Court File No. CV-16-11595-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

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

WRITTEN SUBMISSIONS OF THE CATALYST CAPITAL GROUP INC.

PART I
Introduction

1. Following the issuance of the decision of the Ontario Court of Appeal ("OCA") dated March 22, 2018 ("the Appeal Decision"), The Catalyst Capital Group Inc. (hereinafter "Catalyst" or the "Plaintiff") requested an opportunity and has been granted an opportunity to make further submissions regarding the pending motions in this action (the "Stay Motions"), which were heard by this Court in August 2017 and taken under reserve at that time.

2. As requested by the Plaintiff and confirmed by this Court, the written submissions which follow are limited to the impact of the Appeal Decision upon the Stay Motions.

3. For the reasons detailed hereafter, it is respectfully submitted that the Appeal Decision, considered in the context of the appeal record and the position of the parties asserted therein (the "Appeal Record"), demonstrate that the Stay Motions must be dismissed.

4. Alternatively, ii is respectfully submitted that the contents of the Appeal Decision and Appeal Record are relevant to and support the exercise of discretion by this Court in favor of Catalyst, so as to allow this action to continue.

PART II
Submissions based upon the Appeal Decision and the Appeal Record

5. To put these written submissions in context, it is important to recall that the stay motion brought by WestFace was based upon two specific findings which, according to WestFace, the Honourable Mr. Justice Newbould had made. Specifically, in "**Part I – Overview**" of its Factum before this Court, WestFace contended that the Trial Judge made two factual findings that were are fatal to Catalyst's claims in this case:

> " [8]... Justice Newbould dismissed Catalyst's claim in the Moyse action in its entirety. In addressing Catalyst's claim for breach of confidence, he made two findings that are fatal to Catalyst's claims in the case at bar:
>
> > "(a) Catalyst did not lose its bid for WIND because of anything done by West Face. Rather, Catalyst lost its bid because it refused to accept VimpelCom's request for a $5-20 million break fee to cover the risks associated with regulatory approval for the sale of VimpelCom's interest in WIND being delayed or denied;[1] and
> >
> > (b) even if Catalyst had been able to sign an agreement to acquire WIND, *it could never have **closed** the acquisition.* Catalyst required regulatory concessions before it would have closed an acquisition of WIND, and the Government of Canada had categorically refused to grant the concessions in question.[2]
> >
> > [2] Trial Reasons, ***para. 131***, MR Exhibit 1, pp. 123-124." (italics and bolding added)

(a) Issue Number One: Limitations in the scope of the proceedings before Justice Newbould

6. The Appeal Decision demonstrates that the issues at trial and on appeal were limited to Catalyst's assertion of a cause of action based upon the improper leakage of confidential information by **Moyse, and by no one else**. As described by the OCA:

> "[2] In this lawsuit, Catalyst alleged that West Face effectively "stole" the WIND deal from Catalyst by improperly using confidential information West Face obtained

about Catalyst's strategies in respect of its negotiations for the purchase of WIND. According to Catalyst's claim, the confidential information came from the respondent, **Brandon Moyse ("Mr. Moyse")**. He had worked for Catalyst as an analyst for about two years until May 2014 when he quit Catalyst to go to work for West Face." (Underlining and bolding added.)

7. This limitation was reiterated in paragraphs 4 and 8 of the Appeal Decision:

> "[4] In the lawsuit, Catalyst alleged that the misuse of confidential information by West Face and **Mr. Moyse** caused damage to Catalyst. Catalyst also sought an accounting of the profits made by West Face and the consortium when Shaw Communications purchased WIND from the consortium." (Underlining added)
>
> "[8] To succeed on the misuse of confidential information claim, Catalyst had to prove that:
> - **Mr. Moyse** gave confidential information concerning Catalyst's bid to purchase WIND to West Face;
> - West Face used that confidential information when pursuing its bid for WIND; and
> - The misuse of that confidential information caused detriment to Catalyst." (Underlining and bolding added.)

8. The limitation of the scope of the issues before Justice Newbould was also reflected in the Appeal Decision's reference to the Trial Judge's conclusion that Catalyst's refusal to agree to a break fee was fatal to the claims it had advanced against Moyse and West Face:

> "[14]...The respondents contended at trial that the evidence showed that Catalyst chose to end the negotiations rather than agree to the break fee demanded by the vendor. On this argument, which did not depend on the Trial Judge accepting the testimony of Mr. Moyse, or the West Face witnesses, Catalyst suffered no damages or detriment, even if **Mr. Moyse** had given confidential information to West Face and West Face had attempted to use that information in its negotiations with the vendor of the WIND shares." (Underlining and bolding added.)

