Federal Court  Cour fédérale

Date: 20200730

Docket: T-296-19

Citation: 2020 FC 803

Vancouver, British Columbia, July 30, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

HAVI GLOBAL SOLUTIONS LLC, HAVI GS ASIA PACIFIC(S), GOLDEN ARCHES DEVELOPMENT CORPORATION, HAVI LOGISTICS TAIWAN LTD., MARTIN-BROWER SINGAPORE PTE, AND MARTIN-BROWER MALAYSIA CO. SDN.

Plaintiffs

and

IS CONTAINER PTE LTD., THE SHIP MV "MOL PRESTIGE", HER OWNERS, AND ALL OTHERS INTERESTED IN HER, KAWASAKI KISEN KAISHA LTD., AND YANG MING MARINE TRANSPORT CORPORATION

Defendants

ORDER AND REASONS

[1] This is a motion brought pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106, by the Defendant, IS Container PTE Ltd. [Defendant Owner], on behalf of its containership MV

"MOL Prestige" [Defendant Ship] appealing the Order of the Case Management Judge, Prothonotary Ring, dated June 30, 2020 [Order] which, pursuant to Rule 84(2), granted leave to the Plaintiffs to file the affidavit of Mr. Lim Sin Siong, also known as Bernard Lim, sworn on March 4, 2020 [Lim Affidavit], attached as Exhibit "A" to the Affidavit of Mr. Barry Oland, sworn on May 8, 2020 [Oland Affidavit].

Background

[2] The Plaintiffs commenced the underlying action on February 13, 2019. In their Statement of Claim, they allege that on or about January 29, 2018 or February 1, 2018, an onboard engine room fire caused a complete disruption of electrical power to the refrigeration containers onboard the Defendant Ship. The Plaintiffs claim damages against the Defendant Owner, as registered owner of the Defendant Ship, for negligence and breach of duty as bailee for reward for failure to deliver the Plaintiffs' cargo in good order and condition. The Plaintiffs claim *in rem* against the Defendant Ship pursuant to ss 22 and 43(2) of the *Federal Courts Act*, RSC 1985, c F-7 and Rule 477 of the *Federal Courts Rules* [Rules].

[3] The Plaintiffs claim damages against the Defendants, Kawasaki Kisen Kaisha Ltd. [K-Line], and Yang Ming Marine Transport Corporation [Yang Ming] [collectively, the Carriers] for breach of their contracts of carriage, and breach of their duties as bailees for reward, for failure to deliver the Plaintiffs' cargo in good order and condition at the agreed destination.

[4] This action is one of eleven actions by multiple plaintiffs, all represented by the same Canadian counsel, claiming damages against multiple defendants arising from the engine room

fire [collectively the "Actions"]. Prothonotary Ring is the assigned Case Management Judge for the Actions. Currently, the Plaintiffs are proceeding only against the Defendant Ship and Defendant Owner.

[5] On June 26, 2019, the Defendant Owner filed a motion in T-303-19 seeking an order that the Actions be consolidated and seeking a stay of proceedings based on jurisdictional grounds. Both parties filed their motion records and completed cross-examinations. On May 8, 2020, the Plaintiffs brought a motion in writing seeking leave to file the Lim Affidavit as part of their responding evidence in the stay motion. The Case Management Judge granted leave, on the terms set out in the Order. This is the appeal of that Order.

Decision under review

[6] The Prothonotary stated that the test under Rule 84(2) is the same as under Rule 312 of the Rules (*Pfizer Canada Inc v RhoxalPharma Inc*, 2004 FC 1685 at paras 14, 16 [*Pfizer*]; *Janssen-Ortho Inc v Canada (Health)*, 2009 FC 1179 at para 9 [*Janssen-Ortho*]; *Gemak v Jempak*, 2020 FC 644 at para 75 [*Gemak*]), and that the factors to be taken into account in deciding whether to allow the moving party to file a further affidavit after cross-examination are:

i. the relevancy of the proposed evidence;

ii. whether the proposed evidence was available and/or could be anticipated as being relevant prior to the cross-examinations;

iii. absence of prejudice to the opposing party;

iv. whether the proposed evidence assists the Court in making its final determination; and

v. whether the proposed evidence serves the interests of justice.

