**CITATION:** Merkur v Devidal, 2023 ONSC 4128
**COURT FILE NO.:** CV-20-00654027
**MOTION HEARD:** 20230608



**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Miriam Merkur and Amalgo Corporation Inc., Plaintiffs

**AND:**

Jean-Pierre Devidal and Frédéric Menguy, Defendants

**BEFORE:** Associate Justice L. La Horey

**COUNSEL:** Marshall Reinhart, Counsel for the Moving Party Plaintiffs

David Ziegler and Rachel Hung, Counsel for the Responding Party Defendants

**HEARD:** June 8, 2023 by videoconference

## REASONS FOR DECISION

[1] The plaintiffs bring this motion pursuant to Rule 39.02(2) of the Rules of Civil Procedure for an order for leave to deliver an affidavit after cross-examinations for use on the defendants' pending jurisdiction motion.

[2] For the reasons that follow, the motion is dismissed.

### Brief Background and Procedural History

[3] The plaintiffs claim against the defendants in connection with the purchase of a medical device manufacturer. They seek damages for negligent or fraudulent misrepresentation, punitive damages, and aggravated damages in the amount of $16,000,000.

[4] The defendants have brought a motion for an order dismissing or staying the action commenced by the plaintiffs on the grounds that the Ontario court lacks jurisdiction *simpliciter* over the subject matter of the action and the defendants and that France is the more appropriate and convenient forum. The defendants' notice of motion was served in December 2021. Their motion record, which includes an affidavit from the defendant Frédéric Menguy, was served on March 25, 2022. On May 4, 2022, the plaintiffs served their responding record containing the affidavit of the plaintiff Miriam Merkur.

[5] Mr. Menguy was cross-examined on July 5, 2022. Ms. Merkur was cross-examined on July 18, 2022.

[6] On August 29, 2022, the defendants served a supplementary motion record, containing answers to undertakings given at the cross-examination of Mr. Menguy and the cross-examination transcripts, as well as their factum.

[7] The plaintiffs served the affidavit of Nicolas Flachet (the "Flachet Affidavit") on September 29, 2022, as well as their responding factum on the jurisdiction motion. In that affidavit, Mr. Flachet, who is a lawyer practising in France, explains French procedure and the French evidentiary system in civil and commercial courts. It is this affidavit that the plaintiffs seek leave to file. The factum served at the same time includes a number of references to the Flachet Affidavit.

[8] The plaintiffs had not given any indication that they wished to deliver any further affidavits prior to the cross-examinations.

[9] The jurisdiction motion scheduled for October 13, 2022, was adjourned on consent in order for the plaintiffs to bring this motion. I was advised that the jurisdiction motion is currently scheduled for September 19, 2023, although this date may have to be moved because of a scheduling conflict.

**Preliminary Issue**

[10] The only affidavit filed by the moving parties on the motion before me is the affidavit of Eduardo Barbosa, an articling student. Neither plaintiff filed an affidavit. Mr. Barbosa provided evidence based on information from Mr. Reinhart, counsel on this motion. At the outset of the hearing, I questioned whether it was appropriate for Mr. Reinhart to argue this motion as some of the paragraphs in the Barbosa affidavit seemed to me to be on contentious issues, in particular, paragraphs 8 and 9.[1] I invited submissions on this issue and queried whether an adjournment was required so that another lawyer could appear to argue the motion for the plaintiffs or whether some other relief may be appropriate. Mr. Reinhart said that the moving parties concede that there was no reasonable excuse for the Flachet Affidavit not having been tendered to prior to cross-examinations (the fourth factor of the *First Capital* test, as set out below) and therefore paragraphs 8 and 9 are not germane to the motion and the moving parties did not need to rely on them. Both parties agreed that the motion could proceed with Mr. Reinhart arguing the motion, with the concession that the plaintiffs were not relying on the reasonable excuse factor and I would not have regard to paragraphs 8 and 9 of the Barbosa affidavit.

**Law and Analysis**

*General Principles*

[11] Rules 39.02(2) provides:

[1] See *Mapletoft v Service*, 2008 CanLII 6935 (Ont. Master) at paras 7 – 15

> A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03.

