Court File No. CV-16-11272-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

COSTS SUBMISSIONS OF THE PLAINTIFF

September 19, 2016

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COSTS SUBMISSIONS OF THE PLAINTIFF

(A) Overview

1. In June 2014, The Catalyst Capital Group Inc. ("**Catalyst**") commenced an action against Brandon Moyse ("**Moyse**") and West Face Capital Inc. ("**West Face**") to remedy a clear and intentional breach of Moyse's employment contract. A few months after the action commenced, West Face acquired Wind Mobile, the last investment opportunity Moyse worked on while he was employed at Catalyst.

2. In light of the dishonest conduct that had already come to light in the action, it was eminently reasonable for Catalyst to link West Face's hiring of Moyse in willful contravention of his employment contract and its subsequent purchase of Wind. Catalyst amended its claim accordingly.

3. On August 18, 2016, after a six-day summary trial, this Court dismissed Catalyst's action.

4. Catalyst acknowledges that West Face is entitled to costs, but it does not agree that it is entitled to costs on a substantial indemnity scale. In fact, Catalyst has offered to pay West Face's partial indemnity costs without a discount, but West Face has refused to accept the offer.

5. Catalyst also acknowledges that Moyse is entitled to some costs. However, Moyse's undisputed dishonest conduct in 2014, both before and after the action was commenced, and his questionable conduct, which was discovered by the ISS in 2015, is the reason that Catalyst had to pursue a complete determination of its rights in Court. In light of this conduct, the costs claimed by Moyse are neither fair nor reasonable. Further, if this Court were to grant substantial indemnity

costs to Moyse, it would incentivize other litigants to take evidentiary decisions into their own hands and potentially delete relevant evidence without penalty.

6. Catalyst submits that the fair and reasonable costs for this action are as follows:

(a) West Face: $843,246.50 (inclusive of disbursements and HST); and

(b) Moyse: $100,000 (inclusive of disbursements and HST).

(B) Substantial Indemnity Costs Not Appropriate

7. Neither West Face nor Moyse is entitled to substantial indemnity costs. Catalyst pursued this case to trial in good faith in an effort to force West Face and Moyse to account for their conduct. The fact that the claim did not succeed is not a sufficient reason to award costs on a higher scale.

(i) Substantial Indemnity Costs Only Appropriate to Admonish Improper Conduct

8. Substantial indemnity costs are only appropriate "where a party has conducted itself improperly".[1] As Epstein J.A. writes in *Blue Circle Canada*:

> Of course, a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counter-production conduct, on the other. The former, the thrust and parry of the adversary system, does not warrant sanction: the latter well may.[2]

(ii) Catalyst's Suspicions of West Face and Moyse Were Reasonable

9. Catalyst did not take steps to unnecessarily lengthen the proceedings. Moreover, it was reasonable for Catalyst to pursue its claim. During the injunction proceedings in Fall 2014, Justice Lederer found that Catalyst's confidential information, the investment memoranda that were the

[1] *Clarington (Municipality) v Blue Circle Canada Inc*, 2009 ONCA 722 at para 45, Moyse Cost Submissions at **Tab 6.**
[2] *Blue Circle, supra* at para 45, Moyse Cost Submissions at **Tab 6**.

subject of testimony at trial, had been communicated to West Face and West Face failed to disclose this fact to Catalyst:

> What is clear from this review is that, despite their assurances that there was no reason for concern, West Face and Brandon Moyse were both aware that memos, regarded by West Face as confidential, had been sent by Brandon Moyse to Thomas Dea with the e-mail of March 27, 2014. The memos, as delivered, each say on the first page, "Confidential" and "For Internal Discussion Purposes Only". There can have been little doubt that West Face would have and did understand the perspective of those at Catalyst. Having received the memos, Thomas Dea circulated them to the other partners and a Vice-President at West Face. He did this understanding that the information was confidential and of the concern associated with its disclosure.
>
> […]
>
> What is apparent is that both West Face and Brandon Moyse did not provide information or respond to the concerns of Catalyst, in a meaningful way, until the evolution of this motion required them to do so. They waited until Catalyst discovered that information it considered to be confidential had been delivered before acknowledging there was an issue and then proclaimed that, based on their analysis, the material should not be considered to be confidential.[3]

10. Justice Lederer held that both West Face and Moyse had provided Catalyst with misleading assurances that their conduct was proper and innocent. Justice Lederer also held that neither defendant came to the injunction proceeding with clean hands:

> Now, as part of the position taken on this motion, counsel for West Face and Brandon Moyse, submit that, in the absence of any immediate proof, the court should accept the assurances of Brandon Moyse that his accessing files of Catalyst between March 28, 2014 (two days after he met with Thomas Dea) and May 26, 2014 (two days after he resigned from Catalyst) was, in every respect, proper, innocent and should be of no concern to Catalyst.

