

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

**Plaintiff
(Appellant)**

and

**VIMPLECOM LTD., GLOBALIVE CAPITAL INC., UBS
SECURITIES CANADA INC., TEMMEMBAUM CAPITAL
PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM
HOLDINGS LP, LG CAPITAL INVESTORS LLC, SERRUYA
PRIVATE EQUITY INC., NOVUS WIRELESS
COMMUNICATIONS INC., WESTFACE CAPITAL INC. and
MID-BOWLINE GROUP CORP.**

**Defendants
(Respondents in Appeal)**

NOTICE OF APPEAL

**THE CATALYST CAPITAL GROUP INC.. (hereinafter referred to as “Catalyst” or the
“Plaintiff”) appeals to the Court of Appeal from the judgment of the Honorable Justice G.
Hainey (the “Motions Judge”) dated April 18, 2018, made at Toronto.**

CATALYST asks that the judgment be set aside and that judgment be granted as follows:

- (1) that the motions brought by the Defendants (“Motions”) for the dismissal or a
permanent stay of this action (“Action”) be dismissed,**
- (2) in the alternative, that this Court order that the Plaintiff be granted leave to proceed
with this Action on such terms as this Court considers appropriate,**
- (3) costs of the Motions and costs of this appeal, and,**

(4) such further and other relief as counsel may advise and this Court deems just.

THE GROUNDS OF APPEAL ARE AS FOLLOWS:

1. The Motions were based upon the Defendants' contentions that the principles of issue estoppel, cause of action estoppel and abuse of process should be invoked in this case and that the appropriate relief was the dismissal or a permanent stay of the Action. In addition, certain of the Defendants sought relief on the basis that the pleadings disclosed no cause of action against them.
2. The Motions were based upon a voluminous written record which included extensive references to a prior proceedings ("the Moyse Action") in which Catalyst sued a former employee, Brendon Moyse ("Moyse") and West Face Capital Inc. ("WestFace").
3. In the Moyse Action, Catalyst unsuccessfully sued WestFace and Moyse based upon allegations that Moyse had improperly disclosed confidential information to WestFace about Catalyst's regulatory strategies to acquire a telecommunications company known as Wind Mobile Corp. ("WIND") and that West Face had inappropriately used such confidential information to acquire WIND and secure profits from its subsequent sale.
4. The Moyse Action was dismissed in its entirety by the Honorable Justice F. Newbould by a decision dated August 18, 2016 ("Moyse Trial Decision"). This decision was subsequently upheld by the Ontario Court of Appeal, in a decision dated March 22, 2018 ("Moyse Appeal Decision").

5. While Catalyst sought damages against WestFace in the Moyse Action, it did so on the basis of different allegations of fact than are advanced in this Action. Moreover, the Moyse Action did not assert any causes of action, make any allegations, or seek any relief against any of the other Defendants in this Action, namely VimpleCom Ltd. (“Vimplecom”), Globalive Capital Inc. (“Globalive”), UBS Securities Canada Inc. (“UBS”), Tennenbaum Capital Partners LLC, 64 NM Holdings GP LLC 64 NM Holdings LP, LG Capital Investors LLC, Serruya Private Equity Inc., Novus Wireless Communications Inc., or Mid-Bowline Group Corp. (collectively the “Other Defendants”).
6. Consequently none of the other Defendants were parties to the Moyse Action, and there was no production of relevant documents from, nor any discoveries of any of the Other Defendants in the Moyse Action.
7. In these circumstances, the Moyse Trial Decision and Moyse Appeal Decision did not adjudicate any of the allegations made by the Plaintiff against WestFace or any of the Other Defendants.
8. The Reasons for Decision of the Motions Judge reflect the following:
 - (1) The Motions Judge held that the Action as against WestFace, the US Investors (as defined below) and Globalive Capital Inc. were barred and should be permanently stayed on the basis of issue estoppel and cause of action estoppel;

- (2) The Motions Judge held that the Defendants Tennebaum Capital Partners LLC, 64 NM Holdings GP LLC, 64 NM Holdings LP, LG Capital Investors LLC (the “US Investors”) and Globalive Capital Inc. were “privies” of WestFace;
 - (3) The Motions Judge held that the Action was an abuse of process and should be permanently stayed against all of the Defendants on this basis;
 - (4) The Motions Judge held it was plain and obvious that Catalyst’s breach of contract claims against Globalive and UBS could not succeed and that they should be struck out, without leave to amend.
9. The Motions Judge erred in law in making each of the above holdings.
 10. With respect to the determination that issue estoppel barred the Plaintiff’s claims, the Motions Judge erred in law for the following reasons:
 - (1) the issues decided in the Moyses Action were not the same as and are not determinative of the issues in this Action.
 - (2) the “findings” from the Moyses Action relied upon by the Motions Judge were not findings at all, and in so holding, the Motions Judge misinterpreted the Moyses Trial Decision;

- (3) in any event, the “findings” relied upon by the Motions Judge were not findings which were “fundamental” to the Moyse Trial Decision, without which that decision “could not stand”;
- (4) in the alternative, the Motions Judge erred in law by holding, in effect, that Catalyst failed to establish that any “manifest injustice” would result from a permanent stay based upon issue estoppel. The record in this case makes it clear that upon the proper application of the applicable jurisprudence, it was unfair, unreasonable, and inappropriate to bar Catalyst from continuing with the Action.
11. With respect to the determination cause of action estoppel barred the Action, the Motions Judge erred in law for the following reasons:
- (1) the issues and claims in the Action do not relate to the claims Moyse improperly conveyed confidential information that was misused by WestFace. Rather they relate to whether Vimpelcom and its representative UBS breached or conspired to breach express contractual obligations to Catalyst by making improper disclosures, dealings, and encouragements to WestFace and certain of the other Defendants during the period of exclusivity contracted for by Catalyst. These issues, and the manner in which WestFace and the Other Defendants took advantage of or contributed to such breaches are central to this Action. The claims based upon these issues, and the questions of causation arising from them, are completely different than the issues and allegations decided in the Moyse Action.

