

Court File No.: CV-16-553800

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- 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

STATEMENT OF DEFENCE OF VIMPELCOM LTD.

1. Except as expressly admitted, the Defendant VimpelCom Ltd. (**VimpelCom**) denies all of the allegations in the Statement of Claim.

Background

2. VimpelCom is a global telecommunications company with its headquarters in Amsterdam. VimpelCom held an indirect interest in WIND Mobile Corp. (**WIND**), a new entrant in the Canadian telecommunications market, through its majority shareholdings in Global Telecom Holdings S.A.E. (**GTH**), an Egyptian company listed on the Egyptian stock exchange.

3. By the autumn of 2013, GTH had no option but to dispose of its interest in WIND:

- (a) its investment in WIND had been repeatedly frustrated by what it believed to be unfair actions of Industry Canada;
- (b) WIND had suffered significant losses as a result and was continuing to operate at a loss; and

- (c) WIND was facing the necessity of purchasing additional license spectrum and would require the further investment of funds to do so.

4. VimpelCom took carriage of the sale process and, with the assistance of its financial advisor UBS Securities Canada Inc., began to solicit potential purchasers. VimpelCom made clear to interested parties that its priorities were securing:

- (a) the best possible price (and in excess of CDN \$300 million); and
- (b) a quick and certain exit given WIND's ongoing operating losses.

5. Through the first half of 2014, VimpelCom had discussions with several prospective purchasers, including The Catalyst Capital Group Inc. (**Catalyst**), West Face Capital Inc. (**West Face**), and Tennenbaum Capital Partners (**Tennenbaum**).¹

6. During this period, VimpelCom and GTH signed a confidentiality agreement (the **Confidentiality Agreement**) with Catalyst to facilitate their discussions.

Negotiations with Catalyst and the Exclusivity Agreement

7. On July 23, 2014, VimpelCom and Catalyst also entered into a short Exclusivity Agreement (the **Exclusivity Agreement**) pursuant to which VimpelCom agreed, *inter alia*, to refrain from soliciting or negotiating an alternative transaction for one week, until July 30, 2014.

8. The Exclusivity Agreement provided that:

- (a) neither party was obligated to proceed with a transaction; and
- (b) no such obligation would arise until a binding agreement between the parties had been executed and delivered.

9. VimpelCom denies the allegations in paragraph 39 of the Statement of Claim that the Exclusivity Agreement contained implied terms. The Exclusivity Agreement, by its express terms, documented the parties' entire agreement and understanding.

¹ West Face and Tennenbaum subsequently formed a consortium with LG Capital Investors (**LG Capital**), 64NM Holdings GP LLC, 64NM Holdings LP, Serruya Private Equity Inc. and Novus Wireless Communications Inc. (collectively the **Consortium**).

Negotiations between VimpelCom and Catalyst

10. The parties did not conclude their discussions by July 30, 2014, and agreed in writing to extend the Exclusivity Agreement.

11. On or about August 3, 2014, the parties had substantially settled the terms of a proposed transaction which would provide for the sale of GTH's interest in WIND to Catalyst, subject to internal approval and execution through exchange of signed agreements (the **Proposed Catalyst Transaction**).

12. The Proposed Catalyst Transaction was also subject to regulatory approval from Industry Canada. Given the past difficulties with Industry Canada and the need to exit its investment in WIND quickly because of the forthcoming auction of additional spectrum, VimpelCom had sought to minimize regulatory risk. In contrast, Catalyst wanted an extended period of time in which to obtain Industry Canada approval and close the transaction. The parties had discussed this issue at length.

13. The Proposed Catalyst Transaction provided that:

- (a) Catalyst would have until December 31, 2014 to obtain Industry Canada approval;
- (b) GTH would be responsible for funding WIND's operating losses during this period; and
- (c) Catalyst would not ask for any regulatory concessions in its discussions with Industry Canada. VimpelCom was concerned that any attempt by Catalyst to seek concessions from Industry Canada could impede the regulatory approval process.

14. These were the best terms that VimpelCom's negotiating team was able to achieve with respect to regulatory risk and the length of time to closing. The VimpelCom team then proceeded to seek formal internal approval for the Proposed Catalyst Transaction.

