Court of Appeal File No.: C65431
Superior Court File No. CV-16-11595-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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 DEFENDANT UBS SECURITIES CANADA INC.

October 31, 2018

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PART I - OVERVIEW

1. The defendants in this action all brought motions to strike. These motions were heard together and granted by the motions judge, the Honourable Mr. Justice Hainey, in a comprehensive and well-reasoned decision that is entitled to deference from this Court. The appellant has advanced no compelling reason to override that deference.

2. UBS Securities Canada Inc. ("**UBS**") brought its motion pursuant to rules 21.01(b) and 21.01(3)(d) of the *Rules of Civil Procedure* and the Court's inherent discretion to stay abusive proceedings. The request that the action be struck as an abuse of process was made jointly by all defendants.

3. In a decision dated April 18, 2018, the motions judge correctly found that this action is a collateral attack on final determinations made by Newbould J. in *The Catalyst Capital Group Inc. v. Moyse* (the "**Moyse Action**"). In the Moyse Action, the appellant advanced related claims in respect of its attempted acquisition of the interests in WIND Mobile Corp. ("**WIND**") held by the respondent VimpelCom Ltd. ("**VimpelCom**"). UBS was engaged as an advisor to VimpelCom in respect of the sale of its interests in WIND.

4. As found by the motions judge, central issues that are directly relevant to the appellant's ability to succeed in this action were determined against it in the Moyse Action. By adding new defendants and asserting ostensibly different causes of action, which could have been asserted in the Moyse Action and are based on the same factual matrix, the appellant attempted to circumvent and re-litigate crucial and determinative findings which establish that no possible liability can arise from the allegations made in

the statement of claim, even if proven:

(a) There was "no chance that Catalyst would have successfully concluded a deal with VimpelCom";[1] and

(b) "Catalyst had no intention of closing a deal with VimpelCom if it could not obtain the concessions it was looking for from the Government and "from the start Government officials had made clear that no such concessions would be given."[2]

5. The motions judge made the direct factual finding that this action is an attempt by Catalyst to:

> relitigate why it failed to acquire Wind. This issue was "front and centre" in the litigation before Newbould J. It is also the main issue in Catalyst's Current Action. In my view, relitigation of this issue in this proceeding would impeach the integrity of the judicial system. It should not be permitted.[3]

6. This appeal relies primarily if not entirely on the premise that the findings made by Newbould J. in the Moyse Action were *obiter*. The appellant's main assertion is, in effect, that because Catalyst failed to establish liability, the trial judge was not required to make a determination in respect of causation. This does not make such findings *obiter*. The trial judge's finding that there was no chance Catalyst would have successfully concluded a deal with VimpelCom was directly relevant to the causes of action asserted in the Moyse Action. For Catalyst to succeed in this action, a court

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[1] *Catalyst Capital Group Inc. v. Moyse,* 2016 ONSC 5271 at para 131 ("**Moyse Decision**"); Appeal Book, Tab 4.
[2] *Ibid.* at paras 124 and 11(d).
[3] Reasons for Decision of Hainey J. dated April 18, 2018 (the "**Motion Decision**") at para. 88, Appeal Book at Tab 3.

would have to make factual findings on causation and damages that are inconsistent with the findings of Newbould J.

7. The UBS motion also raised a separate ground unique to the claim made against UBS, asking the motions judge to strike the breach of contract claim advanced against UBS, without leave to amend, on the ground that it discloses no reasonable cause of action.

8. The appellant alleges that VimpelCom and UBS acted in breach of a Confidentiality Agreement and an Exclusivity Agreement (both as defined below). UBS was not a party (and is not alleged to have been a party) to either agreement. The contention that UBS was "bound" by these agreements because VimpelCom was acting as agent to UBS in entering the agreements is unsupported by contract or agency law. (It is also inconsistent with the statement of claim, which asserts that UBS was acting as *VimpelCom's* agent.) UBS's role as advisor to VimpelCom did not make it a party to these agreements. The motions judge agreed that the breach of contract claim against UBS must accordingly be struck, and made no error in doing so.

