CITATION: The Catalyst Capital Group Inc. v. Moyse, 2016 ONSC 554
DIVISIONAL COURT FILE NO.: 648/15
DATE: 20160122

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: The Catalyst Capital Group Inc. v. Moyse and West Face Capital Inc.

BEFORE: Swinton J.

COUNSEL: *Rocco Di Pucchio and Lauren Epstein,* for the Plaintiff (Moving Party)
Kent E. Thomson and Matthew Milne-Smith, for the Defendant West Face Capital Inc. (Responding Party)
Robert A. Centa, for the Defendant Brandon Moyse (Responding Party)

HEARD at Toronto: January 21, 2016

ENDORSEMENT

[1] The Catalyst Capital Group Inc. ("Catalyst") has brought a motion to extend time to bring a motion for leave to appeal and, if leave is granted, seeks leave to appeal two parts of an interlocutory order made by Glustein J. dated July 7, 2015:

1. the dismissal of the request for an order to authorize the Independent Supervising Solicitor ("ISS") to create and review forensic images of the corporate servers of the responding party West Face Capital Inc. ("West Face") and the electronic devices used by five individuals at West Face (the "Imaging Order"); and

2. the dismissal of a request for an order that the responding party Brandon Moyse be found in contempt because of his failure to comply with a court order (the "Contempt Order").

[2] In granting an extension of time, the court considers four factors. The overarching consideration is the justice of the case. Those factors are:

1. whether the moving party formed an intention to appeal within the relevant period;

2. the length of the delay and the explanation for it;

3. prejudice to the responding party; and

4. the merits of the appeal.

(See *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131 at para. 15.)

Intention to appeal in the relevant period

[3] I am satisfied that Catalyst formed an intention to appeal within the relevant period, as it filed a Notice of Appeal to the Court of Appeal on July 22, 2015, and it pursued that appeal.

The length of the delay and the explanation for the delay

[4] Two days after the Notice of Appeal was served, counsel for both West Face and Mr. Moyse informed counsel for Catalyst that Catalyst was in the wrong court, because the orders under appeal were interlocutory. Catalyst continued with its appeal, which required the responding parties to bring motions to quash the appeal.

[5] Sometime in October 2015, Catalyst consented to West Face's motion to quash, but it continued to oppose Mr. Moyse's motion. The Court of Appeal granted Mr. Moyse's motion to quash the appeal on November 17, 2015. The Notice of Motion seeking an extension of time to file a motion for leave and the Notice of Motion for leave to appeal were served November 27, 2015. The motions were heard January 21, 2016.

[6] The delay in this case has been lengthy. A motion for leave to appeal an interlocutory order must be brought within 15 days of the date of the order.

[7] Catalyst argues that the delay was caused by counsel's mistake about the appropriate appeal route. Counsel believed that the Contempt Order was a final order, and the interlocutory Imaging Order could be joined to the appeal of the Contempt Order pursuant to s. 6(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. That provision states:

> The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal.

Although West Face had raised the jurisdictional issue in July 2015 because the Contempt Order was interlocutory, it did not mention any problem with reliance on s. 6(2). Catalyst states that West Face first signalled the need to obtain leave to appeal the Imaging Order in its motion materials, which were served in September 2015.

[8] In my view, Catalyst has not adequately explained the delay, given the state of the law with respect to appeals to the Court of Appeal and the Divisional Court and the facts of this case.

[9] Catalyst is represented by experienced litigation counsel. With respect to the Imaging Order, Catalyst knew that the order was interlocutory and was advised on July 24, 2015 that jurisdiction was an issue. There is a long line of cases in the Court of Appeal applying s. 6(2), which permits an appeal to the Divisional Court to be joined with an appeal to the Court of Appeal when an appeal "lies to the Divisional Court." If the order under appeal is interlocutory, leave to appeal must first be obtained from a Superior Court justice (see, for example, *Albert v. Spiegel*, [1993] O.J. No. 1562 (C.A.) and *Waldman v. Thomson Reuters Canada Ltd.*, 2015

ONCA 53 at para. 17). Even if counsel did not know of this line of cases, it had notice by early September 2015 and still continued in the Court of Appeal.

