Court File No.: CV-16-1159500CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

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

FACTUM OF THE DEFENDANT, SERRUYA PRIVATE EQUITY INC.

July 21, 2017

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PART I - OVERVIEW

1. The defendant, Serruya Private Equity Inc. ("Serruya"), brings this motion for an order dismissing or permanently staying this action as against it on the ground that it is an abuse of process.

2. This is the second action brought by Catalyst Capital Group Inc. ("Catalyst") regarding its unsuccessful attempts during the summer of 2014 to acquire an interest in WIND Mobile Inc. ("WIND") from VimpelCom Ltd. ("VimpelCom"). In September 2014, a consortium of firms (the "Consortium"), which included Serruya, were ultimately successful in negotiating an agreement to acquire all of VimpelCom's debt and equity interests in WIND.

3. The first action was commenced by Catalyst in the Superior Court of Justice (Commercial List), bearing court file no. CV-16-11272-00CL (the "Moyse Action") against one of the Consortium members, West Face Capital Inc. ("West Face"), and Brandon Moyse ("Moyse"), a junior analyst who was employed by Catalyst until he resigned in May 2014 to accept a position at West Face. In that action, Catalyst alleged, *inter alia*, that West Face unlawfully obtained and used confidential information about Catalyst's attempts to acquire WIND to (i) formulate an unsolicited proposal sent by certain of the Consortium members (which did not include Serruya), and (ii) formulate a successful bid by the Consortium to purchase VimpelCom's interest in WIND.

4. The trial of the Moyse Action was heard by Justice Newbould in June 2016. In reasons for judgment, released August 18, 2016, Justice Newbould dismissed the

Moyse Action in its entirety. Justice Newbould found that Catalyst suffered no damages as a result of any misuse of its confidential information, and that its failure to acquire WIND was caused by its insistence that any deal with VimpelCom be conditional on it receiving regulatory concessions from the federal government, and by its refusal to agree to a modest break fee requested by VimpelCom.

5. These and other findings by Justice Newbould are determinative of key liability and damages issues raised in this action. In order to succeed in this action, Catalyst will require this Court to make findings that directly contradict findings that were made in the Moyse Action. Catalyst's attempt to re-litigate these issues is an abuse of process.

6. In addition, the issues in this action arise in the same circumstances as the issues that were raised and determined by the Court in the Moyse Action. By March 2015, Catalyst was aware of any and all alleged facts upon which the current claim is based. Catalyst could and should have added Serruya and the other defendants to the Moyse Action and pursued its claims in that action. However, it made a tactical decision to "lie in the weeds". Catalyst's attempt to pursue its litigation by instalments is also an abuse of process.

PART II - FACTS

A. Background

7. In this action, commenced May 31, 2016, Catalyst claims damages in the amount of $1.3 billion in connection with its failed attempt to acquire WIND in 2014. Catalyst alleges that the members of the Consortium conspired with each other to misuse confidential information belonging to Catalyst and induce VimpelCom to breach an

exclusivity agreement with Catalyst. Catalyst pleads that as a result of the Consortium's alleged conduct, it was able to develop and successfully conclude an agreement to purchase all of the available debt and equity interests in WIND. The Consortium's indirect acquisition of WIND closed on September 16, 2014.

8. In addition to serving a Statement of Defence denying the allegations in the Statement of Claim, Serruya has brought this motion to dismiss or permanently stay the action as against it on the basis that the action constitutes an attempt to relitigate matters that were already determined in prior proceedings, particularly the Moyse Action.

9. The relevant facts and procedural history are comprehensively set out in Part II of West Face's factum and will not be repeated in detail here. Serruya adopts and relies on the facts and submission set out in West Face's factum.

B. Trial in Moyse Action and Justice Newbould's Reasons for Judgment

10. The six-day trial of the Moyse Action commenced on June 6, 2016, one week after the issuance of the Statement of Claim in this action.

