

CITATION: Catalyst Capital Group Inc. v. Moyse, 2016 ONSC 6285
COURT FILE NO.: CV-16-11272-00CL
DATE: 20161007

**SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST**

BETWEEN: THE CATALYST CAPITAL GROUP INC

Plaintiff

AND:

BRANDON MOYSE and WEST FACE CAPITAL INC

Defendants

BEFORE: Newbould J.

COUNSEL: *Rocco DiPucchio, Andrew Winton and Bradley Vermeersch*, for the plaintiffs

Robert A. Centa, Kris Borg-Olivier and Denise M. Cooney, for the defendant
Brandon Moyse

Kent E. Thomson, Matthew Mile-Smith and Andrew Carlson, for the defendant
West Face Capital Inc.

COST ENDORSEMENT

[1] I have now received cost submissions from the parties following the dismissal of this action.

West Face costs

[2] West Face claims costs on a substantial indemnity basis. The normal rule is that costs are to be paid on a partial indemnity basis. However, conduct of a party that is reprehensible, scandalous or outrageous are grounds for costs to be awarded on a substantial or complete indemnity basis. See *Young v. Young*, [1993] 4 S.C.R. 3. The conduct giving rise to such an award can be conduct either in a circumstances giving rise to the cause of action or in the proceedings themselves. See Orkin, *The Law of Costs*, 2nd ed. at para. 219 and *Ford Motor Company of Canada v. Ontario Municipal Employees Retirement Fund* (2006), 17 B.L.R. (4th) 169 (Ont. C.A.).

[3] Unfounded allegations of improper conduct seriously prejudicial to the character or reputation of a party can give rise to costs on a substantial indemnity scale. See *131843 Canada Inc. v. Double "R" (Toronto) Ltd.* (1992), 7 C.P.C. (3d) 15 per Blair J. (as he then was). In *Re Bisyk (No. 2)* (1980), 32 O.R. (2d) 281; aff'd [1981] O.J. No. 1319 (C.A.), Robins J. (as he then was), held that unproven allegations of undue influence in the preparation of a will were allegations of improper conduct seriously prejudicial to the character or reputation of a party deserving of costs on a solicitor and client basis. Both of these cases were referred with acceptance in *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.) at para. 47.

[4] In *Thoughtcorp Systems Inc. v. Tanju*, [2009] O.J. No. 1856, it was alleged that the defendant formed a competing business in breach of his fiduciary duties to the plaintiff and his non-competition agreement, hired a former employee of the plaintiff in breach of non-competition and non-solicitation clauses in her employment agreement, appropriated the plaintiff's confidential information, knowingly participated in the former employee's breach of fiduciary duties to the plaintiff, interfered with economic relations and unlawfully conspired with the former employee to the plaintiff's detriment. Hoy J. (as she then was) viewed the allegations as harmful to the defendant's integrity and awarded costs on a substantial indemnity basis. She said:

21 The allegations in this case go beyond breach of employment contract. Allegations of appropriation of confidential information and knowingly

participating in breach of a fiduciary duty appear to me to be seriously prejudicial to, and to impugn the integrity of, a young professional developing a career in the "trusted intelligence services" field and, in the absence of a release which effectively puts an end to the allegations, to, in appropriate cases, justify costs on a substantial indemnity scale in the event of a discontinuance.

[5] In this case, the claim against West Face was pleaded as follows:

34.6 West Face wrongfully used Catalyst's Confidential Information, which it solicited and obtained from Moyse, to obtain an unfair advantage over Catalyst in its negotiations with Wind. But for the transmission of confidential information concerning Wind from Moyse to West Face, West Face would not have successfully negotiated a purchase of Wind.

[6] On the face of it, this is an accusation of soliciting and misusing confident information. To solicit it indicates an intention to obtain confidential information. In the industry in which both West Face and Catalyst participated, personal integrity is extremely important. The accusation that West Face knowingly solicited confidential information from an employee of Catalyst and used it against Catalyst was an allegation of wrongdoing that attacked the integrity of West Face and its executives.