PART II - THE FACTS

9. This Court is receiving written submissions from several respondents. To reduce duplication, this factum will only address issues specific to UBS's motion. In particular, UBS relies on the facts set out in the factum of VimpelCom and the facts relating to the Moyse Action set out in the factum of the respondent West Face Capital Inc. ("**West Face**"). UBS also adopts the submissions of VimpelCom and West Face as they relate to the standard of review and abuse of process.

10. The Catalyst Capital Group Inc. ("**Catalyst**") alleges in its statement of claim that VimpelCom and UBS acted in breach of (a) a Confidentiality Agreement dated March 21, 2014 among VimpelCom, Global Telecom Holdings S.A.E. and Catalyst (the "**Confidentiality Agreement**") and (b) an Exclusivity Agreement dated July 23, 2014 between Catalyst and VimpelCom (the "**Exclusivity Agreement**").[4] The parties to these agreements are not in dispute, consistent with the pleadings at paragraphs 28 and 43, respectively, of the statement of claim.[5]

11. Catalyst alleges that VimpelCom and UBS breached these agreements by engaging in discussions with a consortium of potential investors (the "**Consortium**"), including West Face, to negotiate an alternative deal for the WIND interests during the term of the Exclusivity Agreement.[6] Catalyst also alleges that the respondent Globalive Capital Inc. ("**Globalive**") passed Catalyst's confidential information to the Consortium, providing the Consortium an unfair advantage over Catalyst in the WIND negotiations.[7] When the term of the Exclusivity Agreement expired on August 18, 2014, Catalyst and VimpelCom had not reached agreement for the WIND acquisition. The Consortium, together with UBS and Globalive, is alleged to have engaged in a conspiracy to induce VimpelCom to breach the Exclusivity Agreement and to cause VimpelCom to cease negotiating with Catalyst.[8]

12. There is only one party responsible for Catalyst's failure to negotiate a deal with

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[4] Amended Amended Amended Statement of Claim, paras. 125-126, Respondent's Joint Compendium at Tab 4, page 94.
[5] *Ibid.* at paras. 28 and 43.
[6] *Ibid.* at paras. 103-109.
[7] *Ibid.* at paras. 95-102.
[8] *Ibid.* at paras. 110-113.

VimpelCom for its interest in WIND: Catalyst. Nevertheless the appellant has pursued repeated meritless litigation in respect of its own failure.

13. As set out in detail in the West Face factum, Catalyst commenced the Moyse Action on June 25, 2014, by seeking to enjoin Mr. Moyse, a former Catalyst employee hired by West Face, from disclosing Catalyst's confidential information to West Face.[9]

14. On September 16, 2014, the Consortium acquired VimpelCom's stake in WIND. Mid-Bowline Group Corp. ("**Mid-Bowline**") was incorporated as the purchaser.[10]

15. On October 9, 2014, Catalyst expanded the scope of the Moyse Action, alleging that Mr. Moyse had disclosed confidential information to West Face about Catalyst's negotiations with VimpelCom.[11]

16. Over a year later, in December 2015, Mid-Bowline commenced an application in the Ontario Superior Court of Justice (Commercial List) for approval of a Plan of Arrangement to effect the sale of WIND to an entity controlled by Shaw Communications Inc. ("**Shaw**").

17. Catalyst opposed the Plan of Arrangement. In doing so, it argued not only the issues raised in the Moyse Action and the claim for a constructive trust over West Face's interests in WIND, but also potential claims relating to breach of contract. As set out in paragraphs 82 to 89 of the VimpelCom factum, Newbould J. (a) determined that

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[9] Moyse Decision, *supra* note 1, at paras. 1, 76, Appeal Book at Tab 4.
[10] *Ibid.* at para. 31; *Re: Mid-Bowline Group Corp.*, 2016 ONSC 669 at paras 1, 3 and 18 (the "**Plan of Arrangement Decision**"); Respondents' Joint Compendium at Tab 8, pages 156-157 and 160.
[11] Affidavit of Andrew Carlson sworn December 7, 2016, para. 8, Respondents' Joint Compendium at Tab 56.1, page 448.