- (2) in these circumstances, the Motions Judge erred in law by concluding that the claims advanced in the Action are “based upon the same facts” as were alleged in the Moyse Action, and by failing to hold that the causes of action advanced in the Action are separate and different from the causes of action adjudicated in the Moyse Action;
- (5) the Motions Judge misstated the “findings” made in the Moyse Trial Decision and erroneously construed these findings to be determinative of issues in the Action, when in law they are not;
- (6) in the alternative, even if the causes of action asserted in this Action are not separate and distinct from the causes of action asserted in the Moyse Action, and even if they could have been raised in that action, the Motions Judge erred in law by failing to hold that, in all the circumstances, it was wrong to conclude that they should have been added to the expedited trial proceedings in the Moyse Action, given the procedural history leading up to the trial.
- (7) in any event, in his application of the principles of cause of action estoppel, the Motions Judge erred in law by failing to recognize that barring the Action on this basis would cause injustice to Catalyst.

12. With respect to the determination that the US Investors and Globalive were “privies” of WestFace for the purpose of “issue estoppel” and “cause of action estoppel”, the Motions Judge erred in law for the following reasons:

(1) in law, in order for a non-party to be a privy with a named party to a legal proceeding, that person must have a right to participate in the proceeding , or must have a participatory interest in the outcome of the proceeding;

(2) none of the US Defendants or Globalive had any right to participate in the Moyse action;

(3) the outcome of the Moyse Action would not have subjected any of the US Defendants or Globalive to any liability: in law, they did not have any participatory interest in that proceeding;

(4) while individuals who were or had been associated with the US Investors and Globalive attended parts of the trial of the Moyse Action, they simply did so as witnesses called by WestFace to assist Westface’s defence to Catalyst’s allegations that Moyse had improperly disclosed and WestFace had improperly obtained and used confidential information belonging to Catalyst. They had no direct interestst in the Moyse Action.

(5) In these circumstances, it was an error of law to conclude that the US Investors and Globalive were “privies” of WestFace.

13. With respect to the determination that the Action was an abuse of process warranting a permanent stay in favour of all of the Defendants, the Motions Judge erred in law for the following reasons:

- (1) the doctrine of abuse of process applies in very limited circumstances;
- (2) for example, litigants can be denied the right to have the merits of legal proceedings decided at trial based upon an alleged abuse of process where the proceedings are “oppressive and vexatious,” and “violate the fundamental principles of Justice underlying the community’s sense of fair play and decency”.
- (3) similarly, if judicial proceedings are used for improper purposes--to harass a defendant or for reasons other than the assertions of legitimate rights – a proceeding can be stayed as an abuse of process;
- (4) the Motions Judge erred in law by failing to apply these principles and by holding that the principles of abuse of process applied to the Action;
- (5) the Motions Judge also erred in law by failing to give effect to the fact that this Action was always contemplated as a separate proceeding, that Justice Newbould barred Catalyst from expanding the issues to be determined in the expedited trial of the Moyses Action (or, at a minimum, Catalyst reasonably believed that he had done so),

that Catalyst had clearly stated its intention to commence a separate proceeding (and had negotiated terms of a release that allowed it to do so), and that the trial of the Moyse Action was conducted in a way that recognized and was limited by the foregoing procedural history;

(6) in these circumstances, it was an error of law to conclude that the doctrine of abuse of process applied to the Action.

14. In any event, even if any of the legal principles relied upon by the Motions Judge were applicable, in his application of the above principles, the Motions Judge further erred in law in the following ways:

(1) by failing to follow the legal criteria enunciated by the Supreme Court of Canada regarding the appropriate tests to apply in deciding to whether and when a litigant should be prevented from having a trial on the merits, because of such principles, and,

(2) by failing to consider and address Catalyst's alternative position that in any event, appropriate terms should be ordered to enable the Action to proceed.

15. The Motions Judge erred in law by determining that it was plain and obvious that the breach of contract claims against UBS and Globalive could not succeed.

16. The Motions Judge erred in law by failing to grant leave to Catalyst to amend its Statement of Claim against Globalive or UBS, where the record indicated that there were viable claims that could be pleaded against those defendants to rectify any deficiency in the existing pleading.

17. Such further and other grounds as counsel may advise and this Honorable Court may permit.

THE BASIS OF THE APPELLATE COURTS JURISDICTION IS:

1. Sections 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43;
2. The Judgement of Hainey permanently staying the Action and striking at Catalyst's Statement of Claim without leave to amend are final
3. Leave to appeal is not required

May 18, 2018

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Court of Appeal File No: CV-16-11595-00CL
Commercial List File No.

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Plaintiff/Appellant

and

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Defendants/Respondents

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at TORONTO

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LLC, SERRUYA PRIVATE EQUITY INC., NOVUS WIRELESS
COMMUNICATIONS INC., WESTFACE CAPITAL INC. and MID-
BOWLINE GROUP CORP.**

**Defendants
(Respondents in Appeal)**

**APPELLANT'S CERTIFICATE
(FORM 61C)**

The Appellant certifies that the following evidence is required for the appeal, in the
appellant's opinion:

The complete record that was before the Court from which this appeal is taken.

May 18, 2018

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