Court File No: C65431

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant)

- 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
(Respondents)

FACTUM OF THE RESPONDENT, SERRUYA PRIVATE EQUITY INC.

February 5, 2019

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PART I - OVERVIEW

1. The appellant, Catalyst Capital Group Inc. ("Catalyst"), appeals from the decision of Justice Hainey (the "Motions Judge") dismissing this action as against all of the respondents on the ground, *inter alia*, that it is an abuse of process.

2. This was the second action brought by Catalyst regarding its unsuccessful attempts to acquire an interest in WIND Mobile Inc. ("WIND") from VimpelCom Ltd. ("VimpelCom"). In September 2014, a consortium of firms (the "Consortium"), which included this respondent Serruya Private Equity Inc. ("Serruya"), was 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. Justice Newbould further found 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. The Motions Judge correctly concluded that those and other findings by Justice Newbould are determinative of key liability and damages issues raised in this action. The Motions Judge found that, in order to succeed in this action, Catalyst would need the Court to make findings that directly contradicted findings that were made in the Moyse Action. The Motions Judge also held that Catalyst could have advanced the claims asserted in the current action in the Moyse Action but chose to lie in the weeds. Ultimately, the Motions Judge determined that this action is an abuse of process and dismissed it as against all of the respondents.

6. There is no merit to Catalyst's principal argument that the action should not have been dismissed because it advances different causes of action. The doctrine of abuse of process is not restricted to situations in which a claimant is advancing the exact same causes of action that were advanced in a previous action.

7. This appeal should be dismissed. The Motions Judge committed no reviewable error justifying the appellate intervention of this Court.

PART II - FACTS

8. Serruya adopts and relies on the relevant background facts set out in paragraphs 7 to 29 of West Face's factum.

A. Motions to Dismiss before Justice Hainey

9. All of the respondents brought motions to dismiss this action. While certain respondents raised additional grounds, such as issue estoppel and cause of action estoppel, all of the respondents, including Serruya, argued that this action was an abuse of process because it constituted an attempt by Catalyst to relitigate matters that had been determined by Justice Newbould in the Moyse Action. The respondents also argued that the action was an abuse of process because Catalyst was attempting to litigate by instalments – Catalyst was fully aware of the circumstances underlying this claim as early as March 2015. Catalyst could have advanced this claim in the Moyse Action but made a deliberate choice not to.

10. The Motions Judge heard the respondents' motions on August 16, 17 and 18, 2017. At the time, Catalyst's appeal of the Moyse Action dismissal (the "Moyse Appeal") was pending in this Court. On April 16, 2018, after the Moyse Appeal was dismissed by this Court, the Motions Judge heard additional submissions from the parties.

11. Pursuant to reasons for decision, released April 18, 2018, the Motions Judge dismissed the action as against all of the respondents on the basis that, *inter alia*, the action was an abuse of process.[1]

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[1] Reasons for Decision of Justice Hainey, dated April 18, 2018, *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2018 ONSC 2471 ("Reasons"), Joint Compendium of the Respondents (Defendants) ("JCR"), Tab 5, p. 99.

12. The Motions Judge concluded that certain findings made by Justice Newbould in the Moyse Action were determinative of the claims advanced by Catalyst in this action. In his reasons for judgment in the Moyse Action, Justice Newbould found that the Consortium did not cause Catalyst to suffer any loss or damage because, *inter alia*:

(a) Catalyst did not suffer any loss as a result of any misuse of its confidential information;[2]

(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 regulatory concessions;[3] 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.[4]

13. The Motions Judge held that because Justice Newbould determined the reason why Catalyst did not acquire WIND in the Moyse Action, Catalyst was not permitted to pursue a new action alleging another reason for its failure to acquire WIND. The Motions Judge correctly concluded that in order to succeed in this action, Catalyst would need to ask the Court to make findings that are inconsistent with Justice Newbould's findings.[5] The Motions Judge held that Catalyst's attempt to relitigate Justice Newbould's findings in this action constituted an abuse of process.[6]