[7] The Prothonotary also noted that in *Campbell v Electoral Canada*, 2008 FC 1080 at paras 25-27 [*Campbell*], Justice Martineau indicated that the Court possesses vast discretion to allow a party to file additional material, and that such discretion is incompatible with a mechanical application of any set test or formula. Each case will involve a different weighing depending on the individual circumstances before the decision maker. Moreover, that he observed that there are particular situations where the second requirement mentioned above has been applied with some flexibility.

[8] The Prothonotary then addressed each of the factors in the context of the matter before her.

[9] As to the first factor, the Prothonotary noted that the Defendant Owner seeks a stay of proceedings in the eleven Actions based on an objection to the jurisdiction of the Court, or alternatively, to the Court as being a convenient forum. The Defendant Owner alleges, among other things, that in all of the cargo carriage contracts sued upon in the Actions, the parties agreed for disputes to be decided in accord with foreign, primarily Japanese, law and to be heard in foreign jurisdictions, primarily Japan.

[10] The Prothonotary found that evidence in the Lim Affidavit is *prima facie* relevant to the jurisdictional issues raised in the stay motion. She stated that the Lim Affidavit provides factual information relating to Service Contract RIC5068904 [Service Contract] between Havi Container Line Limited and K-Line. The Plaintiffs will rely on Article 12 of the Service Contract to refute the Defendant Owner’s position that the parties agreed that disputes are to be decided in accord

with Japanese law and by the Tokyo District Court. Article 12 of the Service Contract, under "Disputes/Applicable Law", provides that "[t]he substantive law of the State of New York shall govern this Contract and the parties submit to the jurisdiction of the U.S. District Court for the Southern District of New York for all purposes".

[11] The Prothonotary rejected the Defendant Owner's argument that the Lim Affidavit adds little to the existing evidentiary record because the Service Contract is already included as an exhibit to the affidavit of Leona Baxter sworn on September 24, 2019 [Baxter Affidavit]. She found that the Lim Affidavit includes additional relevant information regarding the Service Contract, such as the duration of the contract. Mr. Lim states that on behalf of Havi Container Line Limited, he negotiated the Service Contract with K-Line America Inc. as agents for Kawasaki Kilian Kaisha Ltd., which he signed on March 30, 2017. He asserts that Havi Global Solutions LLC, Havi GS Asia Pacific(s) and Havi Logistics Taiwan Ltd. (Plaintiffs in T-296-19 and in Court File No. T-298-19), and Havi Container Line Limited (the party to the Service Contract) are all part of the Havi Group, which is a privately owned transportation and logistics organization group of companies. Mr. Lim also asserts that the Service Contract was in force from April 4, 2017 to March 31, 2018, which covers the timeframe when the engine fire on the Defendant Ship is alleged to have occurred.

[12] The Prothonotary also noted that Defendant Owner advanced various arguments as to why the Service Contract does not apply to this dispute but found that those arguments go to the merits of the Owner's stay motion and accordingly, they are more appropriately addressed by the

Motions Judge based on the full evidentiary record that will be before the Court on the stay motion.

[13] As to the second Rule 84(2) factor, the Prothonotary noted that the moving party must show that the evidence sought to be adduced was not available prior to the cross-examination of the opponent's affidavits. This requirement is included to prevent a party from splitting its case and to require that a party put its best case forward at the first opportunity (*Rosenstein v Atlantic Engraving Ltd*, 2002 FCA 503 at para 9 [*Rosenstein*]).

[14] The Prothonotary noted that the Oland Affidavit deposed that the Service Contract attached as Exhibit "A" to the Baxter Affidavit was received "just in time to be included in the Plaintiffs' Motion record in response to the Owner's Stay Application", and that "[w]ith sufficient time we would have made an effort to contact Mr. Lim and obtain confirmation the Service Contract had been negotiated by him, but due to time constraints this did not happen" (Oland Affidavit at paras 5-6). However, no explanation was offered about what the "time constraints" were. Further, the Plaintiffs had no deadline for filing their responding motion record. Rule 365(1) provides that a respondent's motion record must be filed no later than two days before the day fixed for the hearing of the motion. As no hearing date had been fixed, no time constraint prevented the Plaintiffs from obtaining an affidavit from Mr. Lim prior to filing their motion record.