9. In addition, in paragraph 16 of the Appeal Decision, the OCA gave the following description of the Trial Judge's findings of fact:

> "[16]...The Trial Judge accepted the explanations offered by **Mr. Moyse** for his conduct outlined above, at para. 10. The Trial Judge found, as a fact, that **Mr. Moyse** had not provided any confidential information to West Face in relation to the appellant's negotiations for the purchase of the WIND shares." (Underlining and bolding added.)

(b) Issue Number Two: The Appeal Decision demonstrates that the Trial Judge did ***not*** find that Catalyst would not have ***closed*** a share purchase agreement with VimpelCom

10. In the OCA, as in its Factum in support of the Stay Motions (cited in paragraph 4 of these written submissions), WestFace contended that the Trial Judge had made a "dispositive finding" that Catalyst would not have acquired WIND regardless of any misuse of confidential information by WestFace.

11. According to WestFace in the OCA, Catalyst's failure to appeal this "dispositive finding" was fatal to its appeal, even if there was any merit to any of the grounds of appeal that were advanced by Catalyst. This so-called dispositive finding was detailed in paragraph 39 of WestFace's OCA Factum:

> **"A. Introduction: Catalyst Has Not Appealed the Dispositive Finding that Catalyst Would Not Have Acquired WIND Regardless of West Face's Alleged Misuse of its Confidential Information**
>
> 39. Catalyst's claims against West Face required it to establish that, but for West Face's alleged misuse of Catalyst's confidential information, Catalyst would have acquired WIND. However, the evidence of Catalyst's own witnesses – its three Partners Newton Glassman, Gabriel De Alba, and James Riley – and its contemporaneous documents demonstrated that Catalyst could not have ***closed* its proposed acquisition of WIND, regardless of West Face's alleged wrongdoing. This is precisely what the Trial Judge found, and Catalyst has not appealed either that dispositive finding or the important findings of the Trial Judge underlying his conclusions in that regard. That failure is fatal to Catalyst's claims against West Face, and therefore to its appeal.** In the face of those findings, Catalyst cannot establish that it suffered any loss as a result of West Face's (alleged, but non-existent) misuse of any Catalyst confidential information." (Underlining, italics, and bolding added)

12. In the OCA, WestFace relied upon paragraphs 126-131 of Justice Newbould's reasons for decision ("Trial Decision") in support of the above submissions.

13. These paragraphs contain two different findings.

14. First, paragraphs 126-130 of the Trial Decision relate to a "break fee", which is adverted to in segments of the Appeal Decision quoted in paragraph 7 of these written submissions.

15. It is clear that paragraphs 126-130 do not purport to make any finding that Catalyst would not have **closed** the share purchase agreement which had been negotiated with and signed off between Catalyst and VimpelCom's representatives on or shortly before to August 7, 2014.

16. Moreover, the Appeal Decision makes it clear that the Trial Decision in respect of the break fee demanded by VimpelCom on or about August 11, 2014 did not consider whether VimpelCom's sudden tabling of that break fee demand resulted from breaches of the exclusivity agreement between Catalyst and VimpelCom, actionable leakage of confidential information by UBS or VimpelCom, or improper interactions between WestFace and Lacavera (the principal of the Defendant Globealive).

17. The findings of Justice Newbould relate to whether **Moyse** leaked any information so as to give rise to liability for misuse of confidential information.

18. This conclusion regarding the limited scope of any findings in paragraphs 125-130 of the Trial Decision is reinforced by the immediately preceding paragraph of the Trial Decision, in which Justice Newbould J. stated: "**In summary**, if **Mr. Moyse** provided to West Face any confidential Catalyst Information, I find such information was not used by West Face." ((Underlining and bolding added.)

19. Consequently Paragraph 131 of the Trial Decision is the sole basis that could be used by WestFace in support of its argument to the OCA that Catalyst's appeal should be dismissed *in limine*.

20. Paragraph 131 of the Trial Decision reads as follows:

> "[131] 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 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." (Underlining added, footnotes omitted.)