15. From the start of VimpelCom's internal approval process, concerns were raised that the terms of the Proposed Catalyst Transaction, as then negotiated, unduly exposed VimpelCom to regulatory risk.

16. VimpelCom denies Catalyst's allegation at paragraph 87 of the Statement of Claim that VimpelCom used its internal approval process to stall Catalyst. Catalyst knew and understood that VimpelCom had to obtain internal approvals, and had specifically agreed that there would be no agreement between the parties until and unless signed documents were exchanged.

The Consortium's unsolicited Alternative Proposal

17. On August 7, 2014, VimpelCom received an unsolicited proposal from Tennenbaum, on behalf of itself, West Face and LG Capital, for the purchase of WIND (the **Alternative Proposal**).

18. VimpelCom pleads and relies on Justice Newbould's finding in *Catalyst Capital Group Inc v Moyse*, 2016 ONSC 5271 (the **Newbould Decision**) that:

... the proposal was unsolicited and sent to VimpelCom without any substantive communications with VimpelCom since the exclusivity period had commenced on July 23, 2014.

19. At all times VimpelCom complied with its obligations under the Exclusivity Agreement and specifically denies the allegation at paragraph 84 of the Statement of Claim that it engaged in discussions and negotiations with the Consortium between August 6 and August 18, 2014. VimpelCom pleads and relies on Justice Newbould's finding in the Newbould Decision that:

...neither VimpelCom nor Globalive had any discussion 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.

20. In any event, at the time it received the Alternative Proposal, VimpelCom believed that Tennenbaum and West Face had low credibility and dismissed the Alternative Proposal as having significant execution and regulatory risk.

Consideration of the Proposed Catalyst Transaction

21. The process for obtaining formal internal approval for the Proposed Catalyst Transaction continued. By August 8, 2014, it became clear to VimpelCom that it would not be able to obtain formal approval of the Proposed Catalyst Transaction before the expiry of the Exclusivity Agreement. VimpelCom proposed to extend the Exclusivity Agreement and Catalyst agreed. The Exclusivity Agreement was extended to August 18, 2014.

22. VimpelCom denies the allegation at paragraph 89 of the Statement of Claim that following receipt of the Alternative Proposal VimpelCom sought to frustrate and defeat the Exclusivity Agreement. In fact, VimpelCom proposed an extension of the Exclusivity Agreement for the purpose of finalizing a deal with Catalyst less than a day after receiving the Alternative Proposal.

23. On August 11, 2014, VimpelCom determined, as a matter of business judgment, that the allocation of regulatory risk under the Proposed Catalyst Transaction was unacceptable. To address this issue, VimpelCom requested a break-fee from Catalyst in the event the deal did not receive regulatory approval. The size of the break-fee reflected the funding required to support WIND during the period in which regulatory approval was being sought.

24. Catalyst refused to agree to any break-fee and threatened to terminate discussions with VimpelCom.

25. As an alternative to a break-fee, VimpelCom proposed, on August 12, 2014, that Catalyst agree to permit VimpelCom to pursue an alternate transaction if Catalyst was unable to obtain regulatory approval within two months – instead of the four months contemplated under the Proposed Catalyst Transaction. Again, Catalyst refused.

26. On August 15, 2014, VimpelCom attempted to re-engage Catalyst and proposed a “2+1 month” solution whereby Catalyst would have two months to obtain government approval plus an additional month if the parties agreed.

27. On August 16, 2014, at the behest of Catalyst’s financial advisor, VimpelCom confirmed that it was prepared to consider having the 2+1 month deadline for regulatory approval to start running 10 business days after the signing of a deal.

28. On August 18, 2014, Catalyst advised VimpelCom that it would not agree to any period for Industry Canada approval shorter than four months.

29. VimpelCom and Catalyst were accordingly unable to come to terms. The Exclusivity Agreement expired on August 18, 2014 without a transaction.

30. Catalyst played hard ball, refused to compromise and, as a result, never concluded a transaction.

Negotiation with the Consortium

31. Once the Exclusivity Agreement expired, VimpelCom commenced negotiations with the Consortium and approximately one month later came to agreement with the Consortium.