[10] With respect to the dismissal of the Contempt Order, Catalyst was aware of the jurisdictional problem and had the case of *Simmonds v. Simmonds*, 2013 ONCA 479 on July 24, 2015. That case clearly states that the dismissal of a motion for contempt is an interlocutory order.

[11] Moreover, the decision of the Court of Appeal in the present proceeding applied the well known test for determining if an order is final or interlocutory found in *Hendrickson v. Kallio*, [1932] O.R. 675. The Court of Appeal concluded that on that test, "there can be no doubt that the dismissal of the contempt motion is interlocutory" (*The Catalyst Capital Group Inc. v. Moyse*, 2015 ONCA 784 at para. 11).

The merits of the appeal

[12] I turn now to the merits of the appeal, leaving prejudice to be discussed when I assess the justice of the case at the end of these reasons.

[13] In *Enbridge,* above, Gillese J.A. stated that "lack of merit alone can be a sufficient basis on which to deny an extension of time, particularly in cases such as this where the moving party seeks an extension of time to file a notice of leave to appeal, rather than an extension of time to file a notice of appeal…" (at para. 16).

[14] In *Enbridge,* Gillese J.A. considered whether the motion for leave to appeal was likely to be successful. Using the same approach, I conclude that the motion for leave to appeal would likely fail.

The Imaging Order

[15] The test for obtaining leave to appeal found in rule 62.02(4)(a) requires that there be a conflicting decisions – that is, different principles have been applied in the cases to decide a similar legal problem or to guide the exercise of discretion (*Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 (Div. Ct.)).

[16] Catalyst has identified no conflicting decision. The motions judge applied the test in rule 30.06. He did so in accordance with recognized legal principles and then, based on the facts before him, he exercised his discretion to refuse the order sought. Rule 62.02(4)(a) does not apply.

[17] With respect to rule 62.02(4)(b), there is no good reason to doubt the correctness of the order. The motions judge made an explicit finding, based on the record before him, that there was no evidence that West Face was failing to comply with its production obligations or intentionally destroying evidence (see paras. 52-57 of the Reasons). Accordingly, he concluded that it was not appropriate to make the order sought, which, I note, is an exceptional one.

[18] Catalyst makes much of the fact that Lederer J. made an order dated November 10, 2014 appointing an ISS to identify and review the forensic images from Mr. Moyse's electronic devices. Catalyst suggests that there is good reason to doubt the correctness of the Imaging Order, because the motions judge did not take into account the findings respecting West Face in the reasons for the decision of Lederer J. and the impact of Mr. Moyse's conduct on that order.

[19] I disagree. The decision of Lederer J. was made on the basis of a different evidentiary record, at a different stage of the litigation, and against a different party. Given the motions judge's findings that West Face was more than complying with its production obligations and there was no evidence that West Face had destroyed evidence, he reasonably refused to exercise his discretion to make the Imaging Order against West Face.

[20] Even if I were wrong in my conclusion on the first part of the test, the second part of the test requires that the moving party show the proposed appeal raises an issue of general importance. The proposed appeal raises no issue of law, since the motions judge applied established principles to the specific facts of this case. There is no issue of general importance raised.

The Contempt Order

[21] Again, Catalyst has failed to identify any conflicting decision for the purposes of rule 62.02(4)(a). The motions judge correctly set out the legal principles to be applied in a contempt proceeding at para. 59 of his Reasons.

[22] While Catalyst suggests that the motions judge applied a test for determining reasonable doubt and assessing credibility that conflicts with other case law, I do not agree. Catalyst is seeking to attack findings of credibility and the weighing of the evidence.