[12] The parties agree that the factors that a court considers in deciding whether to grant leave are those set out in *First Capital Realty Inc. v Centrecorp Management Services Ltd*.[2] These factors are:

i. Is the evidence relevant?

ii. Does the evidence respond to a matter raised on cross-examination, not necessarily raised for the first time?

iii. Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?

iv. Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

[13] All four criteria should be weighed evenly in determining, in light of the facts of each case, whether leave should be granted.[3]

[14] In *First Capital Realty Inc.*, the Divisional Court went on to say:[4]

> 14 A flexible, contextual approach is to be taken in assessing the criteria relevant to rule 39.02(2), having regard to the overriding principle outlined in Rule 1.04 of the Rules of Civil Procedure that the rules are to be interpreted liberally to ensure a just, timely resolution of the dispute. An overly rigid interpretation can lead to unfairness by punishing a litigant for an oversight of counsel. [Citations omitted]

[15] In *Shah v LG Chem, Ltd.*,[5] Justice Perell summarized the jurisprudence on motions under Rule 39.02(2) as follows:

> [23] The jurisprudence about rule 39.02(2) indicates that (1) leave should be "granted sparingly": *Catalyst Fund Limited Partnership II v. IMAX Corp*., [2008] O.J. No. 873, 2008 CanLII 8778 (S.C.J.), at para. 14; *Skrobacky (Attorneys for) v. Frymer*, [2011] O.J. No. 2468, 2011 ONSC 3295 (S.C.J.), at para. 27; *Sure Track*

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[2] *First Capital Realty Inc. v Centrecorp Management Services Ltd.*, [2009] O.J. No. 4492 (Div. Ct.) at para 13
[3] *First Capital Realty Inc.* at para 24
[4] *First Capital Realty Inc.* at para 14
[5] *Shah v LG Chem, Ltd.*, 2015 ONSC 776 at paras 23 - 25

*Courier Ltd. v. Kaisersingh*, [2011] O.J. No. 5930, 2011 ONSC 7388 (S.C.J.), at para. 51; (2) the moving party has "a very high threshold" to meet: *Catalyst Fund Partnership II v. IMAX Corp*., *supra*, at para. 14; *Skrobacky v. Frymer*, *supra*, at para. 27; *Sure Track Courier Ltd. v. Kaisersingh*, *supra*, at para. 51; (3) the rule about the delivery of subsequent affidavits should not be used as "a mechanism for correcting deficiencies in the motion materials": *Lihou v. VIA Rail Canada Inc.*, [2006] O.J. No. 4451, 153 A.C.W.S. (3d) 59 (Master), at para. 24; and (4) the rule is designed to fairly regulate and provide closure to the evidence gathering process for motions and applications.

[24] In *Catalyst Fund Limited Partnership II v. IMAX Corp.*, *supra*, Justice Pepall stated, at para. 14: "Rule 39.02 is there for a reason. It imports principles of fairness and economy." In *Skrobacky (Attorneys for) v. Frymer*, *supra*, at para. 27, Justice Corrick stated that "Rule 39.02 is designed to prevent, in part, an endless exchange of affidavits and cross-examinations." In *Sure Track Courier Ltd. v. Kaisersingh*, *supra*, at para. 44, Justice Goodman stated: "Rule 39.02 is one such rule designed to place finite limits on the evidentiary elements of litigation."

[25] In *Brock Home Improvement Products Inc. v. Corcoran* (2002), 58 O.R. (3d) 722, [2002] O.J. No. 931 (S.C.J.), at para. 8, Justice Stinson stated:

> Rule 39.02(1) and (2) are an important and integral part of the procedural code governing the conduct of motions and applications. These rules are designed to place finite limits on the evidentiary element of those proceedings, an element that is all-too frequently time-consuming, expensive and drawn-out. These rules oblige the parties to consider the issues and to put all relevant evidence forward before embarking upon cross-examination of the opposite party's witnesses. This is the approach mandated by the rules to achieve the "just, most expeditious and least expensive determination" of motions and applications. Consistent with that approach, it is only in exceptional cases that should resort should be had to rule 39.02(2).

*1) Is the evidence relevant?*

[16] The plaintiffs submit that the evidence is relevant to the issue of juridical advantage.

[17] The defendants argue that the proposed affidavit is of “limited relevance” because juridical advantage is only one factor of many to be considered in determining the convenient forum. Further, they assert that the Flachet Affidavit does not assist the plaintiffs in establishing that the plaintiffs will suffer a loss of juridical advantage by having the matter heard in France.

[18] It would not be appropriate for me to make findings on the issues to be determined in the jurisdiction motion or to assess the weight to be given to the proposed evidence. My role is to decide whether or not the proposed evidence is relevant as one of the factors in the

*First Capital* test. I find that the Flachet Affidavit is relevant to the issue of juridical advantage.

[19] In a related objection, the defendants also submit that the Flachet Affidavit does not comply with the rules for expert evidence because there is no signed acknowledgement of expert's duty or other evidence that Mr. Flachet was informed of his obligations as an expert before the Ontario court, and thus leave to admit should not be granted. I do not give effect to this submission. If I were to grant leave, the plaintiffs could deliver a signed acknowledgment of expert at a later date.