32. VimpelCom specifically denies the allegations in the Statement of Claim:

- (a) at paragraph 48 and 50 that VimpelCom disclosed that it was in discussions with Catalyst to the Consortium or terms of the Proposed Catalyst Transaction; and
- (b) at paragraph 85 that VimpelCom used its negotiations with Catalyst as a “stalking horse” to improve the terms of the Alternative Proposal.

No liability and no damages

33. VimpelCom denies any liability to Catalyst, as alleged in the Statement of Claim or otherwise.

34. There is no basis in fact or law for Catalyst’s claim. Catalyst had multiple opportunities, including after the expiration of the Exclusivity Agreement, to acquire an interest in WIND but refused to agree to terms. Catalyst is the author of any alleged misfortune it has suffered.

35. Moreover, a deal with Catalyst could never have been concluded between the parties. The Proposed Catalyst Transaction would have required Catalyst to refrain from seeking regulatory concessions from Industry Canada. Yet, Catalyst would not have proceeded with a transaction that did not include Industry Canada concessions.

VimpelCom pleads and relies on Justice Newbould's finding in the Newbould Decision that "...there was no chance that Catalyst could have successfully concluded a deal with VimpelCom."

36. In any event, if the Proposed Catalyst Transaction had been concluded, it was always Catalyst's intention to seek concessions from Industry Canada and breach the terms of the Proposed Catalyst Transaction. Catalyst is estopped from seeking damages with respect to a contract it intended to repudiate.

37. In the alternative, if VimpelCom is liable to Catalyst (which is strictly denied), Catalyst has not suffered any damages as alleged in the Statement of Claim or at all. Catalyst has no basis to a claim for damages in fact or at law. Further, Catalyst had an opportunity to mitigate its damages, but failed to do so.

The claim has been released

38. The Consortium effected its acquisition of GTH's interest in WIND through the corporation Mid-Bowline Group Corp. (**Mid-Bowline**). After the acquisition, Mid-Bowline indirectly held 100% of WIND.

39. In late 2015, Mid-Bowline commenced an application in the Ontario Superior Court of Justice for approval of a plan of arrangement (**Plan of Arrangement**) to effect the sale of WIND to Shaw Communications Inc. (**Shaw**).

40. On February 3, 2016, the parties, including Catalyst, consented to an order giving effect to the Plan of Arrangement. The Plan of Arrangement included a release for "all actions, causes of action, claims or proceedings... based on or in any way relating to any Purchased Shares..." (the **Release**).

41. VimpelCom pleads and relies on the Release as a complete defence and reply to Catalyst's claim: (a) Catalyst is bound by the Release; (b) Catalyst's claim against VimpelCom is captured by the Release; and (c) VimpelCom is entitled to benefit from the Release.

The claim is an abuse of process

42. The findings in the Newbould Decision directly contradict Catalyst's allegations against VimpelCom, including, *inter alia*, the allegations that:

- (a) VimpelCom negotiated with members of the Consortium during the period of exclusivity with Catalyst (paragraphs 84 and 89 of the Statement of Claim);
- (b) VimpelCom used Catalyst as a "stalking horse to improve the terms of the [Consortium's] Proposal" (paragraph 85 of the Statement of Claim); and
- (c) Catalyst suffered damages arising from the sale of WIND to Mid-Bowline and then to Shaw (paragraphs 94 and 100 of the Statement of Claim).

43. Catalyst ought not to be permitted to re-litigate the findings contained in the Newbould Decision; and its attempt to do so is an abuse of process.

44. In addition, contrary to the allegations at paragraphs 98 and 99 of the Statement of Claim, Catalyst was aware of a potential claim for breach of contract against VimpelCom by March 2015 or earlier.

45. As a result, Catalyst could have and should have pursued the allegations it raises in this action at the same time as its litigation against West Face. Catalyst's separate proceeding against VimpelCom constitutes improper litigation by instalment and is an abuse of the Court's process, giving rise to an unnecessary multiplicity of proceedings, the risk of inconsistent judgments and a duplication and waste of the court's resources.

46. VimpelCom asks that this action be dismissed or permanently stayed, with costs.

September 30, 2016

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THE CATALYST CAPITAL GROUP INC.
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Proceeding commenced at TORONTO

STATEMENT OF DEFENCE

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