

COURT OF APPEAL FOR ONTARIO

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2018 ONCA 283

DATE: 20180322

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Doherty, MacFarland and Paciocco JJ.A.

BETWEEN

The Catalyst Capital Group Inc.

Plaintiff (Appellant)

and

Brandon Moyse and West Face Capital Inc.

Defendants (Respondents)

Brian H. Greenspan, David C. Moore and Michelle Biddulph, for the appellant

Robert A. Centa, Kristian Borg-Olivier and Denise Cooney, for the respondent,
Brandon Moyse

Kent E. Thomson, Matthew Milne-Smith and Andrew Carlson, for the respondent,
West Face Capital Inc.

Heard: February 20 and 21, 2018

On appeal from the decision of Justice F. Newbould of the Superior Court of Justice, dated August 18, 2016, dismissing Catalyst's action, reported at 2016 ONSC 5271, and an application for leave and, if leave is granted, an appeal from the costs decision of Justice F. Newbould, dated October 7, 2016.

REASONS FOR DECISION

I

[1] The appellant, The Catalyst Capital Group Inc. (“Catalyst”), and the respondent, West Face Capital Inc. (“West Face”), two investment management firms, made separate efforts to acquire WIND Mobile Inc. (“WIND”) in 2014. In early August, it appeared that Catalyst and the principal shareholder of WIND had reached an agreement for the sale of WIND to Catalyst. Within days, that agreement had fallen apart and West Face, along with other entities (the “consortium”) had come forward with a new, and eventually, successful bid for WIND. The consortium and West Face later sold WIND for a very substantial profit to Shaw Communications.

[2] In this lawsuit, Catalyst alleged that West Face effectively “stole” the WIND deal from Catalyst by improperly using confidential information West Face obtained about Catalyst’s strategies in respect of its negotiations for the purchase of WIND. According to Catalyst’s claim, the confidential information came from the respondent, Brandon Moyse (“Mr. Moyse”). He had worked for Catalyst as an analyst for about two years until May 2014 when he quit Catalyst to go to work for West Face.

[3] Mr. Moyse had worked on the WIND file while at Catalyst, although the extent of his involvement in the file was a matter of dispute in the evidence. He

also actively pursued employment with West Face while at Catalyst and while involved in Catalyst's attempts to acquire WIND.

[4] In the lawsuit, Catalyst alleged that the misuse of confidential information by West Face and Mr. Moyse caused damage to Catalyst. Catalyst also sought an accounting of the profits made by West Face and the consortium when Shaw Communications purchased WIND from the consortium.

[5] In addition to the claims based on the misuse of confidential information, Catalyst sued West Face and Mr. Moyse for spoliation. This claim arose out of Mr. Moyse's destruction of what Catalyst claimed was relevant evidence contained on Mr. Moyse's cellphone and his personal computer. Catalyst advanced spoliation as a distinct tort claim, alleging damages equal to Catalyst's costs in pursuing the misuse of confidential information claim. Catalyst also advanced spoliation as an evidentiary rule available to assist Catalyst in proving the misuse of confidential information by West Face and Mr. Moyse.

[6] The trial judge dismissed all claims. He awarded costs to West Face on a substantial indemnity basis and costs to Mr. Moyse on a partial indemnity basis. Catalyst appeals from the dismissal of its claims and seeks leave to appeal from the costs order.

[7] At the end of oral argument, the court dismissed Catalyst's appeal from the judgment dismissing the action and reserved judgment on the costs-related appeals. These reasons address both.

II

[8] To succeed on the misuse of confidential information claim, Catalyst had to prove that:

- Mr. Moyse gave confidential information concerning Catalyst's bid to purchase WIND to West Face;
- West Face used that confidential information when pursuing its bid for WIND; and
- The misuse of that confidential information caused detriment to Catalyst.

[9] Catalyst did not have direct evidence to support its allegations. It relied on a body of circumstantial evidence and primarily on the testimony of its partners, Newton Glassman, Gabriel De Alba, and James Riley.

