez's home. He asserted that the computer belonged to him, that both the computer and his e-mail account were password-protected and that he had an expectation of privacy.
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> ...
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> None of the circumstances discussed in *Toronto* at para. 52-53 that may have avoided a finding of abuse of process is present. Mr. Gonzalez did not argue that relitigation would yield a more accurate result. If a court hearing his civil claim were to make the same findings as Butler J., the litigation would prove to be a waste of judicial resources and unnecessary expense for the parties, particularly Mrs. Gonzalez. On the other hand, if contrary findings were reached, this inconsistency would 'undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality'. Mr. Gonzalez has not shown that relitigation would 'enhance, rather than impeach, the integrity of the judicial system'.

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[23] *Gonzalez v. Gonzalez*, 2016 BCCA 376, [2016] B.C.L.R. (5th) 221.
[24] *Privacy Act*, R.S.B.C. 1996, c. 373.

[88] The same can be said about Catalyst's attempt in this proceeding to relitigate why it failed to acquire Wind. This issue was "front and centre" in the litigation before Newbould J. It is also the main issue in Catalyst's Current Action. In my view, relitigation of this issue in this proceeding would impeach the integrity of the judicial system. It should not be permitted.

Conclusion

[89] For these reasons I have concluded that Catalyst's Current Action is an abuse of process.

Are the US Investors and Globalive Privies of West Face?

The US Investors

[90] The US Investors submit that they are privies of West Face by virtue of their direct and extensive involvement in the Moyse/West Face Action and their clear community of interest with West Face in defeating Catalyst's claims.

[91] The question of whether a party is a privy in a previous proceeding is a fact-specific inquiry that must be made on a case-by-case basis. The Court of Appeal for Ontario in *Rasanen v. Rosemount Instruments Ltd.*[25] concluded that the plaintiff was a privy in a prior proceeding where he had "a clear community of interest" with the party in the prior proceeding. The Court also relied upon the fact that Rasanen "had a meaningful voice, through his own evidence"[26] in the prior proceeding.

[92] The US Investors actively participated in both the plan of arrangement proceeding and the Moyse/West Face trial. Michael Leitner ("Leitner"), the managing partner of Tennenbaum and Hamish Burt ("Burt"), a member of 64NMGP, filed affidavits in the plan of arrangement proceeding in which they explained how they became involved in the Wind transaction. They denied receiving or using any of Catalyst's confidential information or that they were aware of Catalyst's regulatory strategy.

[93] Leitner and Burt also submitted affidavits and testified at the Moyse/West Face trial and were cross-examined by Catalyst's counsel.

[94] At trial they both confirmed that they had no knowledge regarding the status of Catalyst's negotiations with VimpelCom during Catalyst's exclusivity period. They explained how the Consortium developed its proposal to acquire Wind without any knowledge of Catalyst's acquisition strategy.

[95] In his reasons for judgment, Newbould J. commented upon Leitner's and Burt's testimony. He described them both as "impressive" witnesses and accepted their evidence that the Consortium's proposal was not based upon any knowledge of Catalyst's bid or strategies. He

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[25] *Rasanen v. Rosemount Instruments Ltd.*, 17 O.R. (3d) 267 (C.A.).
[26] *Ibid* at para. 47.

had the following to say about their testimony at paras. 108, 114 and 116 of his reasons for judgment:

> In his affidavit, Mr. Leitner stated that the "advantage" of their August 7, 2014 proposal was to meet VimpelCom's desire for a speedy transaction that carried little to no regulatory risk to VimpelCom. It was put to him on cross-examination that he was referring to an advantage of the proposal over the Catalyst offer that was being dealt with by VimpelCom and the consortium knew from Mr. Moyse that Catalyst could not waive regulatory approval. Mr. Leitner denied this and said the advantage referred to was an advantage over the earlier proposal made by Tennenbaum ... that was for control of Wind that would require Government approval. As I read Mr. Leitner's affidavit, his explanation makes sense and I accept it. He knew that VimpelCom wanted to deal with no risk of Government rejection and it was an advantage to VimpelCom to have an offer without such a condition ...
>
> I accept the evidence of Mr. Leitner that the proposal made by him to VimpelCom on behalf of the consortium on August 7, 2014 and the ultimate deal made with VimpelCom was not based on anything that Catalyst was doing but rather was based on what Tennenbaum had concluded from its own due diligence and understanding of Wind and its prospect and of the lack of regulatory risk to what it was proposing. I accept his evidence that the lack of a need for regulatory concessions, and the lack of a need for a condition in the offer to VimpelCom of Government regulatory approval, were not based on or derived from any knowledge of what Catalyst was doing with VimpelCom or of Catalyst's regulatory strategies.
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> ... Mr. Burt's evidence was that LG Capital had no knowledge of the details of Catalyst's offer or negotiations with VimpelCom. They assumed, but did not know that Catalyst's bid would be conditional on obtaining regulatory approval, because VimpelCom's standard form of agreement included such a term. I make the same findings regarding 64NM as I do with respect to Mr. Leitner.