[3] *The Catalyst Capital Group Inc. v Moyse*, 2014 ONSC 6442 at paras 13 and 22 [*Catalyst 2014*] [**Tab 5**].

> I repeat what was said at the outset. An injunction is an equitable remedy. Reliance on that premise is challenged where the assurances of parties who seek what equity offers are, based on past actions, open to question.[4]

11. Justice Lederer concluded that previous representations of no wrongdoing by West Face and Moyse made to Catalyst were difficult to take at face value:

> As matters have developed:
>
> • **where West Face and Brandon Moyse provided assurance that no confidential information had been or would be received by West Face, material that Catalyst believes to be confidential had been delivered to West Face by Brandon Moyse**; and,
>
> • where Brandon Moyes challenged Catalyst on the basis that the allegation that he had maintained confidential information of Catalyst on his 'personal devices' was only speculation and innuendo, he has subsequently found such documents on a personal computer.[5]

12. Catalyst's suspicions were further supported by the subsequent discovery that Moyse had deleted his web browser history from his computer and launched (and arguably used) Scrubber software the night before his computer was forensically imaged pursuant to a consent Court order. In the face of this conduct, which in the context of this action poured fuel on the fire, it was reasonable for Catalyst to proceed to trial to test the veracity of Moyse's claim that he had not communicated confidential information concerning Wind to West Face.

(iii) No Basis to Award Substantial Indemnity Costs to West Face

13. In its lengthy submissions, West Face has not articulated a credible basis for an award of substantial indemnity costs. West Face argues that Catalyst's act of correcting an answer to an undertaking shortly before trial and the media coverage about the trial are sufficient to ground an award of substantial indemnity costs. Neither justifies any such outcome.

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[4] *Catalyst 2014* at paras 44-45 **[Tab 5]**.
[5] *Catalyst 2014* at para 43 [emphasis added] [**Tab 5**].

14. Moreover, in light of Catalyst's with prejudice offer to pay West Face's partial indemnity costs, the Court should view West Face's insistence on seeking substantial indemnity costs on the basis of these thin arguments with suspicion.

15. West Face points to James Riley's correction of an undertaking response prior to trial about negotiations of a break fee with VimpelCom. West Face's argument is a blatant attempt to invite this Court to make new findings on the significance of the break fee in order to interfere with a separate action that Catalyst commenced against West Face and others (including VimpelCom) prior to the hearing of the trial of this matter. The other action, which by this Court's own order is not before this Court, concerns West Face's alleged conspiracy with its fellow consortium members to induce VimpelCom to breach its exclusivity agreement with Catalyst. Evidence concerning VimpelCom's motivation for seeking the break fee at the eleventh hour were not before this Court and it would be inappropriate in the circumstances of a pending related action for this Court to make findings on this issue.

16. Catalyst submits that West Face is asking this Court to interfere with the other action by ruling on the issue of whether the break fee was a "critical" issue that, if learned of earlier, would have been significant. This Court should not take West Face's bait. This Court ruled in January 2016 that it would not consider or rule on any issue concerning a potential inducing breach of contract claim:

> It is too late in the process and the provision in the amended plan of arrangement that would prevent such a claim being made is fair and reasonable. **The trial of the issue I have ordered is not to consider any such claim.**[6]

[6] *Re Mid-Bowline Group Corp*, 2016 ONSC 669 at para 61 [**Tab 3**].

17. Despite this direction, which was made at West Face's request at the application heard in January 2016, West Face now asks this Court to comment on the issue for which no evidence has been adduced at trial in a costs award. The Court cannot, and should not, do so.

18. In any event, the correction of Riley's answer to the undertaking concerning a break fee has no bearing on the issue of costs. Riley corrected the undertaking before trial. He explained the reason for the correction in his oral evidence at trial. This Court found that Riley's evidence was given in a "straightforward manner".[7] There is no reason to question Riley's explanation or to now hold the conduct of correcting an answer to undertaking as sufficient grounds to award costs on an elevated scale.