Catalyst's principal provided false testimony about when he learned about the potential contract claims; (b) determined it was "too late in the process" for the claims; and (c) affirmatively stated that the claims were barred by the Release (defined below) set out in the Plan of Arrangement.[12]

18. On February 3, 2016, following the reasons of decision of Newbould J., Catalyst consented to an Order giving effect to the Plan of Arrangement. The Plan of Arrangement included a release of "all actions, causes of action, claims or proceedings . . . based on or in any way relating to any Purchased Shares..." (the "**Release**").[13]

19. The Release is at section 4.5 of the Plan of Arrangement under the heading "Paramountcy". As described in the reasons for decision of Newbould J., the need for the Release in order to transfer clear title to the Purchased Shares (as defined) was the primary reason for the transaction being done by way of Plan of Arrangement. The Release requirement from Shaw was apparently triggered by Catalyst's claims in the Moyse Action and otherwise. The operative language is as follows:

> ...(iii) all actions, causes of action, claims or proceedings (actual or contingent and whether or not previously asserted) based on or in any way relating to any Purchased Shares or Options shall be deemed to have been settled, compromised, released and determined without liability except as set forth herein; provided, however, that nothing in this section 4.5 shall be construed to extinguish any right of The Catalyst Capital Group Inc. to assert any of the following matters, with the exception of any constructive trust or equivalent remedy over the Purchased Shares, which shall be deemed to have been settled, compromised, released and determined

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[12] *Ibid.* at paras 56 to 61.

[13] Order of Justice Newbould dated February 3, 2016, p. 5155-5167 (the "**Plan of Arrangement Order**"), Respondents' Joint Compendium at Tab 9, page 183.

> without liability, along with all other claims in this section 4.5:
>
> (a) its existing claims as asserted in the Amended Amended Statement of Claim [in the Moyse Litigation];
>
> (b) as against any person (as defined in the OBCA), any potential claim for tracing of the money received by West Face Capital Inc. from the disposition of its interest in the Corporation pursuant to the Arrangement; or
>
> (c) as against the Former Shareholders, any potential claim relating to their acquisition from VimpelCom Ltd. of their interest directly or indirectly in WIND Mobile Corp., including, to the extent permitted by law, for a tracing of the money received by them pursuant to the Arrangement.[14]

20. Shortly before the start of trial in the Moyse Action, and despite the Release, Catalyst issued the original statement of claim in this action. The *only* claim against UBS in this pleading was a bald allegation of breach of contract limited to the statement that UBS disclosed the Exclusivity Agreement to the Consortium. There was neither an allegation nor a suggestion that UBS was a participant in the Consortium's alleged conspiracy to induce VimpelCom to breach the Exclusivity Agreement.[15]

21. UBS delivered a notice of motion to strike the proceeding in its entirety (as against UBS) on the basis that there was no reasonable cause of action disclosed. Faced with the obvious deficiency of its pleading against UBS, Catalyst delivered an amended statement of claim, in which it alleged for the first time that UBS was a co-conspirator with the Consortium to induce VimpelCom to breach the Exclusivity Agreement.

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[14] *Ibid.*

[15] Statement of Claim, paras. 1(a), 5, 16, 25, 27, 31, 48, 49, 81, 84 and 92, Respondents' Joint Compendium at Tab 1.

Catalyst has failed to plead any motive or rationale for UBS to so conspire, or particulars in respect of the alleged conspiracy.[16]

PART III - ISSUES AND THE LAW

22. As it relates to UBS, the issues to be resolved on this appeal are as follows:

(a) Whether the motions judge correctly dismissed the action because it is an abuse of process; and

(b) Whether the motions judge correctly dismissed the claim against UBS for breach of contract without leave to amend.