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[2] Reasons for Judgment of Justice Newbould in the Moyse Action, dated August 18, 2016 ("Moyse Trial Reasons") at paras. 127, 130, JCR, Tab 14, pp. 260, 261.
[3] Moyse Trial Reasons at para. 131, JCR, Tab 14, pp. 261-262.
[4] Moyse Trial Reasons at paras. 127-130, JCR, Tab 14, pp. 260-261.
[5] Reasons at para. 65, JCR, Tab 5, pp. 116.
[6] Reasons at para. 86, JCR, Tab 5, p. 122.

14. The Motions Judge also held that the action was also an abuse of process because it amounted to litigation by installment. All of the facts that Catalyst relied upon in supports of its claims in this action were well known long before the trial of the Moyse Action. Despite being aware of those facts, Catalyst chose to "lie in the weeds" and not advance those claims in the Moyse Action.[7]

PART III - ISSUES AND THE LAW

15. With respect to Serruya, this appeal raises one issue: whether the Motions Judge erred in dismissing the action as an abuse of process. Serruya submits that the Motions Judge committed no reviewable error and that this appeal should be dismissed.

A. Standard of Review

16. The Motions Judge's finding that this action is an abuse of process is a finding of mixed fact and law as it involves the application of a legal standard to a set of facts. Absent an extricable question of law, which does not exist in this case, this Court will only overturn findings of mixed fact and law if the Motions Judge made a palpable and overriding error.[8] No such palpable and overriding errors exist in this case.

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[7] Reasons at paras. 81-82, 86, JCR, Tab 5, pp. 120-122.
[8] *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36, Joint Book of Authorities of the Defendants (Respondents) ("Respondents BOA"), Tab 46.

B. Doctrine of Abuse of Process

17. 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.[9]

18. 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.[10]

19. 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

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[9] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 35-37 ("*C.U.P.E.*"), Respondents BOA, Tab 91.

[10] *C.U.P.E.*, at para. 37, Respondents BOA, Tab 91; *Ontario v. O.P.S.E.U.*, 2003 SCC 64 at para. 12 ("*O.P.S.E.U.*"), Respondents BOA, Tab 76; *Gonzalez v. Gonzalez*, 2016 BCCA 376 at paras. 18-22, Respondents BOA, Tab 40.1; *Timm v. Canada*, 2014 FCA 8 at paras. 30-32, Respondents BOA, Tab 90.

> the principle of finality so crucial to the proper administration of justice.[11]

C. This Action is an Abuse of Process

20. The Motions Judge did not err in concluding that this action is an abuse of process.

i. Motions Judge Correctly Concluded that Catalyst is seeking to relitigate matters that were determined in the Moyse Action

21. The Motions Judge found that Catalyst was attempting to relitigate findings that were already made by Justice Newbould in the Moyse Action with respect to whether and to what extent the Consortium's conduct caused Catalyst's bid to acquire WIND to fail. The findings of Justice Newbould are determinative of the causation and damages issues raised in the current action. The Motions Judge correctly concluded that Catalyst's attempt to relitigate these issues constituted an abuse of process.

22. Contrary to what is submitted by Catalyst, it makes no difference that Catalyst has asserted different causes of action in the two actions. What matters is whether the issue was "front and centre" in the prior proceeding.[12]

23. 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

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[11] *C.U.P.E.* at para. 38, citing Donald J. Lange, Respondents' BOA, Tab 91.
[12] *Gonzalez v. Gonzalez*, *supra* at para. 25, Respondents BOA, Tab 40.1

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 were 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.[13]

24. After the proceeding against their son, the parents commenced an action against Farley alleging that he was negligent 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

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[13] *Skender v. Farley*, 2007 BCCA 629 at paras. 1, 2, 20, Respondents BOA, Tab 88.