[96] The US Investors, through the participation of Leitner and Burt as witnesses at trial, clearly had a meaningful voice in the Moyse/West Face Action. Leitner and Burt were important witnesses at trial on the issue of whether the Consortium had been aware of or had taken advantage of Catalyst's acquisition strategy for Wind. Justice Newbould clearly relied upon their evidence in arriving at his decision that the Consortium was not responsible for Catalyst's failure to acquire Wind.

[97] The US Investors also had a community of interest with West Face in the action, not only through Leitner's and Burt's testimony, but also by reason of their status as members of the Consortium which Catalyst alleged was responsible for its failure to acquire Wind.

Conclusion

[98] For these reasons, I have concluded that the US Investors are privies of West Face for the purpose of issue estoppel and cause of action estoppel with respect to the Moyse/West Face Action.

Globalive

[99] As set out above, Globalive founded Wind with Orascom in 2008 and held the majority of the voting shares of Wind. In 2011, VimpelCom acquired the majority of Wind's equity when it acquired Orascom. This ownership structure, in which Globalive was the controlling shareholder of Wind but VimpelCom held the majority equity interest, remained in place until September 2014 when the Consortium purchased VimpelCom's interest in Wind through Mid-Bowline. From 2008 until early 2015, Globalive's executives managed Wind's day-to-day operations.

[100] Globalive submits that it is a privy of West Face with respect to the Moyse/West Face Action because it was a member of the Consortium and its representative, Simon Lockie ("Lockie"), Globalive's Chief Legal Officer, testified in the plan of arrangement proceeding and at the Moyse/West Face trial. Lockie testified at the Moyse/West Face trial about Globalive's relationship to VimpelCom and the Consortium, its involvement in supporting the negotiations between VimpelCom and Catalyst, the Consortium's bid for VimpelCom's interest in Wind and the regulatory environment at the time. His evidence was central to the factual matrix in the Moyse/West Face trial and was relied upon by Newbould J. in arriving at his decision at trial. This same evidence would have to be adduced again in Catalyst's Current Action as it is highly relevant to its allegations in this proceeding.

[101] Further, Newbould J. made findings of fact in the Moyse/West Face Action that related to the entire Consortium and not just West Face. This was necessary because Catalyst's allegations in the Moyse/West Face Action were directed not just at West Face, but at the Consortium as a whole. Newbould J. made key findings about the actions of the entire Consortium at paras. 105 and 122 of his reasons for judgment as follows:

> … As a result, neither VimpelCom nor Globalive had any discussions with any of the consortium members who had made the proposal before the exclusivity period that VimpelCom had with Catalyst expired on August 18, 2014.
>
> …
>
> The basic strategy of Catalyst was based on its belief that Wind could not survive without Government concessions that would allow Wind to sell its spectrum to an incumbent by the end of five years. Even had West face or its consortium members been told of this strategy by Mr. Moyse or anyone else, it played no part in the reasoning of West face to bid as it did by itself and later with the consortium.

[102] Globalive clearly had a "meaningful voice" in the Moyse/West Face Action by reason of Lockie's participation as an important witness at trial. Further, Globalive had a clear

"community of interest" with West Face in defeating Catalyst' claims against the Consortium. I am therefore satisfied that Globalive is a privy of West Face with respect to the Moyse/West Face Action.

[103] My decision is supported by the decision of E. Macdonald J. in *Machado v. Pratt & Whitney Canada Inc.*[27] In that case, the plaintiff was dismissed for cause by his employer, Pratt & Whitney, because he was alleged to have sexually harassed three other employees. The plaintiff brought a claim before the Employment Standards Branch of the Ministry of Labour, and the referee found that Pratt & Whitney had just cause to dismiss the plaintiff. The three employees were witnesses in the proceeding before the referee. The plaintiff later sued Pratt & Whitney for unjust dismissal and the three employees for conspiracy and defamatory libel. The Court found that the three employees were privies to the proceeding before the referee because they had testified in that proceeding and their evidence was central to Pratt & Whitney's defence to the claim before the referee. The action was dismissed against them on the basis of issue estoppel.

Conclusion

[104] For these reasons I have concluded that Globalive is a privy of West Face for the purposes of issue estoppel and cause of action estoppel with respect to the Moyse/West Face Action.

Can VimpelCom and UBS rely upon the plan of arrangement to bar Catalyst's Current Action against them?