A. The Action is an Abuse of Process

23. The motions judge determined that the doctrine of abuse of process, which may preclude a party from attempting to re-litigate a claim or issue which has already been determined, bars Catalyst from pursuing this action.[17] As the Supreme Court of Canada held in *Toronto (City) v. C.U.P.E., Local 79,* the court in every case has the inherent and residual discretion to "prevent an abuse of the court's process".[18] In addition, the *Rules of Civil Procedure* state that "[a] defendant may move before a judge to have an action stayed or dismissed on the ground that...the action is frivolous or vexatious or is

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[16] Amended Amended Amended Statement of Claim, *supra note 4*, paras. 67-72 and 93, Respondents' Joint Compendium at Tab 4, pages 83-85 and 88.
[17] Motion Decision, *supra note 3*, at paras. 85 to 88, Appeal Book at Tab 3.
[18] *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 SCR 77 at paras 35-38 (SCC) ("***C.U.P.E.***"); Respondents' Joint Book of Authorities at Tab 91.

otherwise an abuse of process of the court, and the judge may make an order or grant judgment accordingly."[19]

24. There are no enumerated prerequisite factors that must be met before the doctrine of abuse of process can be invoked.[20] Canadian courts have applied the doctrine of abuse of process where allowing the litigation to proceed would "violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice."[21]

25. Like *res judicata*, the doctrine of abuse of process may prevent a party from litigating issues that could have been, but were not, raised in earlier proceedings. However, unlike issue and cause of action estoppel, the abuse of process doctrine does not require that the parties be the same between the two proceedings. As the Nova Scotia Court of Appeal has stated:

> ...abuse of process by re-litigation has sometimes been described as a rule against litigation by instalment, or the rule in *Henderson* [(1843), 3 Hare 100]. 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 re-litigation, 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 re-litigate a case because counsel failed to raise an argument which the party wanted to raise or re-litigate an issue indirectly by "a cleverly camouflaged effort."[22]

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[19] *Rules of Civil Procedure*, RRO 1990, Reg 194 at Rule 21.01(3)(d). See also: Rule 25.11 and *Courts of Justice Act*, RSO 1990 c C. 43 at s. 106 re stay of proceedings.
[20] *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para 40; Respondents' Joint Book of Authorities at Tab 12.
[21] *C.U.P.E., supra* note 18, at para. 37, Respondents' Joint Book of Authorities at Tab 91.
[22] *R. v. Gough*, 2006 NLCA 3 at para 49 (quoting Donald J. Lange, *The Doctrine of Res Judicata in Canada*, (Toronto: Butterworths, 2000), at p. 361) (Emphasis added); Respondents' Joint Book of Authorities at Tab 82.

26. The appellant contends in paragraphs 77 to 82 of its factum that the doctrine of abuse of process "is intended to prevent the raising of issues as it relates to the same cause of action previously determined *and not a separate cause of action.*" (emphasis added) The appellant's authorities do not support such a narrow application of the doctrine, which would render it a meaningless addition to the doctrines of issue and cause of action estoppel. Unlike the present action, neither of the cases relied upon by the appellant would require the court to make findings inconsistent with a prior judgment in order to meet the necessary elements of the causes of action asserted.

27. This action is the classic example of litigation by installments and demonstrates repeated abuse of the court's process. Catalyst has made strategic decisions to pursue some claims against certain parties while foregoing others until later. Newbould J. has called its conduct "tactical";[23] accused it of delay and "l[ying] in the weeds";[24] and made the judicial determination that its witnesses were unreliable and not forthcoming.[25] Catalyst objected to the Plan of Arrangement and has repeatedly amended its pleadings, in this Action and the Moyse Action.