> Skenders were allowed to seek a conclusion contrary to the findings of Dorgan J. as inevitably they must to succeed.[14]

25. In *Skender v. Farley*, it did not matter that the parents were asserting a different cause of action in the professional negligence action against Farley. The question was whether the "core issue" raised in the subsequent action – that is, whether the registration of the property reflected the true interests of the parents – was decided in the prior proceeding. The BC Court of Appeal found that it was decided in the prior proceeding, and dismissed the second claim against Farley as an abuse of process.

26. In this case, while Catalyst has asserted different causes of action in this action, the core issue is the same issue that was decided by Justice Newbould – the reason Catalyst's bid to acquire WIND failed. Justice Newbould determined that Catalyst's bid failed because VimpelCom would never have agreed to a deal that was conditional on regulatory approval, which was insisted upon by Catalyst, and because Catalyst terminated negotiations after VimpelCom requested that Catalyst agree to a break fee.[15] The Motions Judge found that Catalyst would only be able to succeed in the current action if the court made findings that were inconsistent with the findings of Justice Newbould in the Moyse Action.

27. Catalyst's claim that the Consortium misused its confidential information would be unable to 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

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[14] *Skender v. Farley*, *supra* at para. 32, Respondents BOA, Tab 88.
[15] Moyse Trial Reasons at paras. 127-131, JCR, Tab 14, pp. 260-262.

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.[16]

28. Catalyst's claim for inducing breach of contract also would be unable to succeed in the face of Justice Newbould's findings. To make out a claim for inducing breach of contract, Catalyst would need to establish, among other requirements, that it suffered damages as a result of the Consortium's conduct.[17] However, Justice Newbould found that Catalyst suffered no detriment or damage as a result of any misuse of its confidential information. Justice Newbould found that Catalyst failed to acquire WIND because it insisted on conditions that were unacceptable to VimpelCom and because it terminated negotiations after VimpelCom requested a break fee.

29. Catalyst's claim in civil conspiracy would fail for the same reason. To make out a claim for civil conspiracy, Catalyst would have to establish that it suffered damages as a result of the conduct of the respondents.[18] However, it would be unable to do so without the court making findings that are entirely inconsistent with Justice Newbould's findings in the Moyse Action.

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[16] Moyse Reasons, paras. 87, 120, 126, 127, 130, JCR, Tab 14, pp. 247-248, 258, 260, 261.
[17] *Persaud v. TELUS Corporation*, 2017 ONCA 479 at para. 26, Respondents BOA, Tab 80.
[18] *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 at para. 23 (C.A.), Respondents BOA, Tab 71.

30. The Motions Judge correctly recognized that Catalyst was attempting to relitigate in this action matters that had been determined by Justice Newbould in the Moyse Action. He also recognized that in order to succeed in this action, Catalyst would need the court to make findings that are inconsistent with findings made by Justice Newbould. The Motions Judge committed no error in determining that this action constituted an abuse of process and should be dismissed.

ii. Motions Judge Correctly Concluded that Action Amounts to Litigation by Instalment

31. The Motions Judge also concluded that this action amounts to litigation by instalment and should be barred on that basis.[19]

32. 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.[20]

33. 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**

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[19] Reasons at paras. 81-82, 86, JCR, Tab 5, pp. 120-122.

[20] Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3rd ed. (LexisNexis: Markham, 2010) at pp. 215-216, Respondents BOA, Tab 101; *Abacus Cities Ltd. v. Bank of Montreal*, 1987 ABCA 166, Respondents BOA, Tab 4.

> **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."[21]

34. 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.[22]

35. 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.[23]

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[21] Lange, *supra* at pp. 215-216, Respondents BOA, Tab 101; *Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin & Younger*, 2001 CarswellOnt 682 at para. 35 (S.C.J.), Respondents BOA, Tab 53.
[22] Affidavit of Andrew Carlson, sworn December 7, 2016, at para. 18, JCR, Tab 56.1, pp. 452-457.
[23] Reasons at paras. 34-35, JCR, Tab 5, p. 105-106.