11. In reasons for judgment released August 18, 2016, Justice Newbould dismissed the action in its entirety. In assessing the credibility of the witnesses, Justice Newbould generally accepted the evidence of West Face's witnesses over the evidence of Catalyst's witnesses. For example, in assessing the evidence of Newton Glassman, the managing partner of Catalyst, Justice Newbould noted that Mr. Glassman was "aggressive, argumentative, refused to make concessions that should have been made and contradited his own statemetns made contemporaneously in emails". In contrast,

Justice Newbould regarded the defence witnesses as "straightforward", "impressive" and "did not engage in overstatement".

Reference: Reasons for Judgment of Justice Newbould in the Moyse Action, dated August 18, 2016 ("Moyse Reasons") at paras. 11-14, Exhibit 1 to Affidavit of A. Carlson, sworn December 7, 2016 ("Carlson Affidavit"), Motion Record of West Face Capital Inc. ("MRWF"), Tab B(1), pp. 87-90

12. In the course of his reasons, Justice Newbould made the following findings, among others:

(a) The Consortium members that delivered the unsolicited offer to VimpelCom on August 7, 2014 – West Face, Tennenbaum Capital Partners LLC and LG Capital Partners LLC (collectively, the "New Investors") – had no information about Catalyst's regulatory strategy or any bid that may have been made by Catalyst to acquire an interest in WIND;

(b) Neither VimpelCom nor Globalive had any discussions with the New Investors before the expiry of Catalyst's period of exclusivity on August 18, 2014;

(c) The terms of the unsolicited proposal on August 7, 2014 or the ultimate deal between the Consortium and VimpelCom were not based on any confidential information about Catalyst's attempt to acquire an interest in WIND;

(d) There is no evidence that West Face was acting on any confidential information belonging to Catalyst;

(e) The purchase price offered by the Consortium, which was based on an enterprise value of $300 million, was known to the marketplace by VimpelCom as early as April 2014;

(f) Catalyst did not suffer any damages as a result of any misuse of its confidential information;

(g) Catalyst would not have closed a deal for the acquisition of WIND because VimpelCom would never have agreed to a deal that was conditional on Catalyst receiving government approval of its regulatory concessions; and

(h) The reason the deal between Catalyst and VimpelCom fell through was because Catalyst terminated negotiations after VimpelCom requested that Catalyst pay a break fee.

Reference: **(a)** Moyse Reasons, at paras. 85-87, MRWF, Tab B(1), pp. 109-110; **(b)** Moyse Reasons, at para. 105, MRWF, Tab B(1), pp. 115-116; **(c)** Moyse Reasons, at para. 114, MRWF, Tab B(1), p. 114; **(d)** Moyse Reasons, at para. 87, MRWF, Tab B(1), p. 109-110; **(e)** Moyse Reasons, para. 94, MRWF, Tab B(1), p. 112; **(f)** Moyse Reasons, paras. 127, 130, MRWF, Tab B(1), pp. 122, 123; **(g)** Moyse Reasons, para. 131, MRWF, Tab B(1), pp. 123-124; **(h)** Moyse Reasons, paras. 127-130, MRWF, Tab B(1), pp. 122-123

PART III - ISSUES AND THE LAW

13. There is one issue raised in this motion: Is Catalyst's action against Serruya an abuse of process? Serruya submits it is, and that the action should be dismissed or permanently stayed as against it on that basis.

A. Doctrine of Abuse of Process

14. The doctrine of abuse of process is based on the Court's inherent and residual discretion to terminate litigation in order to prevent abusive proceedings that threaten to bring the administration of justice into disrepute.

Reference: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 35-37 ("*C.U.P.E.*")

15. Rules 21.01(3)(d) and 25.11 also allow the Court to strike out a pleading and/or stay or dismiss a proceeding on the basis that it is an abuse of process.

16. Abuse of process is a flexible doctrine and is not constrained by the specific requirements of issue estoppel. Abuse of process has been applied to preclude relitigation in circumstances where the requirements of issue estoppel – e.g. privity or mutuality – are not satisfied, but where allowing the litigation to proceed would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. Unlike issue estoppel, abuse of process transcends the interests of individual litigants and focuses on the integrity of legal system.

