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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Appellant

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Respondents

SECOND SUPPLEMENTARY NOTICE OF APPEAL

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

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

1. Judgment against Moyse for the tort of spoliation;

2. In the alternative, ~~O~~ordering that a new trial be held before another Judge of the Superior Court of Justice;

3. An award of costs of the trial and this appeal in the Plaintiff's favour; and

4. Such further and other relief as counsel may advise and this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

A. Denial of Procedural Fairness

1. The trial judge deprived the Plaintiff ("Catalyst") of procedural fairness by applying an inconsistent standard in his evaluation of the witnesses' credibility. Catalyst's witnesses were held to, and found not to have met, a higher standard than the defendants' witnesses.

2. In particular, without limiting the generality of the foregoing, the trial judge relied upon small inconsistencies in Catalyst's witnesses' evidence as justification to hold that those witnesses were not credible, when similar (or even more glaring) inconsistencies in the defendants' witnesses were held not to affect credibility.

3. At the direction of the trial judge, the trial was conducted as a summary/hybrid trial with evidence in chief to be adduced by way of affidavits previously sworn by witnesses in motions preceding the trial, to be supplemented by additional affidavits where necessary.

4. Prior to the issuance of this direction, the Plaintiff's witnesses in pre-trial motions consisted of James Riley, a partner and chief operating officer at the Plaintiff, and Martin Musters, a forensic IT investigator, who gave expert evidence.

5. The Defendants' witnesses included:

(a) The defendant Brandon Moyse, who swore numerous affidavits in 2014 and 2015;

(b) Kevin Lo, Moyse's expert forensic IT witness;

(c) Anthony Griffin, a partner at the defendant West Face Capital Inc. ("West Face");

(d) Tom Dea, a partner at West Face;

(e) Michael Leitner, a partner at Tennenbaum Capital Partners LLC; and

(f) Hamish Burt, an employee at 64NM Holdings LP.

6. The trial judge erred in law and in fact by finding that Catalyst's witnesses lacked credibility on facts that were supported by contemporaneous documentary evidence. In addition, the trial judge erred in law and in fact by finding that the defendants' witnesses' credibility was not diminished by inconsistencies with contemporaneous documentary evidence.

7. The contrast between the standard applied to Catalyst's witnesses and the standard applied to the defendants' witnesses amounted to a denial of procedural fairness to Catalyst – different standards were applied to the parties, which tainted the trial judge's findings of fact.

B. Error of Law in Determining the Spoliation Issue

8. The motion judge erred in law in relation to his findings on the issue of spoliation of evidence by Moyse.

9. It is undisputed that after Moyse consented to an order that required him to preserve the contents of his personal computer, Moyse deleted his web browsing history from his computer and launched a document deletion programme (a "Scrubber") the night before his computer was scheduled to be forensically imaged.

10. The trial judge applied the wrong legal test for spoliation. This was an error of law.

11. The trial judge held that in order to make out the tort of spoliation, Catalyst was required to adduce evidence of a particular piece of evidence that was destroyed. This was an error of law.

12. In circumstances where the alleged spoliation undisputedly involved the running of a Scrubber, which deletes data in a manner that makes detection of that deletion activity impossible, it is impossible for a plaintiff to point to particular pieces of evidence that were destroyed. That it is the mischief inherent in the use of Scrubber software.

13. The trial judge held Catalyst to an impossible level of proof in circumstances where the undisputed evidence was sufficient to permit him to draw a reasonable inference that evidence was destroyed in order to affect the outcome of the litigation. In so doing the trial judge erred in law.

14. In addition, the trial judge erred in law by adopting a subjective approach to the intent to destroy evidence. The trial judge accepted Moyse's subjective evidence that he did not intend to destroy relevant evidence, when the tort of spoliation requires only that Moyse destroyed material not that he intended to destroy relevant evidence. ~~a determination of objective intent to destroy evidence~~.

15. It is undisputed that Moyse intentionally destroyed his web browsing history. That is sufficient to establish the requisite level of intent to make out the tort of spoliation. The trial judge's finding that Catalyst failed to establish intent to destroy evidence is an error of law.

16. Finally, the trial judge erred in law by failing to properly apply one of the accepted required elements for the tort of spoliation to the evidence.

17. The trial judge misapplied the element ~~It is undisputed and the trial judge acknowledged that to establish spoliation, the plaintiff must establish~~ that it must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation. This was an error of law. ~~However, the trial judge did not properly consider this requirement.~~ Instead of considering whether

it was "reasonable" to draw the required inference, the trial judge considered whether he would draw the inference from the established facts.

18. The evidentiary record at trial established that:

(a) On June 17, 2014, when litigation was within his contemplation, Moyse wiped his Blackberry smartphone before returning it to Catalyst;

(b) On July 16, 2014, approximately one hour before the hearing of an interim motion concerning preservation of data, Moyse downloaded a software suite that included a Scrubber as one of its tools;

(c) In order to launch the Scrubber tool, a user had to first click through two well-labelled screens and on two clearly labelled buttons;

(d) Moyse launched the Scrubber the evening of July 20, 2014, the night before he was to turn over his computer to a forensic expert for the purpose of creating a forensic image;

(e) Moyse admitted to deleting an email from his email system in March or April 2014 because he knew he had erred in sending the email to West Face and did not want Catalyst to find out he had done so; and

(f) Moyse had misrepresented facts concerning his work on the Wind deal team in affidavits sworn prior to the July 16 interim motion.