[23] With respect to rule 62.02(4)(b), again there is no good reason to doubt the correctness of the order. The motions judge carefully reviewed the evidence and made findings of fact that are clearly explained and are supported by the evidence.

[24] Catalyst argues that the motions judge erred in applying the test for a finding of contempt, as set out in ***Carey v. Laiken***, 2015 SCC 17, because he erred in his interpretation of paragraph 4 of the Consent Order of July 16, 2014. Paragraph 4 ordered West Face and Mr. Moyse to

> … preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to their activities since March 27, 2014, and/or relate to or are relevant to any of the matters raised in this action, except as otherwise agreed to by Catalyst.

Catalyst argues that this order clearly requires the preservation of all records relating to activities since March 27, 2014.

[25] The first part of the test set out in *Carey* requires the court to determine that the order allegedly breached is clear as to what is to be done or not done (at para. 33). In my view, the motions judge properly applied this part of the test.

[26] The motions judge gave his interpretation of this order at paras. 70 to 71 of his Reasons:

> [71] If the words "activities since March 27, 2014" were intended to encompass searching adult entertainment sites or any other non-litigation related activities, then I would agree with Moyse's submissions that the Consent Order would be ambiguous, as reasonable people could have a different understanding of whether non-work-related activities were to be included.
>
> [72] Catalyst does not strenuously submit that "activities" should be read as broadly as including adult entertainment internet searches. I agree with Moyse that deleting adult entertainment files is not caught by the word "activities" in the Consent Order as those activities would still need to be relevant to Moyse's conduct at Catalyst and/or with respect to issues raised in the litigation.

[27] When paragraph 4 is read as a whole and in the context of the Consent Order, the motions judge correctly held that "their activities since March 27, 2014" must refer to activities relevant to the action and, in particular, activities related to Catalyst, and it did not require Mr. Moyse to preserve all documents about all his activities since March 27, 2014, even if they had no relevance to the action.

[28] The motions judge concluded that Catalyst failed to prove beyond a reasonable doubt that Mr. Moyse deleted relevant information from the browsing history on his computer, or that he ran the Secure Delete program to delete relevant files from his computer. Those conclusions are supported by the evidentiary record. Moreover, the motions judge indicated that if Mr. Moyse had deleted information covered by the Consent Order, he would exercise his discretion and not find Mr. Moyse in contempt because Mr. Moyse acted in good faith.

[29] Moreover, this is not a case where the proposed appeal raises issues of public importance. The motions judge was dealing with a motion for civil contempt, a motion that is of significant interest to the immediate parties, but does not raise legal issues or issues affecting the administration of justice that warrant the attention of an appellate court. Accordingly, the leave to appeal motion would likely fail.

Prejudice to the responding parties and the justice of the case

[30] Mr. Moyse has been under the cloud of a contempt motion since February 2015. The allegations of misconduct are serious and damaging to his reputation and undoubtedly stressful because the motion sought that he be jailed. I am satisfied that he has suffered prejudice from the delay in pursuing the motion for leave in a timely way because of the nature of this proceeding.

[31] West Face argues that it has suffered prejudice because of the delay in this litigation and its potential impact on proceedings on the Commercial List concerning the sale of WIND Mobile. I accept that there is some prejudice, because the delay impedes the progress of the present litigation and, in turn, may affect litigation on the Commercial List.

[32] Given the delay in this case, the explanation for it, the prejudice (particularly to Mr. Moyse) and, most importantly, the lack of merit to the proposed motions for leave to appeal, the justice of the case does not require an extension of the time to bring a motion for leave to appeal. Accordingly, the motion for an extension of time to file the motion for leave to appeal is dismissed.

[33] The parties have agreed on costs. Catalyst shall pay costs of the motions for an extension of time and for leave to appeal to each of the responding parties, fixed in the total amount of $10,000.00 all in.

K. Swinton J.

Swinton J.

DATE: January 22, 2016