Reference: *C.U.P.E.*, at para. 37; *Ontario v. O.P.S.E.U.*, 2003 SCC 64 at para. 12 ("*O.P.S.E.U.*"); *Timm v. Canada*, 2014 FCA 8 at paras. 30-32

17. The policy grounds underlying the doctrine of abuse of process have been described as follows:

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

Reference: *C.U.P.E.*, para. 38, citing Donald J. Lange

B. This Action is an Abuse of Process

18. Serruya submits that this action is an abuse of process.

i. Catalyst is seeking to relitigate matters that were determined in the Moyse Action

19. This action is a clear attempt by Catalyst to relitigate matters that were already litigated and determined against Catalyst's favour by Justice Newbould in the Moyse Action.

20. An action that relies on the Court making findings that will be inconsistent with finings in prior proceedings will be an abuse of process. In *Skender v. Farley*, a mother purchased a home with her son. Farley, a notary public, handled the transaction and registered the mother and son on title as tenants-in-common. The parents took the position that their son's interest in the property was limited to the son's proportionate contribution to the down payment, or 1/15th, with the balance owned by the mother. The son disagreed and commenced an action for a declaration that he was entitled to a 50% interest in the property. The parents and Farley testified at the trial. The parents argued their instructions to the notary public was to register the property in the names of the mother and son in accordance with their contributions toward the down payment. The trial judge rejected the parents' evidence and found that Farley registered the mother's and son's names on title in accordance with the instructions he received from the mother and the son.

Reference: *Skender v. Farley*, 2007 BCCA 629 at paras. 1, 2, 20

21. After the proceeding against their son, the parents commenced an action against Farley alleging that he was negligence in the way he registered the title to the property. Farley brought a motion for an order dismissing the action. The motion was denied and Farley appealed to the British Columbia Court of Appeal. The British Columbia Court of

Appeal allowed the appeal and dismissed the action as an abuse of process because, in order for the parents' claim to succeed, the Court would be required to make findings that would be inconsistent with findings that were made in the earlier action:

> In my view, insofar as the Skenders pursue Mr. Farley for failing to follow their instructions, this action is an abuse of process. The core issue before Dorgan J. was whether the property, as registered, reflected the true interests of Nada and Leon Skender. She found that it did. In para. 26 the chambers judge said, "[t]o succeed the plaintiffs in this action are going to have to persuade a trier of fact to come to different conclusions on essential points". It would be a misuse of the court's procedures, would impinge upon the integrity of judicial decision making and would hold the administration of justice in disrepute if, in this action, the Skenders were allowed to seek a conclusion contrary to the findings of Dorgan J. as inevitably they must to succeed.
>
> **Reference:** *Skender v. Farley*, *supra* at para. 32

22. In this action, Catalyst alleges that the Consortium unlawfully misused confidential information about Catalyst's acquisition strategy and induced VimpelCom to breach its exclusivity agreement with Catalyst. Catalyst alleges that its bid to acquire WIND failed as a result of the defendants' conduct.

23. As was the case in *Skender v. Farley*, in order for Catalyst to succeed in this action, it will need the Court to make findings that directly contradict findings that were made by Justice Newbould in the Moyse Action. In particular, Justice Newbould found that:

(a) Catalyst did not suffer any damages as a result of any misuse of its confidential information;

(b) Catalyst would not have closed a deal for the acquisition of WIND because VimpelCom would never have agreed to a deal that was

conditional on Catalyst receiving government approval of its regulatory concessions; and

(c) The reason the deal between Catalyst and VimpelCom fell through was because Catalyst terminated negotiations after VimpelCom requested that Catalyst pay a break fee.