19. The other reason West Face seeks substantial indemnity costs is because of the actions of non-parties. West Face is angry that *The Globe and Mail* and *Financial Post* devoted column space to this dispute.[8] West Face accuses Catalyst of "disseminating" its pleadings to the media in an "ancillary" campaign against West Face. West Face goes one step **further** and baldy suggests that Catalyst **controlled** Canada's two leading financial newspapers:

> Remarkably, in the period after the media's attention was first drawn to the parties' dispute, Catalyst sought to ensure that the press coverage would be entirely one-sided in nature, including by threatening to sue West Face and its counsel should they maintain West Face's public denial of Catalyst's allegations.[9]

20. Catalyst does not control *The Globe and Mail* or the *Financial Post* or the stories that either newspaper publishes about publicly available documents, namely pleadings filed with the Court. It

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[7] Reasons for Decision at para 13 **[Tab 7**].
[8] West Face conveniently ignores the fact that there were just as many media articles devoted to its side of the story.
[9] West Face Cost Submissions at para 81.

is unreasonable for Catalyst to be punished on the basis that the media reported on its pleadings, especially when other articles, which took a contrary view, were published by these same papers.

21. In conclusion, this Court should be wary of West Face's real motivation for refusing Catalyst's with prejudice offer to pay its partial indemnity costs without discount.[10] West Face has already indicated it intends to bring an unspecified motion in the other action in light of this Court's reasons for judgment.[11] The Court should avoid making further determinations of fact in a costs award that West Face seeks for the purpose of bolstering its defence to a separate action.

22. Notably, West Face's costs, which are not properly particularized, vastly exceed Catalyst's partial indemnity costs. The hours claimed are excessive. Disbursements are claimed for costs not normally awarded by this Court. Yet in the face of a wholesale acceptance of its partial indemnity costs, West Face insists on pursuing a thin claim for substantial indemnity costs. The Court should not allow West Face to abuse the costs submissions process for an ulterior motive. Costs on a substantial indemnity basis should not be awarded to West Face.

(iv) No Basis to Award Substantial Indemnity Costs to Moyse

23. Likewise, Moyse has not articulated a proper basis to ground his request for an award of substantial indemnity costs. As submitted above, Catalyst's conduct in pursing this litigation to trial was reasonable in light of Moyse's conduct before and during the proceeding.

24. Moyse's submission that Catalyst made "baseless" allegations against him is incorrect. Catalyst commenced this action in June 2014 to enforce restrictive covenants in its employment agreement with Moyse. In the course of injunction proceedings, Catalyst learned that:

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[10] Email from Rocco DiPucchio to Matthew Milne-Smith, dated September 19, 2016 [**Tab 2**].
[11] Email from M. Milne-Smith to A. Winton dated September 13, 2016, attached at **Tab 8.**

(a) In March 2014, Moyse sent Catalyst's proprietary and confidential investment memoranda to West Face and deleted evidence of this transmission;[12]

(b) The day after he sent this information to Tom Dea, Moyse began reviewing Catalyst's confidential investor letters concerning a closed fund; and

(c) The day after he scheduled an interview with Greg Boland in April 2014, Moyse transferred confidential documents concerning the Stelco transaction (in which Catalyst and West Face were adverse in interest) to his Dropbox account.

25. Moyse's subsequent conduct while litigation was contemplated or ongoing is also troubling. This conduct included the following:

(a) Moyse wiped his Catalyst-issued Blackberry in the face of litigation with Catalyst;[13]

(b) The morning of the interim motion, Moyse bought the software suite that included the SecureDelete program;

(c) The night before his personal computer was to be forensically imaged pursuant to a consent Court order, Moyse launched SecureDelete, deleted his web browsing history and ran registry cleaner software;[14]

(d) Moyse was untruthful in affidavits throughout this proceeding about a variety of topics, including his role on the Wind team while at Catalyst and the documents that he reviewed and possessed;[15] and

(e) Moyse failed to disclose personal emails with a Catalyst employee about the Wind transaction while Moyse was on vacation in Southeast Asia in either his affidavit of documents on July 22, 2014, or in his supplementary affidavit of documents sworn on July 29, 2014. These emails, which contradicted his affidavit evidence, were only produced after the parties attended a 9:30 a.m. appointment on April 13, 2016 to address the issue of Catalyst's request for a further and better affidavit of documents.

26. Catalyst is not attempting to re-litigate the issues of Moyse's conduct or challenge this Court's findings in its Reasons for Judgment. However, Moyse's undisputed conduct belies the argument that Catalyst acted in bad faith in its decision to take this action to trial.

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[12] Reasons for Decision at para 57 **[Tab 7**].
[13] Reasons for Decision at para 132 **[Tab 7**].
[14] Reasons for Decision at para 133 **[Tab 7**].
[15] Reason for Decision at para 16 **[Tab 7**].