[7] In this case, Catalyst was aware before it amended its statement of claim to make this claim that West Face had set up a confidentiality wall before Mr. Moyse began working for West Face. It was also aware that Mr. Griffin of West Face had sworn two affidavits denying that West Face had obtained any confidential information about Catalyst from Mr. Moyse or had used such information in its dealings to acquire an interest in Wind. It was also aware of affidavits from Messrs. Leitner and Burt, principals of two of the partners of West Face in the bid for Wind, denying that they had received any information from West Face about Catalyst's dealings regarding Wind. Catalyst had also received extensive production of all of West Face's productions. Catalyst openly admitted at the opening of trial that it had no "direct" evidence that Mr. Moyse communicated confidential Catalyst information about Wind to West Face.

[8] This was not a case in which it was acknowledged by West Face that it had obtained Catalyst information from Mr. Moyse and the issue was whether it constituted confidential

information or was used by West Face. Rather it was a straight contest as to whether West Face had obtained confidential Catalyst information about Wind and had used it. Catalyst was aware aware that in order to prove its allegations it had to establish that West Face witnesses were lying. There was no way around that. In its closing argument it alleged “subterfuge and secrecy” as being an essential part of the asserted tort.

[9] Thus the allegations not only impugned the integrity of Mr. Griffin and other persons at West Face by asserting a solicitation and misuse of confidential Catalyst information but also attacked their honesty in their asserting that no confidential information regarding Catalyst was obtained from Mr. Moyse or used by West Face.

[10] This law suit 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.¹

[11] In these circumstances I am of the view that West Face is entitled to costs on a substantial indemnity basis.

[12] Regarding the amount of the costs claimed by West Face on a substantial indemnity basis, Catalyst raises no argument on the quantum. West Face claims substantial indemnity costs totalling \$1,239,970.41, including fees of \$1,053,238.29, disbursements and HST.

[13] West Face in its bill of costs claimed \$843,246.50 on a partial indemnity basis, including fees of \$702,155.18, disbursements and HST. Catalyst accepts that that claim on a partial indemnity basis is reasonable. Under rule 1.03 the definition of substantial indemnity cost means

¹ I in no way impugn the integrity of Catalyst’s lawyers who conducted the case in an entirely professional manner.

1.5 times partial indemnity costs. 1.5 times \$702,155.18, the amount of fees claimed by West Face on a partial indemnity basis and accepted by Catalyst as reasonable, comes to \$1,053,232.77, which is within \$5 dollars of the amount claimed by West Face for substantial indemnity fees.

[14] Thus I fix the substantial indemnity costs to be paid by Catalyst to West Face at \$1,239,965.

Brandon Moyse

[15] Mr. Moyse also claims costs on a substantial indemnity basis. In many ways he is entitled to costs on that scale for the same reasons that West Face is entitled to substantial indemnity costs. His reputation and integrity were attacked. Had the allegation stuck that he disclosed confidential Catalyst information to West Face, it would have had a very detrimental effect on his career prospects at a very early stage of his career. As it was, the allegations alone caused Mr. Moyse great difficulty. As a result of the litigation, Mr. Moyse was off work from July 16, 2014 until December 2015, and had significant difficulties securing a new job.

[16] Mr. Moyse made some mistakes at the outset of this sorry saga. He destroyed evidence of his web browsing history out of a concern that it would show he had accessed adult entertainment websites and become part of the public record. He wiped his blackberry to remove personal information. He always asserted that they were honest mistakes and that he never passed on to West Face any confidential Catalyst information regarding its Wind initiative or destroyed any evidence of any such activities. Mr. Moyse was a young man at that time who had a very close relationship with his girlfriend who is now his fiancée.

[17] Mr. Glassman caused Catalyst to assert a full scale attack on this young man. No thought was given to all of the denials by Mr. Moyse as well as by the West Face witnesses that there had not been any confidential Catalyst information regarding Wind given to West Face by Mr. Moyse. Catalyst claimed general damages against Mr. Moyse. What those would be were not particularized, which in a case involving a claim by Catalyst against West Face in excess of \$500 million, would leave Mr. Moyse in a perilous state. It was only in its closing submissions on a

question from the bench that Catalyst counsel said that damages equivalent to an award covering its costs of the case would be appropriate. That amount in this expensive litigation would be something that Mr. Moyse would in all likelihood be unable to pay.²

[18] However, the steps that Mr. Moyse took that he has readily acknowledged were mistakes, albeit with no intention to destroy any relevant evidence, must be considered in deciding what level of costs to be awarded to Mr. Moyse. In my view, it is a reason not to award costs on a substantial indemnity basis, and I award costs only on a partial indemnity basis.