[10] On the first issue, whether Mr. Moyse had provided confidential information about Catalyst's strategies in respect of the acquisition of WIND to West Face, Catalyst relied heavily on inferences it claimed should be drawn from Mr. Moyse's conduct while he was pursuing employment with West Face, immediately after he left Catalyst to join West Face, and after this litigation was commenced. That evidence included the following:

- Mr. Moyse deliberately provided Catalyst's confidential information to West Face when he was trying to get a job with West Face. This information did not relate to WIND.
- Mr. Moyse erased emails that showed he provided that confidential information to West Face;
- Mr. Moyse erased all of the contents of the BlackBerry Catalyst had provided to him for work purposes before he returned it to Catalyst after he quit;
- Mr. Moyse made inaccurate and potentially misleading statements in affidavits filed on preliminary motions in this litigation;
- Mr. Moyse deleted his internet browsing history from his personal computer and installed programs to scrub the computer registry where deletions could otherwise be detected, in the face of a court order requiring that he turn his computer over to his lawyer so that the computer could be forensically examined for the purposes of this litigation.

[11] Catalyst claimed that Mr. Moyse's conduct was consistent only with him having provided confidential information about Catalyst's proposed acquisition of WIND to West Face.

[12] Mr. Moyse gave various "innocent" explanations for his conduct. West Face also led evidence that when Mr. Moyse was hired by West Face, extensive measures were taken to ensure that Mr. Moyse had no knowledge of, or involvement in, West Face's ongoing negotiations for the purchase of WIND

shares. The witnesses testified that there were no breaches of this confidentiality wall during the few weeks that Mr. Moyse was actually present in the West Face offices.

[13] The respondents also introduced a body of evidence, which they claimed demonstrated that no confidential information from Catalyst had been used in the ultimately successful bid for WIND. The respondents argued that the approach taken by West Face and its consortium to the acquisition of WIND, particularly with respect to the need to obtain certain concessions from the government, was fundamentally different than the approach taken by Catalyst. Consequently, West Face had no use for any information pertaining to Catalyst's strategies.

[14] The respondents also defended on the basis that the appellant had not proved any damages. The respondents claimed that Catalyst's bid to acquire WIND in August 2014 failed, not because of any competing bid made by West Face and the consortium, but because Catalyst chose to terminate negotiations with the vendor of the WIND shares after the vendor demanded a significant break fee very late in its negotiations with Catalyst. The respondents contended at trial that the evidence showed that Catalyst chose to end the negotiations rather than agree to the break fee demanded by the vendor. On this argument, which did not depend on the trial judge accepting the testimony of Mr. Moyse, or the West Face witnesses, Catalyst suffered no damages or detriment, even if Mr. Moyse had

given confidential information to West Face and West Face had attempted to use that information in its negotiations with the vendor of the WIND shares.

[15] The trial judge gave lengthy and detailed reasons for judgment. He found against Catalyst on almost every contested factual issue. Specifically, he found (paras. 126-30) that the appellant chose to terminate its negotiations with the vendor of the WIND shares when the vendor demanded a substantial break fee.

[16] In his reasons, the trial judge made strong credibility findings against the appellant's primary witnesses, particularly Mr. Glassman, and equally strong credibility findings in favour of the respondents' witnesses, including Mr. Moyse. The trial judge accepted the explanations offered by Mr. Moyse for his conduct outlined above, at para. 10. The trial judge found, as a fact, that Mr. Moyse had not provided any confidential information to West Face in relation to the appellant's negotiations for the purchase of the WIND shares.

III

[17] Catalyst advanced essentially three arguments on appeal. The first asserts alleged errors in the trial judge's fact-finding process, the second alleges procedural unfairness, and the third relates to the trial judge's treatment of the spoliation arguments.

A. THE ALLEGED FACT-FINDING ERRORS

[18] The appellant submits that the trial judge's factual findings cannot stand, first, because they are the product of an unfair and uneven scrutiny by the trial judge of the competing versions of the relevant events and, second, because they are tainted by several material misapprehensions of the evidence.