27. Moyse is in many ways the author of his own misfortune. He professed at his first cross-examination not to know what made the investment memos confidential. He made the deliberate decision to wipe his Blackberry, delete his browsing history and download the SecureDelete program with the knowledge that he was engaged in the litigation process and that his computer was about to be forensically imaged. Although this Court held that Moyse did not "intend" to breach the Court order to preserve information, Moyse is not the innocent victim of a vendetta – he engaged in questionable conduct that supports Catalyst's decision to take its claim to trial.

28. Awarding substantial indemnity costs to Moyse would incentivize other litigants to make reckless decisions about deleting documents that they subjectively "thought" were irrelevant. It would encourage defendants to act first and worry about the consequences later. Litigants will seek refuge under the defence of subjective ignorance and opposing parties will be penalized for pursuing the issue of spoliation based on a strong arguable case.

(C) Moyse's Partial Indemnity Costs Are Excessive

29. Catalyst acknowledges that Moyse is entitled to some costs on a partial indemnity basis, however, when comparing Catalyst's bill of costs to Moyse's claimed costs, it is evidence that Moyse's claimed costs are excessive.

30. Catalyst prepared a bill of cost for the trial on a partial indemnity scale to assess the reasonableness of West Face and Moyse's claimed costs. Rule 57.01(1)(0.b) states that the appropriate scale of costs is influenced by the "amount of costs that an unsuccessful party could

reasonably expect to pay". The best measure of what the unsuccessful party could expect to pay is the amount it expected to receive itself.[16]

31. On a partial indemnity basis Catalyst's costs are $**595,340** *with* disbursements and HST.[17] This action was effectively a summary proceeding. The parties did not incur the costs of a normal litigation proceeding with extensive discoveries or procedural motions. Disputes between the parties were resolved at 9:30 a.m. appointments rather than with fully briefed motions. The parties also drew on an extensive record that existed prior from previous motions. The costs award must reflect this summary process.

32. In contrast, Moyse's bill of costs does not reflect the costs of defending a six-day trial on the Commercial List with two witnesses.

33. Catalyst's counsel time totalled $519,953.55. In contrast, Moyse claims $339,500.18, nearly as much as Catalyst and half as much as West Face.[18] This is unreasonable. Moyse's case took up a fraction of the proceeding. He only called two witnesses in chief and only cross-examined four witnesses. Moyse's costs should be drastically lower than the costs claimed.

34. Catalyst submits that the costs claimed by Moyse are excessive in relation to Catalyst's own costs:

(a) Moyse claims 15 hours ($5,925 on partial indemnity) for "Commercial List attendances". There were six attendances by the parties at the Commercial List since January 2016. At no time did the parties spend more than an hour at a particular attendance, and no costs were sought, awarded or reserved for those attendances.

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[16] *Smith Estate v Rotstein*, 2011 ONCA 491 at paras 54-55 [**Tab 4**].
[17] Catalyst Bill of Costs on a Partial Indemnity Basis [**Tab 1**].
[18] Moyse has claimed $339,500.18 and West Face has claimed $702,155.18 for counsel time.

(b) Moyse claims 151.4 hours ($49,068 on partial indemnity) for oral discoveries. This is distinct from the hours claimed for reviewing each party's productions. The only "discovery" that Moyse conducted was of Catalyst's witness for thirty minutes. Moyse only gave six undertakings during his one-day discovery. It is impossible for one day of defending a witness and preparing for a 30-minute oral discovery to require 140 hours of preparation.

(c) Moyse claims 218.3 hours ($59,540.50 on partial indemnity) for direct and cross examination preparation. Again, Moyse only called two witnesses during trial and only cross examined four witnesses. Moyse claims over nine days of preparation time for these examinations. That is excessive by any account.

35. In light of these grossly excessive claims, this Court should carefully consider Moyse's bill of costs in relation to Catalyst's bill of costs in deciding the fair and reasonable quantum of costs.

(i) Moyse's Disbursements Are Excessive

36. It appears that Moyse included the cost of transcripts, $2,430.70, on its bill of costs twice. This is an error and should be corrected.

(ii) Moyse's Cost Entitlement

37. Catalyst's position is that the appropriate quantum of legal costs to award Moyse is $100,000, inclusive of disbursements and HST. This amount accords with the appropriate cost of a six-day trial on the Commercial List where the party only called two witnesses and cross-examined only four other witnesses.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of September, 2016.

Rocco DiPucchio / Andrew Winton / Brad Vermeersch

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Clarington (Municipality) v Blue Circle Canada Inc*, 2009 ONCA 722

2. *Smith Estate v Rotstein*, 2011 ONCA 491

3. *Re Mid-Bowline Group Corp*, 2016 ONSC 669

4. *The Catalyst Capital Group Inc. v Moyse*, 2014 ONSC 6442

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