21. In theory, if there had been any merit to West Face's contention that paragraph 131 contained an unchallenged finding of fact that Catalyst would never have ***closed*** a share purchase agreement with VimpelCom, such a finding would have been fatal to Catalyst's appeal, even if there was merit to any of the other grounds of appeal advanced.

22. In these circumstances, if the OCA considered that such an unchallenged finding of fact had been made by Justice Newbould, the OCA would have adverted to this finding in the Appeal Decision. The OCA did not do so. In fact, paragraph 131 of the Trial Decision is not even mentioned in the Appeal Decision.

23. To put this submission in context, the OCA questioned appeal counsel and heard oral argument as to the contents and implications of paragraph 131 of the Trial Decision. In response, appellant counsel for Catalyst submitted that paragraph 131 of the Trial Decision did **not** contain any finding of fact that Catalyst would not have closed a share purchase agreement with VimpelCom. Appellate counsel noted that this paragraph only contained a finding that Catalyst **would never have been able to *enter into* an agreement of purchase and sale** with VimpelCom for the sale of WIND.

24. In this context, it is clear that the OCA agreed with Catalyst's submissions on the proper interpretation of paragraph 131, and did not agree with the submissions in WestFace's Factum about the meaning of that paragraph.

25. Apart from the well-known principle that Courts of Appeal do not generally decide issues or deal with arguments which are unnecessary to support the conclusions reached on appeal, the above submission is supported by the fact that where the OCA considered that it was unnecessary to deal with arguments raised by Catalyst on appeal because of factual findings made by Justice Newbould, the OCA said so, clearly and unequivocally (in dealing with the spoliation issues raised on appeal):

"[45] The appellant's argument faces an insurmountable factual hurdle. Any inference that may be drawn against the respondents can arise only after a finding that Mr. Moyse destroyed relevant evidence. The Trial Judge found as a fact that Mr. Moyse did not destroy relevant evidence (paras. 147, 165). The appellant has not established any basis upon which this court can interfere with that factual finding. That finding puts an end to any argument that Mr. Moyse's deletion of data from his computer and cellphone supports an adverse inference against Mr. Moyse or West Face.

[46] As this argument runs aground on the Trial Judge's factual finding, we need not consider the merits of the substance of the argument. We should not be taken as agreeing that the appropriate evidentiary approach to evidence that a party to a proceeding destroyed relevant evidence should be functionally different from the approach to be taken to other kinds of circumstantial evidence." (Underlining added.)

(c) Issue Number Three: The Appeal Decision confirms that the findings in Paragraph 131 of the Trial Decision were *obiter*

26. In addition to the arguments referred to above, appellate counsel also argued that the finding actually made by Newbould J. in paragraph 131 of the Trial Decision; namely that Catalyst could never have entered into a share purchase agreement with VimplelCom, constituted a palpably wrong and overriding error warranting intervention by the OCA.

27. These further submissions included references to the contents of the Trial Affidavit of Gabriel de Alba, and, most importantly, contemporaneous documentary evidence demonstrating that: (i) as of August 7, 2014 Catalyst and VimpelCom's representatives were ad idem on the terms of a share purchase agreement; (ii) the share purchase agreement on which Catalyst had signed off did not include any of the supposedly unattainable conditions referred to by Justice Newbould in paragraph 131 of the Trial Decision, and (iii) once the break fee suddenly emerged, Catalyst pressed for the execution of the share purchase agreement in the form which Catalyst had previously been willing to accept previously.[1]

28. The OCA did not refer to any of these additional submissions in its reasons nor, as noted above, to paragraph 131 of the Trial Decision. If the findings in paragraph 131 (properly interpreted) were central to the Trial Decision, it is respectfully submitted that the OCA would have dealt with these submissions (and documents) in the Appeal Decision.

[1] Counsel will forthwith deliver a concise compendium of relevant documents for the purposes of oral argument in relation to these written submissions

29. The fact that the OCA did not do so demonstrates that the OCA did not consider the alternative finding made in paragraph 131 of the Trial Decision to be essential. In the result, that paragraph is simply *obiter*.

(d) Issue Number Four: The OCA Record demonstrates that any amendments to the Statement of Claim or expansion of the trial would have been strenuously opposed

30. It is submitted that the OCA Record demonstrates that any attempt to significantly expand the trial would have been vigorously resisted by **Moyse** and **West Face**.

31. Without revisiting WestFace's arguments that Catalyst could and should have amended its claim, it is beyond doubt than an expansion of the existing claims and/or the trial to include the issues advanced and the parties named in this action would have caused a very significant delay.