[19] Mr. Moyse claims partial indemnity costs of \$339,500.18, made up of fees to the end of trial of \$282,330.50, disbursements of \$20,466.71 and HST. Catalyst argues that the fees claimed are excessive. It has filed a bill of costs of its own costs on a partial indemnity basis with fees to the end of trial being \$455,381 plus HST. The arguments of Catalyst essentially come down to an assertion that the spoliation case against Mr. Moyse was a separate claim that did not require all of the time spent. I do not accept that argument. Mr. Moyse had to be represented throughout the case, including discoveries and cross-examinations of West Face witnesses and at trial. The spoliation case against him was not divorced from the evidence led against West Face and he was exposed to a very large judgment that could have been affected by an award against West Face.

[20] The fees claimed by counsel for Mr. Moyse are approximately 61% of the fees claimed in the Catalyst bill of costs. The fees claimed by counsel for Mr. Moyse are 40% of the fees claimed by counsel for West Face on a partial indemnity basis. It is evident that the work done by counsel for Mr. Moyse was substantially less than the work done for Catalyst and West Face.

² One might wonder why the action against Mr. Moyse was continued after his leave of absence from West Face. He was in no position to pay any substantial award of damages. If Catalyst was hoping that in order to get out of the impending financial disaster, Mr. Moyse would “turn state’s evidence” and say that he had disclosed confidential Catalyst information regarding its Wind initiative to West Face, it did not work. The fact that West Face has paid Mr. Moyse’s legal fees may have had something to do with that, although West Face has not indemnified Mr. Moyse against any damage award. Mr. Moyse continued his denial of making any such disclosure and I accepted his evidence.

[21] It is not the court's function when fixing costs to second guess successful counsel of the amount of time spent unless the time spent was obviously too much. See *Fiorillo v. Krispy Kreme Doughnuts Inc.* [2009] O.J. No. 3223 and the authorities cited in it. I am in no position to say that the time spent was obviously too much.

[22] There are three areas specified by Catalyst in its critique of the bill of costs of Mr. Moyses:

- (a) Mr. Moyses claimed 15 hours for Commercial List attendances. It is said there were six attendances since January 2016 and that none lasted more than one hour. This ignores preparation time. It is said no costs were sought, awarded or reserved for those attendances. That is irrelevant. Attendances at 9:30 am conferences are the norm in the Commercial List and they save a lot of time and expense, as acknowledged by Catalyst in its costs submissions that costs were reduced because disputes between the parties were resolved at those appointments without fully briefed motions. Counsel are entitled to their costs of those attendances as they are steps in the proceeding.
- (b) Mr. Moyses claimed 151.4 hours for oral discoveries. It is said that the only discovery that Mr. Moyses conducted was of Catalyst's witness for thirty minutes and that he only gave six undertakings during his one day of discovery. It is said that it is not possible for one day of defending a witness and preparing for a 30 minute oral discovery to take 140 hours of preparation. This ignores the fact that counsel for Mr. Moyses had 7800 productions to consider, including 3400 documents produced by Catalyst between late March and May, 2016 and also attended, quite properly, the other discoveries. To have ignored those would have been foolhardy.
- (c) Catalyst complains that counsel for Mr. Moyses claimed 218.3 hours for direct and cross-examination preparation yet he only called two witnesses during trial and only cross-examined four witnesses. It should be pointed out that 70 hours were spent by a law clerk for preparing briefs of documents for witnesses and 5 hours

were for a student. It is said counsel for Mr. Moyse need not have spent so much preparation time. I cannot say that the time spent was obviously too much. Second-guessing successful counsel in a complex case such as this, particularly the spoliation case, is a difficult thing to do on the basis of simply looking at the hours.

[23] In this case, with the personal attack made on Mr. Moyse by Catalyst that affected Mr. Moyse's livelihood, Catalyst had to know that Mr. Moyse had no alternative but to take every possible step he could to defend himself.

[24] Taking into account the factors in rule 57.01 and discussed in *Andersen v St. Jude Medical Inc.*, [2006] O.J. No. 508 (Div. Ct.), I fix the partial indemnity costs to be paid to Mr. Moyse by Catalyst at the amount claimed of \$339,500.18.



Newbould J.

Date: October 7, 2016