Reference: **(a)** Moyse Reasons, paras. 127, 130, MRWF, Tab B(1), 122, 123; **(b)** Moyse Reasons, para. 131, MRWF, Tab B(1), pp. 123-124; **(c)** Moyse Reasons, paras. 127-130, MRWF, Tab B(1), pp. 122-123

24. Catalyst is bound by these and other findings of Justice Newbould, which are determinative of key liability and damages issues raised in this action.

25. Specifically, Catalyst's claim that the Consortium misused its confidential information cannot succeed in the face of Justice Newbould's findings. First, Justice Newbould found that there was no evidence that the Consortium members had any of Catalyst's confidential information. Second, Justice Newbould went on to find that even if West Face had any confidential information belonging to Catalyst, West Face did not make use of it in the bid that was presented by the Consortium to VimpelCom. Finally, Justice Newbould found that even if a case of misuse of confidential Catalyst information was made out, it did not cause Catalyst to suffer any detriment or damage.

Reference: Moyse Reasons, paras. 87, 120, 126, 127, 130, MRWF, Tab B(2), pp. 109-110, 120, 122, 123

26. Catalyst's claim for inducing breach of contract also cannot succeed in the face of Justice Newbould's findings. To make out a claim for inducing breach of contract, a plaintiff must establish, among other requirements, that it suffered damages as a result of the defendant's tortious conduct. Justice Newbould's findings that Catalyst suffered no detriment or damage as a result of any misuse of its confidential information and that

its failure to acquire WIND was caused by its insistence on a deal that was conditional on receiving regulatory concessions and its refusal to accept VimpelCom's request for a break fee.

Reference: *Persaud v. TELUS Corporation*, 2017 ONCA 479 at para. 26

27. Finally, Catalyst's claim in civil conspiracy must also fail as a result of Justice Newbould's findings in the Moyse Action. To make out a claim for civil conspiracy, a plaintiff must establish, among other elements, that two or more parties engaged in unlawful conduct they knew in the circumstances would cause harm to the plaintiff, or engaged in conduct the predominant purpose of which was to cause harm to the plaintiff. A plaintiff must also prove that it suffered damages. Catalyst's conspiracy claim cannot succeed in the face of Justice Newbould's finding that Catalyst lost the WIND deal as a result of its own acquisition strategy and not as a result of the conduct of the defendants.

Reference: *Normart Management Ltd. v. West Hill Redevelopment Co.*, 1998 CarswellOnt 251 at para. 23 (C.A.)

28. Catalyst should not be permitted to use this action as means to relitigate or conduct a collateral attack on Justice Newbould's findings.

ii. Catalyst should not be permitted to pursue this litigation by instalments

29. This action amounts to litigation by instalment and should also be dismissed or permanently stayed on that basis.

30. The courts have taken a stern view of parties who raise issues in proceedings that should have been raised in earlier proceedings. Parties are expected to advance

all claims arising out of one set of circumstances in a single action and the failure to do so is an abuse of process.

Reference: Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3rd ed. (LexisNexis: Markham, 2010) at pp. 215-216; *Abacus Cities Ltd. v. Bank of Montreal*, 1987 ABCA 166

31. It is also an abuse of process to bring a proceeding against a defendant who could have been added as a party in prior proceedings. As Donald Lange put it:

> As with cause of action estoppel, abuse of process by relitigation has sometimes been described as a rule against relitigation by instalment, or the rule in *Henderson*. **To breach the rule in *Henderson*, even though the parties are not the same, is an abuse of process.** In applying abuse of process by relitigation, the courts have taken a stern view of raising in new proceedings issues that ought reasonably to have been raised in earlier proceedings. A party is not entitled to relitigate a case because counsel failed to raise an argument which the party wanted to raise or to relitigate an issue indirectly by "a cleverly camouflaged effort."

Reference: Lange, *supra* at pp. 215-216; *Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin & Younger*, 2001 CarswellOnt 682 at para. 35 (S.C.J.)