[19] Counsel for the appellant candidly acknowledge that they face an uphill climb in their assault on the fact-finding at trial. This was a hard-fought trial. The result was almost entirely fact-driven. The trial judge's findings of fact turned on his assessment of the credibility of the key witnesses, the reliability of their evidence, and the inferences to be drawn from certain primary findings of fact. All of those tasks engage a myriad of considerations by the trial judge. His determinations are owed strong deference on appeal. The appellant must overcome that deference in the face of reasons by the trial judge that display a strong command of the evidentiary record and a full understanding of the issues and positions of the parties.

(i) The Alleged Uneven Scrutiny of the Evidence

[20] In support of the uneven scrutiny argument, counsel submits that the credibility of the Catalyst witnesses was subject to a hypercritical microscopic examination by the trial judge. Any misstep or inconsistency in their testimony, no matter how apparently minor, became, for the trial judge, a reason to reject the

evidence of those witnesses. In contrast, argues counsel for the appellant, the trial judge forgave or ignored similar, and much more serious, defects in the evidence of witnesses for the respondents.

[21] To demonstrate the unevenness of the trial judge's consideration of the evidence, counsel compared the trial judge's treatment of Mr. Moyse's testimony with that afforded Mr. Glassman's evidence. The appellant argues that the trial judge excused the litany of serious misconduct by Mr. Moyse, including a deliberate breach of a court order, as mere "mistakes" or "errors" explainable by Mr. Moyse's youth or his fatigue. Counsel contrasts the trial judge's benign treatment of Mr. Moyse's evidence with his aggressive rejection of Mr. Glassman's evidence on what counsel argues are much weaker and more subjective grounds.

[22] The appellant submits that the trial judge totally rejected Mr. Glassman's evidence because on occasion he slipped into the role of advocate when testifying and overstated certain matters. Counsel submits that even if this characterization is accurate, Mr. Glassman's transgressions pale beside the egregious misconduct of Mr. Moyse. Counsel submits that the trial judge's complete acceptance of Mr. Moyse's evidence and his total rejection of Mr. Glassman's evidence can be explained only by the application of very different levels of scrutiny to their testimony.

[23] Counsel devoted much of their oral argument to their uneven scrutiny submission. They referred to various examples from the trial judge's reasons, which they claimed demonstrated his uneven scrutiny of the evidence.

[24] Counsel's submissions make a case for different credibility and reliability assessments than those made by the trial judge. Unfortunately for the appellant, that is not enough to warrant appellate intervention. It is not for this court to consider what alternative findings may have been reasonably available on the trial record.

[25] The trial judge approached the evidence of the respondents' witnesses no differently than he did the evidence of the appellant's witnesses. The trial judge's reasons must be considered in their entirety. Mr. Moyse's evidence that he did not provide confidential information concerning the WIND negotiations to West Face did not stand alone. The evidence found considerable, largely uncontradicted support in the testimony of the West Face witnesses. It also gained some inferential support in the trial judge's findings as they related to the West Face strategy in respect of the WIND negotiations, and the ultimate reason for the breakdown of the negotiations between the appellant and the vendor of the WIND shares.

[26] The trial judge was alive to the details of the evidence said to demonstrate Mr. Moyse's dishonesty and the unreliability of his evidence. He appreciated the

appellant's argument and the need to carefully and critically examine Mr. Moyse's evidence. The trial judge examined the evidence at length, particularly as it related to the allegation that Mr. Moyse had deliberately deleted material from his personal computer and installed programming to hide that deletion and prevent any recovery of the material. In the end, the trial judge accepted Mr. Moyse's explanations for what he had done, and concluded that it could not be established that Mr. Moyse had actually used the programs he had installed on the computer to hide the deletions.