[15] Moreover, it appeared from the material before the Court that the Plaintiffs had the information needed to contact Mr. Lim since at least September 24, 2019. The Service Contract

appended to the Baxter Affidavit includes Mr. Lim's name and contact information in the preamble. However, Mr. Oland stated in his affidavit that he only made contact with Mr. Lim on February 12, 2020 – almost five months later. The Oland Affidavit acknowledged, at paragraph 11, that there was delay in obtaining the Lim Affidavit, but deposed that "dealing with many matters in the 11 Federal Court actions has been time consuming and contributed to the delay in contacting Mr. Lim".

[16] The Prothonotary found that the justification offered by the Plaintiffs for the delay in obtaining the evidence of Mr. Lim or bringing this motion to be wholly unsatisfactory. The Plaintiffs failed to establish that the proposed evidence was not available at an earlier date or that they acted with due diligence in seeking leave to rely on it. The Prothonotary found that this was a significant factor that militated against granting the relief sought by the Plaintiffs.

[17] As to the third factor, the Prothonotary rejected the Defendant Owner's submission that it would suffer significant prejudice if the Lim Affidavit were allowed to be filed. The basis of that submission was that the Defendant Owner had crafted its case, including counsel's line of questioning on cross-examinations, to meet the case presented by the Plaintiffs and that allowing the new evidence of Mr. Lim at this late stage would permit the Plaintiffs to split their evidence, leaving the Defendant Owner at a disadvantage in providing evidence in response.

[18] The Prothonotary noted that this position was similar to that taken in *Zhu v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16222 (FC) [*Zhu*], where the respondent argued that the filing of the proposed supplementary affidavit would cause serious prejudice to

the respondent because the respondent had crafted its case to meet that of the applicant and that the result might be a need to file additional affidavit material and further cross-examination. The Court in *Zhu* rejected that argument, stating that "[t]his is not prejudice, but merely an additional expense which, if necessary, might be compensated for in costs" (at para 8).

[19] The Prothonotary noted that, in the case before her, the Defendant Owner's motion for a stay of proceedings was filed on June 26, 2019 (over one year ago) and a hearing date has yet to be set down for the stay motion. She found that any procedural unfairness that the Defendant Owner may suffer can be addressed by allowing the Defendant Owner to conduct further cross-examination and to adduce further evidence (*Robert Mondavi Winery v Spagnol's Wine & Beer Making Supplies Ltd*, 2001 FCT 794 at para 12 [*Mondavi*]). Nor was there any evidence that the Plaintiffs are attempting to split their case. They agreed that the Defendant Owner was entitled to cross-examine Mr. Lim. Further, there would appear to be no incentive or advantage to the Plaintiffs splitting their case, given that they have proactively sought the Court's assistance over the past few months to move the stay motion forward to a hearing.

[20] As to the fourth factor, the Prothonotary found that the evidence in the Lim Affidavit, which was limited to matters already at issue between the parties (i.e. the Service Contract), would assist the Motions Judge in properly addressing the jurisdictional issues raised on the Defendant Owner's stay motion.

[21] The Prothonotary concluded, having weighed all of the factors in the exercise of her discretion under Rule 84(2), and considering that the second factor may be applied with some

flexibility depending on the particular circumstances, that it would serve the interests of justice to allow the Plaintiffs to file the Lim Affidavit, subject to appropriate safeguards being put into place to ensure the Defendant Owner is able to fully respond to the proposed evidence in the Lim Affidavit.

[22] The Prothonotary granted leave to file the Lim Affidavit, by no later July 7, 2020. The Defendant Owner was granted leave to cross-examine Mr. Lim in respect of the affidavit and to file further affidavit evidence in response to the Lim Affidavit. She also ordered costs payable to the Defendant Owner in any event of the cause.