32. By March 2015, Catalyst was fully aware of the facts upon which this claim is based. Specifically, by that time, Catalyst had been served with a motion record containing an affidavit sworn on March 7, 2015 by Anthony Griffin of West Face. In that affidavit, Mr. Griffin gave evidence on the unsolicited offer that was made by the New Investors to VimpelCom on August 7, 2014, and with respect to the Consortium's successful bid to acquire WIND.

Reference: Carlson Affidavit, paras. 17-18, MRWF, Tab B, pp. 38-43

33. It was not until January 2016, in the context of Catalyst's opposition to Mid-Bowline Group Corp.'s ("Mid-Bowline") application for Court approval of the Plan of

Arrangement that would result in the sale of all of the shares of Mid-Bowline to a subsidiary of Shaw Communications for about $1.6 billion, that Catalyst announced that it would be advancing a claim for inducing breach of contract against members of the Consortium.

34. The approval hearing was held on January 25, 2016. In reasons released January 26, 2016, Justice Newbould rejected Catalyst's assertion that it only recently learned the facts underlying its proposed inducing breach of contract claim. Justice Newbould's reasons contained the following, strong language regarding Catalyst's questionable tactics and the veracity of the evidence it put before the Court:

> 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.
>
> **Reference:** Reasons for Judgment of Justice Newbould, *Re: Mid-Bowline Group Corp.*, 2016 ONSC 669 at para. 59, Exhibit 2 to Carlson Affidavit, MRWF, Tab B(2), p. 151

35. In short, Justice Newbould found that Catalyst was fully aware of the facts underlying its inducing breach of contract claim in March 2015. However, despite being aware of these facts, and despite amending its Statement of Claim in the Moyse Action numerous times, Catalyst took no steps to assert any new claims or add any new defendants to that action.

36. Catalyst could and should have added Serruya and the other defendants to the Moyse Action and pursued its claims against Serruya in that action. However, as Justice Newbould observed, Catalyst made a tactical decision to "lie in the weeds". Catalyst's attempt to pursue its litigation in instalments is an abuse of process and should not be permitted.

PART IV - ORDER REQUESTED

37. Serruya respectfully requests an order dismissing or permanently staying this action as against it, with costs on a full indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of July, 2017.

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Jameel Madhany

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SCHEDULE "A" – LIST OF AUTHORITIES

1. *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63
2. *Ontario v. O.P.S.E.U.*, 2003 SCC 64
3. *Timm v. Canada*, 2014 FCA 8
4. *Skender v. Farley*, 2007 BCCA 629
5. *Persaud v. TELUS Corporation*, 2017 ONCA 479
6. *Normart Management Ltd. v. West Hill Redevelopment Co.*, 1998 CarswellOnt 251 (C.A.)
7. Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3rd ed. (LexisNexis: Markham, 2010)
8. *Abacus Cities Ltd. v. Bank of Montreal*, 1987 ABCA 166
9. *Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin & Younger*, 2001 CarswellOnt 682 (S.C.J.)

SCHEDULE "B" – RELEVANT STATUTES

1. ***Courts of Justice Act*, RSO 1990, c C43, s 140**

Vexatious proceedings

140 (1) Where a judge of the Superior Court of Justice is satisfied, on application, that a person has persistently and without reasonable grounds,

(a) instituted vexatious proceedings in any court; or

(b) conducted a proceeding in any court in a vexatious manner,

the judge may order that,

(c) no further proceeding be instituted by the person in any court; or

(d) a proceeding previously instituted by the person in any court not be continued,

except by leave of a judge of the Superior Court of Justice.

2. ***Rules of Civil Procedure*, RRO 1994, Reg 194, r. 1.04, 21.01(3)(d), 25.11**

INTERPRETATION

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

...

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL WHERE AVAILABLE

...

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

...

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

...

STRIKING OUT A PLEADING OR OTHER DOCUMENT

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

THE CATALYST CAPITAL GROUP INC. Plaintiff	and	VIMPELCOM LTD., ET AL. Defendants	Court File No: CV-16-1159500CL

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SUPERIOR COURT OF JUSTICE
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Proceeding commenced at TORONTO

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