[27] The trial judge approached Mr. Moyse's evidence by examining the substance of that evidence in the context of the entirety of the evidence. He also considered, as a trial judge is entitled to do, his impressions of Mr. Moyse as he testified. The trial judge took the same approach to Mr. Glassman and other witnesses for the appellant. As often occurs, the same approach to the evidence of different witnesses yielded very different credibility and reliability assessments. Those different assessments are not indicative of any flawed fact-finding process, but instead reflect the essential witness-specific nature of credibility and reliability determinations.

[28] We do not propose to examine all of the passages from the trial judge's reasons relied on by the appellant to demonstrate the asserted different levels of scrutiny of the evidence. Each argument fails for a variety of reasons.

[29] For example, the appellant argues that the trial judge used Mr. Glassman's repetition of parts of his evidence as a reason for finding that Mr. Glassman was not credible, but did not give the same effect to the repetition of evidence by witnesses for the respondents. This submission is not supported by the reasons. The trial judge referred to repetition of parts of the evidence as a by-product of the manner in which the trial was conducted. We do not read his reasons as using the repetition of evidence as a basis for disbelieving Mr. Glassman or otherwise discounting his evidence.

[30] The appellant also argues that the trial judge treated inconsistencies or overstatements in the evidence of the appellant's witnesses much more harshly than he did similar deficiencies in the respondents' witnesses. The appellant submits that the trial judge did the same thing when he faulted Mr. Glassman for not making obvious concessions, but made no comment when the same reluctance was evident in the testimony of witnesses for the respondents.

[31] The evaluation of the impact on credibility and reliability of specific inconsistencies and similar flaws in a witness's testimony lies at the very core of the trial judge's function. His conclusion that a certain inconsistency negatively impacted on the credibility of one witness, while a different inconsistency did not have the same negative impact on the credibility of a different witness testifying about an entirely different topic, does not, on its own, establish that the trial judge applied different levels of scrutiny to the evidence of those witnesses. Instead, it

demonstrates that credibility and reliability assessments are fact and witness-specific.

[32] In support of the unequal scrutiny argument, the appellant also submitted that the trial judge proceeded from the assumption that the West Face witnesses were credible, while the appellant had to demonstrate the credibility of its witnesses. In support of this argument, counsel relies on observations made by the trial judge in his costs reasons.

[33] Setting aside whether a judge's comments in his costs reasons can assist in interpreting his reasons for judgment, the trial judge's comments do not support the appellant's submission. In his reasons for costs, the trial judge observed that the appellant could not have succeeded at trial without establishing that the West Face witnesses were lying when they claimed they had not received any confidential information from Mr. Moyse. This observation was correct, having regard to the nature of the claim advanced by the appellant, the respective positions of the parties, and the burden of proof on the appellant.

(ii) The Alleged Misapprehensions of the Evidence

[34] The appellant alleged three material misapprehensions of evidence in the body of its factum and listed several others in an appendix to the factum. We see no misapprehension of any material facts by the trial judge, and do not propose to review the appellant's claims one-by-one.

[35] Some of the appellant's allegations of material misapprehensions of the evidence fail because the trial judge did not make the factual finding said to constitute the material misapprehension. For example, the appellant argues that the trial judge wrongly held that Mr. Moyse did not have any confidential information about the WIND negotiations when he left the employment of Catalyst. The trial judge did not make any such finding. He did find that Mr. Moyse was not aware of the negotiating strategy of Catalyst with the government of Canada and the vendor of the WIND shares (para. 48). That finding was open on the evidence of Mr. Moyse.

[36] Other submissions made by the appellant alleging material misapprehensions of the evidence fail because, even if valid, they relate to factual issues that were relatively insignificant and not material to the outcome of the trial. For example, the appellant argues that the trial judge misapprehended the evidence pertaining to West Face's need for an analyst when it hired Mr. Moyse. Even if it could be said that the trial judge went beyond the evidence in describing the extent to which West Face needed an analyst, that error could not possibly have impacted on his overall assessment of the evidence, or the ultimate findings of fact he relied on in dismissing the claim.