Issues

[23] The Plaintiffs submit that the issue to be determined on this appeal is whether the Prothonotary erred by not correctly applying the test for leave to be granted under Rule 84(2). Alternatively, whether the Prothonotary erred by failing to correctly assess and weigh the facts.

[24] The Plaintiffs identify the issue as whether the Defendant Owner has established that the Prothonotary was wrong in making the terms of her Order, sufficient to overturn her decision.

[25] In my view, the issues can be framed as follows:

i. Did the Prothonotary err in her treatment of the test to be met in order for leave to be granted under Rule 84(2)?

ii. Did the Prothonotary make errors of fact, or mixed fact and law, that amount to palpable and overriding errors?

Standard of Review

[26] The parties submit, and I agree, that discretionary decisions of prothonotaries involving questions of fact, or involving mixed questions of law and fact, are subject to the palpable and overriding error standard of review. Questions of law, or mixed questions of fact and law where there is an extricable principle of law, are subject to the correctness standard (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 2, 28, 66, 68 [*Hospira*]; *Housen v Nikolaisen*, 2002 SCC 33 at paras 19-37; *Apotex Inc v Bayer Inc*, 2020 FCA 86 at paras 30-31).

[27] While the parties disagree on whether the Prothonotary's application of the Rule 84(2) factors potentially gives rise to an error of law thereby attracting the correctness standard, as opposed to a question of mixed fact and law to which the palpable and overriding error standard applies, for the reasons below this is not determinative as I have found that the Prothonotary did not err in her treatment of the test to be met in order for leave to be granted under Rule 84(2).

***Federal Courts Rules,* Rule 84**

> **When cross-examination may be made**
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> 84 (1) A party seeking to cross-examine the deponent of an affidavit filed in a motion or application shall not do so until the party has served on all other parties every affidavit on which the party intends to rely in the motion or application, except with the consent of all other parties or with leave of the Court.
>
> **Filing of affidavit after cross-examination**
>
> (2) A party who has cross-examined the deponent of an affidavit filed in a motion or application may not subsequently file an affidavit in that motion or application, except with the consent of all other parties or with leave of the Court.

Issue 1: Did the Prothonotary err in her treatment of the test to be met in order for leave to be granted under Rule 84(2)?

[28] The Defendant Owner submits that the Prothonotary erred in law, or mixed fact and law with an extricable principle of law, by incorrectly applying the test for leave under Rule 84(2). The Defendant Owner describes three asserted errors, which I have set out and addressed below.

i. Requirement that the proposed evidence not be available prior to the cross-examinations

[29] The Defendant Owner submits that the Prothonotary erred by failing to apply the requirement that the proposed evidence not be available prior to the cross-examinations, or, by failing to give proper effect to that requirement.

[30] In that regard, the Defendant Owner submits that the Prothonotary failed to properly apply the relevant authorities which hold that, for leave to be granted under Rule 84(2), the moving party must show that the evidence to be adduced was not available prior to the cross-examination of the opponents affidavits. In particular, these authorities are *Rosenstein* at para 9 and *Gemak* at para 75. The Defendant Owner submits that the Prothonotary found that the Plaintiffs had not established that the Lim Affidavit was not available earlier but granted leave based upon the weighing of all of the factors of the test. According to the Defendant Owner, she thereby erred in law by failing to properly apply this requirement.

[31] This argument is premised on the Defendant Owner's view that *Rosenstein* is binding authority requiring the Prothonotary to deny leave once she established that the proposed evidence, the Lim Affidavit, was available prior to the cross-examinations previously conducted by the Defendant Owner. The Defendant Owner submits that *Rosenstein* and *Gemak* establish

that the Rule 84(2) factors are discreet, mandatory requirements. In effect, that they form a mandatory conjunctive test whereby failure to meet any one factor – or at least the prior availability factor – would be fatal to the request for leave.

[32] For the following reasons, I do not agree with the Defendant Owner's interpretation of how the Rule 84(2) factors must be applied.