32. The context was that the warring parties and their counsel had already invested very considerable time and resources in preparing for trial and in producing an enormous Trial Record, which was used at trial to litigate the **Moyse** allegations and cause of action.

33. The overall positions of WestFace and Moyse are reflected in the endorsement of His Honour Justice Rouleau dated September 27, 2017:

> "[2] The respondents oppose any adjournment as they are ready and anxious to proceed and are suffering some prejudice by the delay. Mr. Moyse has this cloud over his name and West Face is under pressure to distribute the profits it has made on the transaction." (Underlining added.)

(e) Issue Number Five: In the alternative, the conclusions set out in the Appeal Decision and in the Appeal Record support the exercise of discretion in Catalyst's favour

34. It is submitted that the conclusions recited above demonstrate that the Court should dismiss the Stay Motions.

35. In the alternative, the above conclusions are relevant to the Court's exercise of discretion in Catalyst's favor, in accordance with the principles set out by the Supreme Court of Canada in Danyluk v. Ainsworth Technologies [2001] SCC 44 and related decisions of the Supreme

Court of Canada. As this jurisprudence was previously argued by Catalyst, it will not be repeated here.

36. In the further alternative, the conclusions set out herein support the Court's exercise of a more narrowly based discretion in Catalyst's favour, to enable Catalyst's claims in this action to proceed, subject to such terms providing for the narrowing of the issues, the identity of the parties, the timing of the proceedings and protections as to costs, in such manner as this Court deems appropriate.

Part III
Summary and Conclusions

37. It is respectfully submitted that:

(1) for the reasons set out in paragraphs 6-9 and 18 above, the Appeal Record and the Appeal Decision demonstrate that the ***lis*** and the scope of the proceedings before Justice Newbould and the findings contained in the Trial Decision were and are limited to the issues related to **Moyse** and WestFace;

(2) for the reasons set out in paragraphs 10-25 above, the Appeal Record and the Appeal Decision demonstrate that Justice Newbould did **not** find that Catalyst would not have closed a share purchase agreement to purchase the Wind Shares from VimpelCom;

(3) for the reasons set out in paragraphs 26-29 above, the Appeal Record and the Appeal Decision demonstrate that the findings made by Justice Newbould in paragraph 131 of the Trial Decision were *obiter*, and,

(4) for the reasons set out in paragraphs 30-33 above, the Appeal Record and the Appeal Decision demonstrate that any attempt by Catalyst to amend the Moyse-WestFace Statement of Claim and/or to significantly expand the scope of the trial presided over by Justice Newbould would have been strenously opposed by Moyse and WestFace.

38. Given the above, the Stay Motions should be dismissed.

39. In the alternative, for the reasons set out in paragraphs 34-36 above, the aforementioned conclusions support the exercise of discretion in Catalyst's favor as previously argued, or, in the further alternative, by a more limited exercise of such discretion in accordance with specific terms and conditions which are open to this Court to impose.

40. In addition to the above issues, reference is made here to the possibility of a motion under Rule 59.06 (2) (a). This is raised to avoid any argument by the Respondents that Catalyst should have sought a deferral of this Court's reserve decisions on the Stay Motions, so as to include any Rule 59.06 motion as part of the within submissions, or otherwise to make such a motion part of this Court's adjudication of the pending Stay Motions. Catalyst does not seek any such deferral of the Court's decisions on the Stay Motions for these purposes.

41. Such a separate motion relates to Catalyst being in possession of information and evidence which Catalyst believes could support potential relief under the above Rule in respect of the decision of Justice Newbould, on the grounds that material new evidence exists which could significantly undermine the veracity of the evidence presented by the WestFace witnesses at trial.

42. The jurisprudence indicates that the proper procedure to seek such relief is not through the Appeal Proceedings, nor in the Stay Motions now pending, but rather on a separate motion to the Trial Judge or (in the circumstances of this case) by a motion before another judge of the Superior Court under Rule 59.06 2(a): see, for example, Mehedi v. 2057161 Ontario Inc. (2014), 123 O.R. (3d) 73 (C.A.) ; Janjua v. Khan 2014 ONCA 5 (Lauwers J.A.); Warren v. Gilbert [2010] O.J. No. 5168 (Laforme J.A.); R. v. G.B. [2003] O.J. No. 460 @ para. 24 (C.A.).

April 9, 2018

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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