[105] The next issue I must decide is whether the release contained in Justice Newbould's order dated February 3, 2016 approving the plan of arrangement bars Catalyst's claims against VimpelCom and UBS in this proceeding.

[106] As outlined above, the sale of Wind by the Consortium to Shaw was structured to proceed by a plan of arrangement. This was to enable Shaw to obtain clear title to Wind notwithstanding Catalyst's claim for a constructive trust over West Face's interest in Wind. Ultimately, Catalyst withdrew its claim for a constructive trust and consented to Justice Newbould's order dated February 3, 2016 approving the plan of arrangement. The plan of arrangement carves out certain specified claims that Catalyst is permitted to pursue and extinguishes all other possible claims relating to the transaction in article 4.5 of the plan which reads in part as follows:

> 4.5 Paramountcy
>
> From and after the Effective Time … 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

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[27] *Machado v. Pratt & Whitney Canada Inc.*, [1995] O.J. No. 1732 (Gen. Div.).

> 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 any right of The Catalyst Capital Group Inc. to assert any of the following matters, with the exception of any constructive trust or equivalent remedy over the Purchased Shares, which shall be deemed to have been settled, compromised, released and determined without liability, along with all other claims in this section 4.5:
>
> (a) Its existing claims as asserted in the Amended Amended Statement of Claim as amended December 16, 2014 in the proceeding bearing Court File No. CV-14–507120 in the Ontario Superior Court of Justice, against West Face Capital Inc. and Brandon Moyse;
>
> (b) As against any person (as defined in the OBCA), any potential claim for a tracing of the money received by West Face Capital Inc. from the disposition of its interest in the Corporation pursuant to the Arrangement; or
>
> (c) As against the Former Shareholders, any potential claim relating to their acquisition from VimpelCom Ltd. of their interest directly or indirectly in WIND Mobile Corp., including, to the extent permitted by law, for a tracing of the money received by them pursuant to the Arrangement.

[107] VimpelCom and UBS submit that none of Catalyst's claims that are carved out in article 4.5 are applicable to its claims against them in this proceeding. They argue that the court has jurisdiction to determine this issue as a question of law and dismiss Catalyst's claim against them pursuant to Rule 21.01(1)(a) of the *Rules of Civil Procedure.*[28]

[108] On a motion under Rule 21.01(1)(a), the moving party must show there is a question of law that can be determined without the adjudication of any factual issues. The court must accept all of the facts pleaded in the statement of claim as proven for the purpose of the motion. Although additional evidence may be admitted on the motion with leave of the court, VimpelCom and UBS have not sought leave to introduce any evidence on this motion.

[109] In my view, the application of the release in the plan of arrangement to VimpelCom and UBS is not a pure legal question because it requires a fact–driven analysis that includes consideration of the language of the document itself, the circumstances surrounding its execution, and evidence of the intention of the parties. The Supreme Court of Canada made it clear in *Creston Moly Corp. v. Sattva Capital Corp.*[29] that the interpretation of a contract is a question of mixed fact and law "as it is an exercise in which the principles of contractual

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[28] *Supra* note 6.
[29] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, [*Sattva*].

interpretation are applied to the words of the written contract, considered in light of the factual matrix".[30]

[110] In order to determine the scope of the terms of the plan of arrangement including Article 4.5, the court must have regard to the facts giving rise to the plan. These facts are set out in the evidentiary record before this court for the purpose of VimpelCom's and UBS' abuse of process motions. However, I am not entitled to consider this evidence to determine their Rule 21.01(1)(a) motion. Therefore, in the absence of any evidence of the factual matrix giving rise to the terms of the plan of arrangement, I cannot determine whether it applies to VimpelCom and UBS. To do so would violate the principles of contractual interpretation set out by the Supreme Court of Canada in *Sattva.*

[111] Further, it is not "plain and obvious" from the document itself that the parties who negotiated the plan of arrangement intended to extinguish any claim that Catalyst may have against VimpelCom or UBS. The intention of the plan of arrangement was to permit Shaw to purchase the shares of Mid-Bowline free from any claim that Catalyst might make concerning those shares. The plan of arrangement on its face had nothing to do with VimpelCom or UBS who were not parties to the plan of arrangement proceeding and had no interest in its outcome.

[112] Article 2.1 of the plan of arrangement provides in part as follows:

> This Plan of Arrangement shall become effective at, and be binding at and after, the Effective Time on the Corporation, Guarantor, Purchaser, the Vendors and all Persons who were immediately prior to the Effective Time holders or beneficial owners of Purchased Shares or Options.

[113] VimpelCom and UBS are not included in Article 2.1. Based upon this Article, it is not plain and obvious to me that the plan of arrangement was intended to apply to claims against non-parties to the plan such as VimpelCom and UBS.