[37] Most of the appellant's arguments, however, fail because they do not reveal any misapprehension of the evidence, but instead reveal that the trial judge preferred the evidence of the respondents' witnesses and the inferences that

flowed from that evidence over the competing evidence and inferences relied on by the appellant. For example, the trial judge found that West Face and others in the consortium did not have actual knowledge of the Catalyst bid for the shares of WIND in August 2014. That finding is supported by the respondents' witnesses who testified that they deduced that Catalyst was a bidder in light of "market chatter", comments in the media, and a statement made by counsel for the appellant to counsel for West Face when Mr. Moyse joined West Face. This evidence provided ample grounds for the trial judge's factual finding that West Face and the consortium had no actual knowledge of the bid.

[38] The appellant's submissions go no further than to suggest that the evidence could also have justified the further inference that West Face was aware of the actual bid. The trial judge did not make that inference, no doubt because he accepted the evidence of the West Face witnesses that West Face did not have knowledge of the actual bid. The trial judge's preference for the direct evidence of the West Face witnesses over the inference urged by the appellant is a function of the trial judge's fact-finding responsibilities and does not reflect any misapprehension of the evidentiary record.

B. THE PROCEDURAL UNFAIRNESS ARGUMENT

[39] The appellant argues that the trial judge made a series of factual findings against the appellant in respect of the dealings between the vendor of the WIND

shares and West Face and the consortium in August 2014. The appellant argues that these findings were made despite the trial judge having refused to allow the appellant to amend its claim to allege that West Face had induced the vendor of the WIND shares to breach its agreement with the appellant in the course of those August dealings. The appellant contends that the trial judge's findings were beyond the scope of the claim as framed in the pleadings before him and were based on an inadequate evidentiary record.

[40] We do not accept this submission. The appellant did not move in this proceeding to amend its claim to include an allegation that West Face induced the vendor of the WIND shares to breach its contract with the appellant. The appellant did unsuccessfully seek to make that amendment in a related proceeding. That refusal had no impact on the conduct of this trial.

[41] More to the point, evidence of the dealings between West Face and the consortium on one side and the vendor of the WIND shares on the other side in August 2014 was germane to the appellant's claim and West Face's defence that it pursued its own strategies in seeking to purchase the WIND shares, which were very different from those employed by the appellant. That strategy was reflected, in part, in the unsolicited proposal to purchase the WIND shares made by West Face and the consortium in early August 2014.

[42] The trial judge heard a great deal of evidence about the dealings between the vendor of the WIND shares and West Face and the consortium, particularly in August 2014. The appellant did not object to any of this evidence and, indeed, elicited most of it. In their closing arguments at trial, counsel for the appellant and the respondents urged the trial judge to make certain findings in respect of the dealings between West Face, the consortium and the vendor of the WIND shares. The trial judge's findings reflect those arguments and a preference for the position put forward by the respondents. We see no unfairness to the appellant in the manner in which these issues were litigated at the trial. The trial judge's findings of fact in respect of these issues are supported by the evidence.

C. THE SPOILIATION ARGUMENT

[43] The spoliation submission began as an argument that the trial judge had failed to properly identify the elements of the tort of spoliation. In oral argument, counsel abandoned any reliance on the tort of spoliation.¹

[44] Counsel argued that the trial judge erred in holding that an adverse evidentiary inference could be drawn against the respondents as a result of Mr. Moyse's destruction of relevant evidence only if the appellant established that Mr. Moyse and/or West Face destroyed that evidence for the specific purpose of

¹ The existence of an independent tort of spoliation is an open question in this court: *Robb Estate v. Canadian Red Cross Society* (2001), 152 O.A.C. 60, at 203-208.

affecting the outcome of the litigation. Counsel submitted that the adverse inference was appropriately drawn if relevant evidence was destroyed in the face of pending or reasonably foreseeable litigation.

[45] The appellant's argument faces an insurmountable factual hurdle. Any inference that may be drawn against the respondents can arise only after a finding that Mr. Moyse destroyed relevant evidence. The trial judge found as a fact that Mr. Moyse did not destroy relevant evidence (paras. 147, 165). The appellant has not established any basis upon which this court can interfere with that factual finding. That finding puts an end to any argument that Mr. Moyse's deletion of data from his computer and cellphone supports an adverse inference against Mr. Moyse or West Face.