28. Catalyst clearly lumped UBS into its original Statement of Claim as an afterthought, alleging only that UBS breached contracts to which it was not a party. Faced with a motion to strike to which there was no possible response, only then did Catalyst advance the unsupported theory that UBS was in conspiracy with the Consortium to induce VimpelCom to breach the Exclusivity Agreement. No

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[23] Plan of Arrangement Decision, *supra note 10*, at para. 33, Respondents' Joint Compendium at Tab 8, page 164.
[24] *Ibid.* at para. 59.
[25] *Ibid.*

explanation is provided as to why UBS, as advisor to VimpelCom, would participate in this conspiracy. These amendments provide a further demonstration that this litigation is frivolous and tactical, and should be struck.[26]

29. The issues which form the basis for this action have already been thoroughly canvassed before Newbould J. in the Moyse Action. While the Moyse Action did not, because of a tactical decision by Catalyst, include claims of breach of contract and conspiracy against UBS, the Moyse Action dealt directly with the reasons why Catalyst did not complete a transaction with VimpelCom. These findings from the reasons for decision of Newbould J. in the Moyse Action make it impossible, without inconsistent findings of fact, for a court to find that the conduct alleged against UBS caused damages to Catalyst:

(a) West Face independently knew that "VimpelCom wanted a clean exit without regulatory issues getting in the way" based on its own deal discussions and not because of confidential information it received about the Catalyst bid during the exclusivity period;[27]

(b) There was "no chance that Catalyst would have successfully concluded a deal with VimpelCom";[28] and

(c) "Catalyst had no intention of closing a deal with VimpelCom if it could not obtain the concessions it was looking for from the Government and

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[26] *Bear v. Merck Frosst Canada Co.*, 2011 SKCA 152 at paras 81-83; Respondents' Joint Book of Authorities at Tab 11.
[27] Moyse Decision, *supra note 1*, , at para. 109, Appeal book at Tab 4.
[28] *Ibid.* at para 131.

> "from the start Government officials had made clear that no such concessions would be given."[29]

30. While the motions judge was not prepared to decide on the motion below whether the Release barred Catalyst's action against VimpelCom and UBS without further evidence of the factual matrix surrounding the Release, the fact that Catalyst consented to the Plan of Arrangement and is bound by the Release is also relevant to the application of the doctrine of abuse of process. In this regard, UBS adopts the submissions at paragraphs 64 to 83 of VimpelCom's factum.

31. None of the carve-outs in the Release are applicable to Catalyst's present action. The Release is open-ended and is driven by its subject matter - the Purchased Shares, and any claim based on or in any way relating to the Purchased Shares, which are defined as "the issued and outstanding shares in the capital of [Mid-Bowline]", the purchaser of VimpelCom's interests in WIND.

32. To permit Catalyst to proceed with its action in the face of the decision of Newbould J. in the Moyse Action and the Release would not only sanction the quintessential "litigation by installments", it would do so in circumstances where Newbould J. has made factual and legal determinations that would have to be overridden for Catalyst to prove damages. Catalyst can point to nothing that prevented it from bringing these claims earlier, either as part of or parallel to the Moyse Action. It chose not to do so. Catalyst should not be given another kick at the can. Allowing this

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[29] *Ibid.* at paras 124 and 11(d).

action to proceed would be antithetical to judicial economy, finality and, most importantly, the integrity of the administration of justice.

B. The Claim Against UBS for Breach of Contract Must be Struck

i. Principles Applicable to Motions to Strike

33. Pursuant to rule 21.01(b) of the *Rules of Civil Procedure*, a judge may "strike out a pleading on the ground that it discloses no reasonable cause of action".[30] Rule 21.01(b) is designed to "test whether a plaintiff's allegations state a legally sufficient or substantively adequate claim".[31] A motion to strike should be granted where it is "plain and obvious" that the pleading discloses no reasonable cause of action.[32] That test is met where (a) the plaintiff pleads allegations that do not give rise to a recognized cause of action; (b) the plaintiff fails to plead a necessary element of a recognized cause of action; or (c) the allegations in the pleading are simply conjecture, assumptions or speculation unsupported by material facts.[33]

