COURT OF APPEAL FOR ONTARIO

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2015 ONCA 784
DATE: 20151117
DOCKET: M45378 M45387 (C60799)

Hoy A.C.J.O., MacFarland, and Lauwers JJ.A.

BETWEEN

The Catalyst Capital Group Inc.

Plaintiff (Appellant/Responding Party)

and

Brandon Moyse and West Face Capital Inc.

Defendants (Respondents/Moving Party)

Rocco Di Pucchio, for the appellant/responding party

Kristian Borg-Olivier and Denise Cooney, for the respondents/moving party Brandon Moyse

Andrew Carlson, for the respondents/moving party West Face Capital Inc.

Heard: November 5, 2015

Motion to quash an appeal from the judgment of Justice B.T. Glustein of the Superior Court of Justice, dated July 7, 2015, with reasons reported at 2015 ONSC 4388.

Lauwers J.A.:

[1] The motion judge dismissed the motion of Catalyst Capital Group Inc. for a declaration that its former employee, Brandon Moyse, is in contempt of the July 16, 2014 order of Firestone J. for failing to preserve certain electronic records relating to Catalyst.

[2] The moving party, Mr. Moyse, seeks to quash Catalyst's appeal on the basis that the judgment appealed from is interlocutory and therefore falls within the jurisdiction of the Divisional Court under s. 19 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. For the reasons set out below, I would quash the appeal.

FACTUAL BACKGROUND

[3] Mr. Moyse is a former employee of Catalyst. He accepted employment with a competitor of Catalyst. Catalyst was concerned that he had or would impart its confidential information to his new employer.

[4] Eventually, on Catalyst's motion, Firestone J. issued an interim consent order for injunctive relief, dated July 16, 2014. The court ordered that "Moyse and [his new employer], and its employees, directors and officers, shall preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst." Paragraph 5 of this order provided:

> THIS COURT FURTHER ORDERS that Moyse shall turn over any personal computer and electronic devices owned by him or within his power of control (the "Devices") to his counsel, Grosman, Grosman and Gale LLP, ("GGG") for the taking of a forensic image of the data stored on the Devices (the "Forensic Image"), to be conducted by a professional firm as agreed to between the parties.

[5] Catalyst brought a motion for a declaration that Mr. Moyse was in contempt of the consent order.

MOTION JUDGE FOUND NO CONTEMPT

[6] The motion judge's reasons set out a lengthy review of the evidence. He was unable to find "beyond a reasonable doubt" that Catalyst had established that Mr. Moyse was in contempt. His specific findings are relevant to Catalyst's argument on this motion to quash.

[7] With respect to Mr. Moyse's actions in deleting the personal browsing history from his computer, the motion judge found, at para. 69: "there is no evidence to establish, beyond a reasonable doubt, that Moyse deleted relevant information as a result of deleting his personal browsing history and then running a registry cleaner to delete traces of the internet searches."

[8] With respect to Mr. Moyse's conduct in buying and using software to "scrub" files from his personal computer before delivering it, the motion judge stated, at para. 86:

> I cannot find that the above evidence supports a finding, beyond reasonable doubt, that Moyse breached the Consent Order by scrubbing relevant files with the Secure Delete program. There still remained 833 relevant documents on his computer, as well as the evidence on his computer of the ASO program, the Secure Delete folder, and the purchase receipts. The evidence is at least as consistent with Moyse's evidence that he loaded the ASO software and investigated the products it offered and what the use would entail, but he did not run the Secure Delete program.

ANALYSIS

[9] Mr. Moyse argues that an order dismissing a contempt motion is interlocutory for the purpose of an appeal, and therefore lies to the Divisional Court, with leave, under s. 19(1)(b) of the *Courts of Justice Act*. He relies on this court's brief endorsement in *Simmonds v. Simmonds,* 2013 ONCA 479, which was an appeal from an order of a motion judge dismissing a motion for a finding of contempt against the respondent's spouse in a family dispute. There, the motion judge found that the respondent had complied with the disclosure order in question. In *Simmonds,* this court accepted the respondent's argument that while an order finding contempt is final, the dismissal of the motion for contempt was interlocutory: the motion judge's finding was not binding on the trial judge. The court rejected the conclusion to the contrary found in *Pimiskern v. Brophey*, [2013] O.J. No. 505 (S.C.).

[10] Catalyst argues that the ruling precedent is this court's decision in *Sabourin and Sun Group of Companies v. Laiken*, 2013 ONCA 530, in which the court heard an appeal from a decision dismissing a contempt motion. That case was about the possible breach of a *Mareva* injunction. I observe that the court did not advert to the interlocutory/final distinction or to the question of jurisdiction at all. The issue appears not to have been argued.

[11] In fairness to the parties, this court's decisions on the final/interlocutory distinction have not been models of clarity. Much ink has been spilled, and court and counsel time wasted in exploring the nuances. But the root principle that all can and do accept was expressed by Middleton J.A in *Hendrickson v. Kallio*, [1932] O.R. 675:

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties -- the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the applications, but it is interlocutory if the merits of the case remain to be determined.

[12] This important case is one to which this court frequently returns. See, for example, *Waldman v. Thomson Reuters Canada Ltd.*, 2015 ONCA 53, MacFarland J.A. at para. 22. On the *Hendrickson v. Kallio* test, there can be no doubt that the dismissal of the contempt motion is interlocutory. The merits of the case remain to be determined.

[13] But Catalyst drills deeper and argues that in this case the outcome of the motion is effectively final in a significant dimension. It submits that the important point for the court to keep in mind is that it would not be open to a party who was unsuccessful in a contempt motion to revisit the contempt motion at trial. Counsel argues that the motion judge's decision that Mr. Moyse's conduct did not contravene the order is *res judicata,* and Mr. Moyse's conduct in deleting the

browser history, for example, "can't be re-litigated even in cross-examination." It is therefore final in the sense contemplated by the *Courts of Justice Act*.

[14] I disagree. The motion judge's findings are clear. He simply concluded that Catalyst had not proven, beyond a reasonable doubt, that Mr. Moyse breached Firestone J.'s order. There is nothing in the motion judge's decision that would prevent Catalyst from exploring, in Mr. Moyse's cross-examination at discovery or at trial, what he did with his computer, when he did it, why he did it, who assisted him (if anyone), how he did it and for what purpose or purposes. While the finding that Mr. Moyse was not in contempt may not itself be re-litigated, barring some new revelation, all of the factual issues between the parties may be fully and exhaustively explored at any discovery and at the trial.

[15] In the circumstances of this appeal, the principle in *Simmonds* applies. The order dismissing the contempt motion against Mr. Moyse is interlocutory, and therefore appealable to the Divisional Court, with leave, under s. 19(1)(b) of the *Courts of Justice Act*.

[16] I would quash the appeal without prejudice to Catalyst's right to seek leave to appeal to the Divisional Court. I would award Mr. Moyse costs fixed in the agreed amount of $5,000, all-inclusive.

Frances A

I agree Alexandra Hs ACJO

Released: DL

NOV 17 2015

I agree. Juriaefarland JA