[46] As this argument runs aground on the trial judge's factual finding, we need not consider the merits of the substance of the argument. We should not be taken as agreeing that the appropriate evidentiary approach to evidence that a party to a proceeding destroyed relevant evidence should be functionally different from the approach to be taken to other kinds of circumstantial evidence.

D. THE COSTS APPEAL

[47] The appellant seeks leave to appeal the costs order. The appellant recognizes that this court grants leave to appeal from costs orders only sparingly.

It submits, however, that the orders made in this case reveal errors in principle that warrant leave and intervention by this court.

[48] The trial judge awarded costs to West Face on a substantial indemnity basis because the appellant had made serious and unfounded allegations impugning the honesty and integrity of West Face and its senior executives. He concluded that the lawsuit was precipitated primarily by Mr. Glassman's frustration over losing out on the acquisition of the WIND shares. The trial judge said, at para. 10:

He [Mr. Glassman] set out to prove his belief that the West Face witnesses were lying and that West Face had obtained confidential Catalyst information from Mr. Moyse that they used to defeat Catalyst's bid to acquire WIND. He was certainly playing hardball, attacking the reputation and honesty of West Face. However, in spite of the best efforts of Catalyst's very able and skilled lawyers, he utterly failed.

[49] The appellant submits that the trial judge in effect awarded costs on a substantial indemnity basis because the appellant failed to prove its case at trial. The appellant argues that substantial indemnity costs are the exception and not the rule. To base an award of substantial indemnity costs on a failure to prove one's case is to ignore the exceptional nature of an award of costs on a substantial indemnity basis.

[50] We are satisfied that the trial judge awarded costs on a substantial indemnity basis, not because the appellant failed to prove its case, but rather because the appellant chose to make very serious allegations against West Face, maintain

those allegations in the face of substantial evidence refuting the allegations, and in the end “utterly failed” to substantiate any of the claims.

[51] Unfounded allegations like those made by the appellant in this case can warrant the exercise of discretion in favour of costs on a substantial indemnity basis. We see no error in principle in the trial judge’s decision to award costs on a substantial indemnity basis to West Face. We would not grant leave to appeal the order as it relates to West Face.

[52] The trial judge found that the appellant had made an unwarranted attack on the reputation and integrity of Mr. Moyse. He went on, however, to indicate, at para. 18:

However, the steps that Mr. Moyse took that he has readily acknowledged were mistakes, albeit with no intention to destroy any relevant evidence, must be considered in deciding what level of costs to be awarded to Mr. Moyse. In my view, it is a reason not to award costs on a substantial indemnity basis, and I award costs only on a partial indemnity basis.

[53] The characterization of some of Mr. Moyse’s conduct as “mistakes” is charitable. This is particularly true in respect of his conduct when ordered by the court to turn his personal computer over to his lawyer so that it could be forensically examined. His decision to delete material from the computer without speaking to his lawyer and before turning the computer over to his lawyer was a serious breach of the court order, even given that he did not delete information relevant to the allegations.

[54] The fact remains, however, that the trial judge recognized that Mr. Moyse's conduct should be taken into account in assessing the appropriate costs order. He determined in the exercise of his discretion that it should reduce the order from one of costs of substantial indemnity to one of costs on a partial indemnity basis. Even if other judges might have gone further, the trial judge made no error in the exercise of his discretion in considering the impact of Mr. Moyse's conduct on the costs award.

[55] We would not grant leave to appeal from the order awarding costs to Mr. Moyse on a partial indemnity basis.

E. CONCLUSION

[56] The appeal is dismissed. The application for leave to appeal the costs order is dismissed.

[57] Counsel should exchange and file submissions on the costs of the appeal within 30 days of the release of these reasons. The submissions should not exceed 7 pages.

"Doherty J.A."
"J. MacFarland J.A."
"D.M. Paciocco J.A."