Conclusion

[114] The jurisprudence is clear that this type of motion can only be granted if it is plain and obvious that the action will fail. I cannot come to this conclusion with respect to VimpelCom's and UBS' motions under Rule 21.01(1)(a) without evidence of the factual matrix in relation to the plan of arrangement and accordingly their motions for this relief are dismissed.

Should Catalyst's breach of contract claims against Globalive and UBS be struck as disclosing no reasonable cause of action?

[115] Globalive and UBS submit that Catalyst's claim for breach of contract against them should be struck because it is plain and obvious that Catalyst's statement of claim does not disclose a reasonable cause of action against them for breach of contract.

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[30] *Ibid* at para. 50.

[116] They argue that Catalyst has not pleaded sufficient facts in its statement of claim to sustain its breach of contract claim against either of them. In *McCarthy Corp. PLC v. KPMG LLP*[31] Mesbur J. set out the following requirements for pleading breach of contract at para. 26:

> A claim for breach of contract must contain sufficient particulars to identify the nature of the contract, the parties to the contract and the facts supporting privity of contract between the plaintiff and defendant, the relevant terms of the contract, which term or terms was breached, and the damages that flow from that breach. It must also plead clearly who breached the term, and how it was breached.

[117] Catalyst has not pleaded any of these elements against Globalive or UBS in its statement of claim. Globalive and UBS are not parties to either the Exclusivity Agreement or the Confidentiality Agreement. Paragraphs 28 and 43 of Catalyst's statement of claim set out the parties to the Confidentiality Agreement and the Exclusivity Agreement and neither Globalive nor UBS are alleged to be parties to these agreements. I do not accept Catalyst's submission that VimpelCom entered into these agreements as agent for Globalive and UBS because of the definition of "Authorised Person" in the Confidentiality Agreement and that they are therefore bound by the terms of the Confidentiality Agreement. This theory is not pleaded in Catalyst's statement of claim. Further, there is no privity of contract between either Globalive or UBS and Catalyst and none is pleaded in Catalyst's statement of claim. In my view this is fatal to Catalyst's breach of contract claims against Globalive and UBS.

[118] Ewaschuk J. made this clear in *Napev Construction Ltd. v. Lebedinsky,*[32] when he stated as follows:

> It is trite law that a stranger to a contract cannot be sued on that contract … A person can be sued for breach of contract only when he or she has agreed to accept obligations or duties created by the contract.

Conclusion

[119] I have concluded for these reasons that it is plain and obvious that Catalyst's breach of contract claims against Globalive and UBS cannot succeed and they should be struck. In light of the number of opportunities Catalyst has had to properly plead its breach of contract claims against Globalive and UBS (the statement of claim has already been amended three times) and the fact that there is no contract between Catalyst and either Globalive or UBS such that an amendment could produce a viable cause of action against them for breach of contract, I am of the view that I should not grant Catalyst leave to amend its statement of claim to properly plead its breach of contract claims.

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[31] *McCarthy Corp. PLC v. KPMG LLP*, [2007] O.J. No. 32 (S.C.J.).
[32] *Napev Construction Ltd. v. Lebedinsky*, [1984] O.J. No. 1129, 25 A.C.W.S. (2d) 149 (Ont. H.C.).

Conclusion

[120] For the reasons outlined above Catalyst's Current Action is dismissed as against all of the defendants as an abuse of process. It is also dismissed against West Face, the US Investors and Globalive on the grounds of issue estoppel and cause of action estoppel.

[121] Catalyst's breach of contract claims against Globalive and UBS are struck without leave to amend.

[122] VimpelCom's and UBS' motions to dismiss Catalyst's Current Action on the ground that it is barred against them by the release contained in the plan of arrangement are dismissed.

Costs

[123] If the parties cannot settle the issue of costs they may schedule a 9:30 a.m. appointment with me to determine costs.

[124] I thank all counsel for their helpful submissions.

HAINEY J.

Released: April 18, 2018

CITATION: The Catalyst Capital Group Inc. v. VimpelCom Ltd., 2018 ONSC 2471
COURT FILE NO.: CV-16-11595-00CL
DATE: 20180418

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/Responding Party

– and –

VIMPELCOM LTD., GLOBALIVE CAPITAL INC., UBS SECURITIES CANADA INC., TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP, LG CAPITAL INVESTORS LLC, SERRUYA PRIVATE EQUITY INC., NOVUS WIRELESS COMMUNICATIONS INC., WEST FACE CAPITAL INC., and MID-BOWLINE GROUP CORP.

Defendants/Moving Parties

REASONS FOR DECISION

HAINEY J.

Released: April 18, 2018