36. 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 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.[24]

37. Catalyst was fully aware of the facts underlying its inducing breach of contract claim as early as 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.

38. The Statement of Claim in this action was served only a few days before the commencement of the trial in the Moyse Action in early June 2016. West Face's counsel immediately wrote to Catalyst's counsel to complain that the new action

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[24] Reasons for Judgment of Justice Newbould, *Re: Mid-Bowline Group Corp.*, 2016 ONSC 669 at para. 59, JCR, Tab 8, p. 172.

constituted litigation by instalment and an abuse of process.[25] Nevertheless, Catalyst took no steps to adjourn the trial and add the respondents as defendants in the Moyse Action.

39. There was ample support in the record before the Motions Judge for his finding that Catalyst could have advanced the claims it has asserted in the current action in the Moyse Action but chose not to do so.[26] The Motions Judge committed no error in concluding that this action amounted to litigation by instalment and was therefore an abuse of process.

D. Motion Judge Properly Exercised His Discretion

40. This Court should give no effect to Catalyst's argument, at paragraphs 83 to 85 of its factum, that the Motions Judge should not have exercised its discretion to dismiss the action. In support of this position, Catalyst repeats its flawed argument that the Motions Judge failed to recognize that the Moyse Action did not address the causes of action in the current action.

41. As noted, the doctrine of abuse of process is not restricted to situations where the exact same causes of action are asserted in two proceedings. The court will dismiss an action as an abuse of process if the later proceeding would require the court to determine the same "core issues" that have already been determined in a prior proceeding.

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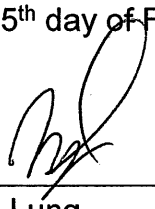
[25] Reasons at para. 38, JCR, Tab 5, pp. 106-107.
[26] Reasons at paras. 81-82, 86, JCR, Tab 5, pp. 120-122.

42. However, Catalyst fairly acknowledges that the decision of the Motion Judge to dismiss the action as an abuse of process was a discretionary decision. Discretionary decisions are afforded significant deference. Absent some palpable and overriding error, which does not exist in this case, this Court should not intervene.

PART IV - ORDER REQUESTED

43. Serruya respectfully requests that this appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of February, 2019.



Per Lucas E. Lung
Lawyers for the Respondent,
Serruya Private Equity Inc.

CERTIFICATE

I, Lucas E. Lung, lawyer for the Respondent, Serruya Private Equity Inc., certify that:

(i) An order under subrule 61.09(2) (original record and exhibits) is not required;

(ii) The estimated time of my oral argument is 15 minutes, not including reply.

February 5, 2019

REL Lucas E. Lung
Lawyers for the Respondent,
Serruya Private Equity Inc.

SCHEDULE "A" - LIST OF AUTHORITIES

1. *Housen v. Nikolaisen*, 2002 SCC 33
2. *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63
3. *Ontario v. O.P.S.E.U.*, 2003 SCC 64
4. *Gonzalez v. Gonzalez*, 2016 BCCA 376
5. *Timm v. Canada*, 2014 FCA 8
6. *Skender v. Farley*, 2007 BCCA 629
7. *Persaud v. TELUS Corporation*, 2017 ONCA 479
8. *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.)
9. Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3rd ed. (LexisNexis: Markham, 2010)
10. *Abacus Cities Ltd. v. Bank of Montreal*, 1987 ABCA 166
11. *Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin & Younger*, 2001 CarswellOnt 682 (S.C.J.)

SCHEDULE "B" - RELEVANT STATUTES

None

THE CATALYST CAPITAL GROUP INC. Appellant	and	SERRUYA PRIVATE EQUITY INC., ET AL. Respondents	Court File No: C65431

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at TORONTO

FACTUM OF THE RESPONDENT, SERRUYA PRIVATE EQUITY INC.

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