*2) Does the evidence respond to a matter raised on cross-examination, not necessarily raised for the first time?*

[20] The plaintiffs submit that Mr. Menguay gave evidence at his cross-examination that went to the issue of *forum non conveniens,* and that the Flachet Affidavit, which provides evidence that goes to the question of *forum non conveniens*, is therefore responsive to the evidence raised on Mr. Menguay's cross-examination.

[21] However, Mr. Reinhart conceded that the issue of juridical advantage, which is one part of the *forum non conveniens* test, was not raised on Mr. Menguay's cross-examination. The Flachet Affidavit only addresses matters relevant to juridical advantage and not the other aspects of the *forum non conveniens* test. Thus the Flachet Affidavit does not respond to a matter raised on the cross-examination. The plaintiffs' definition of the "matter raised" as being the *forum non conveniens* test is overbroad such that it would allow an end-run around this aspect of the test if it were accepted.

[22] The plaintiffs also argue that even if the affidavit does not respond to matters arising out of the cross-examination, it responds to issues raised in the defendants' factum on the jurisdiction motion and this is sufficient. For this proposition, they cite *Austin v Bell,*[6] where Justice Morgan granted leave to the plaintiff to introduce evidence, not in response to a matter raised in cross-examinations, but rather in response to something brought to the plaintiffs' attention in the defendants' factum. Justice Morgan said this was analogous to being raised in cross-examinations.

[23] In *Austin*, the defendants had included in their responding record pension information committee reports for certain years. After cross-examinations and the delivery of the defendants' factums, the plaintiff sought leave to introduce all of the pension information committee reports from 1998 onwards, arguing that the court should have all of the reports, not just the ones introduced by the defendants. In granting leave, Justice Morgan noted the documents in question were already in the possession of the defendants and were "essentially" the defendants' own documents. The defendants did not take issue with the authenticity or credibility of the records in question and defendants' counsel had said that they did not intend to cross-examine on the documents if they were admitted. Justice

[6] *Austin v Bell Canada*, 2019 ONSC 4190

Morgan was satisfied that the plaintiff was not aware the defendants would be making an argument that the plaintiff wished to address with the records for which leave was sought. By contrast, the plaintiffs in the case at bar were aware of the defendants' argument that the plaintiffs would not suffer a juridical disadvantage if they brought their claim in France, as this was stated in the defendants' notice of motion served in December 2021. Further, unlike the situation in *Austin*, the affidavit is not evidence that was already in possession of the defendants.

[24] The plaintiffs say that even if the proposed affidavit does not meet this aspect of the test, the evidence may still be admitted, relying upon *Correct Group Inc. v Cameron*,[7] where Regional Senior Justice Daley granted leave to admit evidence that was not responsive to an issue raised in cross-examination. However, I note that in *Correct Group*, R.S.J. Daley had regard to the fact that the evidence had been in the possession of all parties for several months and thus the defendants were not taken by surprise. This not the situation in the case at bar: the Flachet Affidavit is entirely new.

*3) Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?*

[25] The plaintiffs submit that there is no non-compensable prejudice. They concede that there is compensable prejudice, in that if leave is granted, the defendants will have to redo their factum on the jurisdiction motion and an award of costs thrown away would be an appropriate term of granting leave.

[26] The defendants allege that the plaintiffs were "unfairly privy" to the defendants' entire legal argument, before serving the Flachet affidavit. However, as the defendants themselves point out, their notice of motion made the argument that the plaintiffs would not suffer any juridical disadvantage if the underlying dispute was litigated in France.

[27] The defendants also submit that it is intrinsically unfair for a party to supplement their record after the other party has completed their evidence and argument.

[28] In this case, if I were to grant leave, then the defendants have said that they would file a reply affidavit, with a further round of cross-examinations.

[29] In *Skrobacky (Attorneys for) v Frymer*, Justice Corrick refused to grant leave to file an affidavit after cross-examinations and, in considering the prejudice factor, rejected a submission that there was plenty of time for the other party to file further evidence and cross-examine, saying that Rules 39.02(1) and (2) are designed to place finite limits on the evidentiary element of motions.[8]

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[7] *Correct Group Inc. v Cameron*, 2018 ONSC 6164
[8] *Skrobacky (Attorneys for) v Fryer*, 2011 ONSC 3295 at para 19

4) *Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?*

[30] As noted above, the plaintiffs concede that there no is reasonable or adequate explanation for why the evidence was not included at the outset.