19. The facts established in the evidentiary record create the **reasonable** inference that evidence was destroyed to affect the outcome of the litigation. ~~The test is not whether that fact is~~

~~established on a balance of probabilities, but whether the inference is a reasonable one to make. The trial judge misapplied this requirement of the tort, held Catalyst to a higher burden of proof, and in so doing erred in law.~~ The trial judge failed to apply the correct legal test and erred in concluding Moyse had not committed the tort of spoliation. The trial record conclusively establishes that Moyse did commit the tort of spoliation.

C. Errors of Fact and Mixed Fact and Law in Determining Spoliation

20. The trial judge made palpable and overriding errors of fact and errors of mixed fact and law with respect to the spoliation issue. In particular, the trial judge erred by refusing to accept opinion evidence from Catalyst's forensic IT investigator on the basis that the evidence lay outside his area of expertise.

21. The trial judge erred by adopting a too-narrow approach to the expert's area of expertise. Martin Musters, Catalyst's expert, was qualified as an expert in the area of IT forensics. The forensic nature of his expertise requires Musters to consider and opine on the behaviour of persons such as Moyse who use computers to hide or delete information.

22. Moreover, at a pre-trial cross-examination, Moyse's former counsel asked Musters to opine on the types of usual patterns of behaviour where an employee takes confidential information. Moyse, having acknowledged through this cross-examination that Musters' expertise extended to issues concerning patterns of behaviour, could not object to Musters' opinion on the same topic at trial and the trial judge should not have excluded or discounted Musters' evidence on this basis.

23. In addition, the trial judge made a palpable and overriding error of fact by finding that Musters' basis for concluding that Moyse ran the Scrubber was speculative when all of the facts relied upon by Musters for forming his opinion were not in dispute. In particular, both Musters

and Kevin Lo, Moyse's expert, agreed that the Scrubber function was not easy to get at and that knowledge of a computer's registry was limited to a small pool of computer users, which included Moyse. Musters' evidence was not speculative, it was an exercise in the expert interpretation of known information to opine on a question that could not be answered definitively due to the evasive nature of Scrubber software.

24. The trial judge made a palpable and overriding error of mixed fact and law by determining that Catalyst was required to prove that Moyse destroyed documents that no longer exist either at Catalyst or West Face. The trial judge misapprehended the significance of the possible existence of Catalyst's confidential Wind documents on Moyse's computer – the existence of those documents would have supported the allegation that the contents of those documents were communicated to West Face, even if the documents themselves were not.

25. The trial judge's conclusion that Moyse did not run the Scrubber to delete inculpatory evidence relied on this logical fallacy, which taints the trial judge's related evidentiary findings.

26. Finally, the trial judge made a palpable and overriding error of mixed fact and law by concluding that the absence of "cogent" evidence that Moyse removed evidence of his use of the Scrubber meant that there was no cogent evidence that Moyse ran the Scrubber. Musters and Lo both agreed in their evidence that it was possible to remove evidence of Moyse's use of the Scrubber without any ability to detect that removal activity.

27. The trial judge's reliance on a misapprehension of uncontested facts affected the inference-drawing exercise, such that his refusal to draw a reasonable inference is a related error of fact.

D. Errors of Fact in Determining the Misuse of Confidential Information Claim

28. In his review of the evidence and determination of disputed facts relating to Catalyst's misuse of confidential information claim, the trial judge made several palpable and overriding errors of fact, including, but not limited to the following:

(a) The trial judge erred by finding that Moyse was not aware of Catalyst's negotiating strategy with the government of Canada or with VimpelCom, when contemporaneous documents establish that Moyse was privy to, worked on, and had an appreciation for those negotiations;

(b) The trial judge erred by finding that Catalyst's explanation for why PowerPoint presentations and notes were destroyed differed from witness to witness and "made little sense", when in fact the explanations were consistent and inherently logical;

(c) The trial judge erred by finding that documentary evidence did not support the allegation that Moyse was kept apprised of Catalyst's strategy in May 2014, when in fact documentary evidence proves the opposite;

(d) The trial judge erred when he referred to an alleged lack of common decency or respect for individuals at Catalyst, and called these alleged facts "not surprising", without any contemporaneous documentary evidence to support these spurious allegations;

(e) The trial judge erred by finding that West Face had a "critical need" for an analyst in March 2014 when the undisputed evidence is that Moyse did little to no work for West Face during the three weeks he was actively employed at West Face;

(f) The trial judge engaged in improper speculation when he determined that Moyse "had to be tired" when he emailed Catalyst's confidential deal sheet and deal memos to West Face in March 2014;