34. In considering the impugned statement of claim, the motions judge must accept well-pleaded factual allegations as true for the purposes of the motion to strike, but need not accept factual allegations that are patently ridiculous, incapable of proof, or contradicted by documents relied on by the plaintiffs in their pleading.[34] As noted in *Boudreau v. Bank of Montreal*, "[a] pleading which contains an "untenable plea" in law

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[30] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 21.01(1)(b).
[31] *Aristocrat Restaurants Ltd. v. Ontario*, 2003 CarswellOnt 5574 (WL Can) at para 16 (SCJ); Respondents' Joint Book of Authorities at Tab 9.
[32] *Ibid.* citing *Hunt v. T& N plc*, [1990] 2 SCR 959 at para 33 (SCC).
[33] *Mitchell v. Bentley*, [2008] OJ No 5404 (QL) at para 8 (SCJ); Respondents' Joint Book of Authorities at Tab 66.
[34] *Boudreau v. Bank of Montreal*, 2012 ONSC 3965 at para 14; Respondents' Joint Book of Authorities at Tab 18.

may be struck. An untenable plea is one "that is clearly impossible of success at law, it has no legal potential whatsoever, that is clearly unviable or unachievable at law" or raises no genuine issue of law. Such an untenable plea is frivolous, vexatious and an abuse of process of the court."[35]

ii. The Statement of Claim Does Not Disclose a Cause of Action against UBS for Breach of Contract

35. It is plain and obvious that the statement of claim does not disclose a reasonable cause of action against UBS for breach of contract.

36. The motions judge referenced *McCarthy Corp. PLC v. KPMG LLP* for the requirements for pleading breach of contract:

> A claim for breach of contract must contain sufficient particulars to identify the nature of the contract, the parties to the contract and the facts supporting privity of contract between the plaintiff and defendant, the relevant terms of the contract, which term or terms was breached, and the damages that flow from that breach. It must also plead clearly who breached the term, and how it was breached.[36]

37. The motions judge determined that Catalyst has not pleaded any of these elements against UBS in the statement of claim.[37] UBS is not a party to either the Exclusivity Agreement or the Confidentiality Agreement. The motions judge rejected Catalyst's submission that VimpelCom entered into the Confidentiality Agreement as agent for UBS because UBS was included in the definition of "Authorised Person".

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[35] *Ibid.* at para 17.
[36] *McCarthy Corp. PLC v. KPMG LLP*, (2007), 154 A.C.W.S. (3d) 340, 2007 CarswellOnt 35 (Sup. Ct. [Commercial List]), Respondents' Joint Book of Authorities at Tab 62.
[37] Motions Decision, *supra note 3*, at para. 117, Appeal Book at Tab 3.

38. The parties to the Confidentiality Agreement are set out at paragraph 28 of the statement of claim. UBS is not one of them. The parties to the Exclusivity Agreement are set out at paragraph 43 of the statement of claim, and again, UBS is not one of them.

39. Neither the inclusion of UBS as an "Authorised Person" in the Confidentiality Agreement nor the allegation that UBS was VimpelCom's agent or advisor serves to create privity between UBS and Catalyst to support a cause of action. As aptly stated in *Napev Construction Ltd. v. Lebedinsky*, cited by the motions judge, "[i]t is trite law that a stranger to a contract cannot be sued on that contract...The reason is simple. A person can be sued for breach of contract only when he or she has agreed to accept the obligations or duties created by the contract."[38] The exception to this rule is that a principal may be sued where the *agent* contracts *on behalf of the principal* (not vice versa).[39]

40. Because an agent is acting for and on behalf of one's principal, any acts of the agent are, in effect, those of the principal. The doctrine of privity does not apply where a party contracts as agent for another:

> There is ... a clear exception to the privity rule in agency relationships. Where a contracting party is an agent for a principal not a party to a contract, the principal may directly sue or be sued. The reason is that the agent is the mere conduit for the principal and for that reason, the contract is that of the principal and not the agent.[40]