[31] They submit that nonetheless, a court may grant leave even where no reasonable excuse is present, relying on the decision of Master Jolley (as her title then was) in *Nexium Healthcare Consultants Inc. v Yacoob.*[9] I accept that the absence of a reasonable excuse is not necessarily fatal. However, I also note that in *Nexium Healthcare* the proposed supplementary affidavit attached documents that the deponent had brought to his cross-examination pursuant to a notice of examination and that at least some of the documents had been previously requested at an examination for discovery.[10] This is not the case here.

*Conclusion*

[32] In this case, the plaintiffs were on notice from very early on, in December 2021, that the defendants asserted that the plaintiffs would suffer no juridical disadvantage if the dispute is litigated in France. They did not file any evidence on this point in their responding record before cross-examinations in July 2022, many months later. As noted, the plaintiffs concede that there is no reasonable excuse for not tendering the Flachet Affidavit before cross-examinations.

[33] The Flachet Affidavit does not respond to anything raised in the cross-examinations and the plaintiffs cannot complain about having been taken by surprise by anything in the defendants' factum on the jurisdiction motion.

[34] In some cases, the court has granted leave where the evidence in question is already known to the opposing party[11] or was requested previously by the opposing party.[12] That is not the situation before me.

[35] The plaintiffs submit that fairness requires that all relevant evidence be before the motion judge on this motion relying upon the decision of *Ling v Bemac Auto Body Ltd.*,[13] where Justice Beaudoin granted leave to the plaintiff to file an affidavit after the plaintiff's counsel had cross-examined two of the defendants' witnesses. *Ling* was an extreme situation where the evidence sought to be introduced was the affidavit of the plaintiff himself that "is clearly relevant and addresses critical questions of fact that are at the heart of this motion for summary judgment."[14] If leave was refused, the court would not have had the evidence of the plaintiff himself on the summary judgment motion in a personal

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[9] *Nexim Healthcare Consultants Inc. v Yacoob*, 2018 ONSC 91 (Master)
[10] *Nexim Healthcare* at paras 3, 13 - 14
[11] *Austin v Bell Canada*, 2019 ONSC 4190; *Correct Group Inc. v Cameron*, 2018 ONSC 6164
[12] *Nexim Healthcare*
[13] *Ling v Bemac Auto Body Ltd*., 2017 ONSC 4113
[14] *Ling* at para 12

injury action. In the case at bar, by contrast, the plaintiffs delivered the affidavit of one of the plaintiffs. Moreover, they cross-examined the defendant without any indication that the plaintiffs wished to file additional evidence.

[36] The courts in both *Austin* and *Correct Group* granted leave under Rule 39.02(2) where the underlying motion was a motion for summary judgment, noting the importance of having a full record before the court.[15] Although it is an important motion for the plaintiffs, the underlying motion in this case is not a summary judgment motion.

[37] There is another aspect of fairness that the rule was designed to address, the fairness in having matters adjudicated in an efficient and timely way. To reiterate from the passage in *Brock Home Improvement Products Inc. v Corcoran*, quoted by Justice Perell in *Shah*:[16]

> [Rules 39.02(1) and (2)] oblige the parties to consider the issues and to put all relevant evidence forward before embarking upon cross-examination of the opposite party's witnesses. This is the approach mandated by the rules to achieve the "just, most expeditious and least expensive determination" of motions and applications.

[38] In this case, it would not be fair to grant the plaintiffs' motion as to do so would be to permit a further round of affidavits and cross-examination when the plaintiffs had early notice of the issue of juridical advantage and failed to address it in their motion materials. The evidence sought to be introduced is wholly new. This would not be a just, expeditious and least expensive determination of the jurisdiction motion.

[39] Taking a flexible and contextual approach and having regard to the overriding principle expressed in Rule 1.04, I conclude that leave should be refused.

**Disposition**

[40] The plaintiffs' motion is dismissed. The plaintiffs shall deliver a revised factum deleting the references to the Flachet Affidavit. The defendants may then deliver their reply factum. I will assume that the parties can agree on the appropriate timetable. If they cannot, they may request a case conference through my Assistant Trial Coordinator.

**Costs**

[41] The parties filed cost outlines and made submissions at the conclusion of the hearing. The defendants asked for partial indemnity costs in the sum of $10,441.86 in the event that they were successful on the motion. The plaintiffs agreed that the defendants would be entitled to their partial indemnity costs if successful, but submitted that the sum of $7,500 would be a fair and reasonable amount. Having considered the factors in Rule 57 in the circumstances of this case, I am satisfied that an award of partial indemnity costs fixed in

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[15] *Austin* at para 8; *Correct Group* at para 23
[16] *Shah* at para 25

the sum of $9,000 (all inclusive) is fair and reasonable and within the reasonable expectations of the parties.

L. La Horey, A.J.

**Date:** July 11, 2023