(g) The trial judge's speculation as to Moyse's state of mind, combined with failing to consider Moyse's cross-examination evidence in which he denied that the confidential memos were in fact confidential, led to a palpable and overriding error of fact by failing to find that Moyse had a cavalier attitude about Catalyst's confidentiality;

(h) The trial judge erred in finding that West Face "took seriously" the issue of confidentiality when the documentary and oral evidence demonstrates that in March and April 2014, Tom Dea knowingly and repeatedly distributed Catalyst's confidential information to his partners and reviewed that information to determine if it was "helpful" to West Face;

(i) The trial judge erred in finding that Wind was the only telecom investment West Face was working on in spring 2014 when West Face's witnesses admitted and documentary evidence demonstrated it was also considering an investment in Mobilicity;

(j) The trial judge erred in finding that Catalyst's statement in late March 2014 that it was in advanced discussions with VimpelCom was "clearly misleading" when the documentary evidence shows Catalyst had engaged in such discussions up to that point;

(k) The trial judge erred in failing to draw an inference that Moyse had a general inclination to destroy evidence when the undisputed evidence is that Moyse destroyed relevant evidence of his wrongdoing;

(l) The trial judge erred in finding that no one at Tennenbaum Capital Partners knew the details of any offer made by Catalyst to VimpelCom when the documentary evidence demonstrates Leitner was aware of the details of Catalyst's offer;

(m) The trial judge erred in characterizing Hamish Burt as an impressive witness when Burt was unable to recall basic facts about 64NM's offers to VimpelCom;

(n) The trial judge erred in finding there was no direct evidence that West Face knew Catalyst was a bidder when contemporaneous emails sent in early June 2014 reveal that Griffin referred to Catalyst as a bidder and demonstrated that Griffin had insight into Catalyst's bid;

(o) The trial judge erred in his characterization of Catalyst's Wind strategy. The trial judge held that Catalyst required the ability to sell spectrum to an incumbent in order for Wind to survive, when in fact Catalyst sought the ability to sell spectrum only in case Wind did not survive. The trial judge also erred in finding that West Face did not adopt the same strategy as Catalyst. West Face's internal deal memo revealed it engaged in the same approach to the Wind transaction as Catalyst;

(p) The trial judge erred in finding that the thesis that no regulatory concessions were required for Wind to operate successfully was correct when in fact Wind sought,

and obtained, regulatory concessions to transfer spectrum as part of a three-way deal with Rogers and Mobilicity;

(q) The trial judge erred in finding that Leitner's reference in his unsolicited offer to VimpelCom to a "superior proposal" was not made in comparison to Catalyst's offer, and that this reference was based on knowledge of the details of Catalyst's offer;

(r) The trial judge erred in finding that the consortium's offer was not based on anything Catalyst was doing, when contemporaneous documents demonstrate the consortium acted as it did because of what Catalyst was doing;

(s) The trial judge erred in finding that suing the federal government played no part in West Face's investment thesis when West Face's internal deal memo reveals this was an "exit strategy" West Face expressly contemplated; and

(t) The trial judge erred in finding that VimpelCom would not agree to any deal that carried risk of the federal government not approving the deal when VimpelCom's own deal template contemplated this outcome.

29. These palpable and overriding errors of fact affected the trial judge's determination that West Face and Moyse were not liable for misuse of confidential information.

30. It is impossible for this Court to determine the issues of liability on this appeal. Too many errors have been made. A new trial is required in order to permit a new trial judge to hear the evidence and make fresh determinations of credibility and of fact.

E. Denial of Procedural Fairness in Fact Findings

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

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

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

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

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

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

(a) The trial judge concluded that no one at Tennenbaum Capital Partner LLC or 64NM Holdings GP LLC knew the details of any offer made by Catalyst to VimpelCom during the period of the Exclusivity Agreement;

(b) The trial judge concluded that VimpelCom had no substantive communication with the members of the Consortium, including West Face, during the term of the Exclusivity Agreement; and

(c) The trial judge concluded that there was no evidence that VimpelCom's board of directors looked at the Consortium's proposal during the exclusivity period with Catalyst or that the Consortium's proposal played any part in the decision of VimpelCom to demand a break fee from Catalyst.

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

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

F. Errors of Fact and Law in Determining Costs

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

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

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

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

(a) The trial judge erred in relying on the evidence given by Newton Glassman during trial to make determinations about Catalyst's conduct in the litigation;

(b) The trial judge erred in concluding that it was improper for Catalyst to prosecute its action on the basis of the confidentiality wall that West Face erected after Moyse commenced his employment with West Face; and

(c) The trial judge erred in concluding that Catalyst's prosecution of its action was based on unfounded allegations of West Face's conduct.

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

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

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. Sections 6(1)(b) and 133(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43;

2. The Judgment of Justice Newbould dismissing the Plaintiff's action is final; and

3. Leave to appeal the Judgment is not required;

4. Catalyst requests that the appeal of the Costs Order be joined with the appeal of the Judgment; and

5. Leave to appeal the Costs Order is required.

February 15, 2017

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