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[38] *Napev Construction Ltd. v. Lebedinsky*, 1984 CarswellOnt 725 (WL Can) at para 21 (HCJ); Respondents' Joint Book of Authorities at Tab 70.
[39] *Ibid.* at para 22.
[40] *Ibid.*

41. Catalyst's claim against UBS for breach of contract is inconsistent with longstanding rules of agency. Even if UBS had entered into the Exclusivity Agreement and the Confidentiality Agreement as agent for VimpelCom, it could not be sued under either contract. Here, UBS is even further removed from any contractual relationship with Catalyst, not having entered into either contract at all. Based on the allegations in the statement of claim, UBS's contractual relationship was with VimpelCom, not Catalyst. As UBS is not a party to either agreement in any capacity, it cannot have liability for breach of contract.

42. The motion judge correctly determined that the claim against UBS for breach of contract is not tenable and must be struck, without leave to amend. Leave to amend a defective pleading should only be granted if there are amendments which would disclose a cause of action tenable in law. The motions judge has discretion whether to grant leave to amend, and it should not be granted where it is plain and obvious that the cause of action cannot succeed and cannot be corrected by amendment. There are no amendments that can be made to the statement of claim that would produce a viable cause of action for breach of contract against UBS, because UBS was not a party to the relevant agreements.[41]

PART IV - ORDER REQUESTED

43. For all of the foregoing reasons UBS respectfully requests that the appeal be dismissed with costs.

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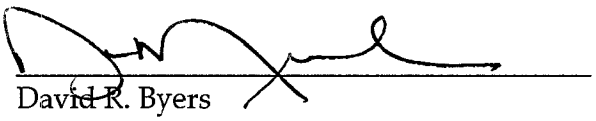
[41] *Jack v. Canada (Attorney General)*, 2004 CarswellOnt 3255 (WL Can) at paras 23-24 (SCJ); Respondents' Joint Book of Authorities at Tab 51.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of October, 2018.



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SCHEDULE "A"

LIST OF AUTHORITIES

#	JBOA Tab	Case
1.	91.	*Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 SCR 77 (SCC)
2.	12.	*Behn v. Moulton Contracting Ltd.*, 2013 SCC 26
3.	82.	*R. v. Gough*, 2006 NLCA 3
4.	11.	*Bear v. Merck Frosst Canada Co.*, 2011 SKCA 152
5.	9.	*Aristocrat Restaurants Ltd. v. Ontario*, 2003 CarswellOnt 5574 (WL Can) (SCJ)
6.	66.	*Mitchell v. Bentley*, [2008] OJ No 5404 (QL) (SCJ)
7.	18.	*Boudreau v. Bank of Montreal*, 2012 ONSC 3965
8.	62.	*McCarthy Corp. PLC v. KPMG LLP, (2007), 154 A.C.W.S. (3d) 340, 2007 CarswellOnt 35 (Sup. Ct. [Commercial List])*
9.	70.	*Napev Construction Ltd. v. Lebedinsky*, 1984 CarswellOnt 725 (WL Can) (HCJ)
10.	51.	*Jack v. Canada (Attorney General)*, 2004 CarswellOnt 3255 (WL Can) (SCJ)

SCHEDULE "B"
RELEVANT STATUTES

***Rules of Civil Procedure*, RRO 1990, Reg 194 at Rules 1.04(1), 21.01(1)(b), 21.01(3)(d), 25.11, 37 and 57**

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 Any Party on a Question of Law

21.01 (1) A party may move before a judge,

...

> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

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. R.R.O. 1990, Reg. 194, r. 21.01 (3).

...

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. R.R.O. 1990, Reg. 194, r. 25.11.

...

***Courts of Justice Act*, RSO 1990, c C.43 at s. 106 and s. 131(1)**

Stay of proceedings

106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just. R.S.O. 1990, c. C.43, s. 106.

...

Costs

131 (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. R.S.O. 1990, c. C.43, s. 131 (1).

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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