[33] I first note that *Rosenstein* concerns Rule 312 and states:

> [8] …By exception, rule 312 allows a party, with leave of the Court, to file additional affidavits. Under that rule, the Court may allow the filing of additional affidavits if the following requirements are met:
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> i) The evidence to be adduced will serve the interests of justice;
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> ii) The evidence will assist the Court;
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> iii) The evidence will not cause substantial or serious prejudice to the other side (see *Eli Lilly and Co. v. Apotex Inc.* (1997), 76 C.P.R. (3d) 15 (T.D.); *Robert Mondavi Winery v. Spagnol's Wine & Beer Making Supplies Ltd.* (2001), 10 C.P.R. (4th) 331 (T.D.)).
>
> [9] Further, an applicant, in seeking leave to file additional material, must show that the evidence sought to be adduced was not available prior to the cross-examination of the opponent's affidavits. Rule 312 is not there to allow a party to split its case and a party must put its best case forward at the first opportunity (see *Salton Appliances (1985) Corp. v. Salton Inc.* (2000), 181 F.T.R. 146, 4 C.P.R. (4th) 491 (T.D.); *Inverhuron & District Ratepayers Assn. v. Canada (Min. of Environment)* (2000), 180 F.T.R. 314 (T.D.))

[34] It is true that in setting out the test to be met the Federal Court of Appeal characterized the factors as "requirements" (*Rosenstein* at para 8). However, while *Rosenstein* sets out the test

to be met, which the Prothonotary correctly identified, it does not address whether the Court is afforded discretion in the weighing of those factors. More specifically, it does not consider whether if one of these factors is not met then if it is still open to the Court to still grant the motion if it is of the view that the other factors outweigh the factor that has not been not established. Moreover, *Rosenstein* it makes it clear that this is a discretionary decision as the Court "may" grant the motion if the factors are met.

[35] The Defendant Owners submit that, subsequent to *Rosenstein*, the Rule 84(2) factors, or at least the prior availability factor, were viewed as mandatory requirements in both *Janssen-Ortho* and *Gemak.*

[36] In *Janssen-Ortho,* Justice Zinn stated:

> [9] The test under Rule 84(2) for granting leave to file evidence after having cross-examined the opposite parties' deponents is the same as under Rule 312: *Pfizer Canada Inc. v. RhoxalPharma Inc.* [2006] 36 C.P.R. (4th) 550 (F.C). As the Prothonotary correctly observed, the filing of additional evidence may be permitted but only if four requirements are met. The first three requirements are not relevant, however, the fourth requirement as stated by her is "whether the further evidence was available and/or could not be anticipated as being relevant at an earlier date." The Court of Appeal in *Atlantic Engraving Ltd. v. Lapointe Rosenstein*, 2002 FCA 503 at para. 9 stated that this requirement is included because the Rule permitting the filing of additional evidence "is not there to allow a party to split its case and a party must put its best case forward at the first opportunity…"

[37] *Gemak* restates the test summarized above in *Janssen-Ortho*, being that "the moving party must establish that the proposed evidence could not have been adduced at an earlier date, the relevance of the proposed evidence, the absence of prejudice to the opposing party, and how

the proposed evidence would be of assistance to the Court in disposing of the motion" (at para 75). *Gemak* found that none of the criteria were met in that case.

[38] While *Janssen-Ortho* appears to view the four factors as mandatory and conjunctive, it is not as clear that *Gemak* was making that determination. Nor does *Gemak* contain any consideration whether there is discretion in the application of those factors.

[39] In her Order, the Prothonotary referred to *Pfizer* at paras 14 and 16 as well as *Janssen-Ortho* at para 9 and *Gemak* at para 75 in properly identifying and describing the Rule 84(2) test.

[40] In *Pfizer*, this Court stated:

> [15] Lemieux, J. further observed at paragraphs 16 and 17:
>
> > I am satisfied Rule 84(2), read in its context and against the history of the former Rules, is designed to deal with matters that arise during cross-examination for which there is a need to address by way of further affidavit with leave of the Court.
> >
> > The cases decided by this Court and by the Ontario Courts recognize that relevancy of the proposed affidavit, absence of prejudice to the opposing party, assistance to the Court, and the overall interest of justice are relevant factors to be taken into account in deciding whether leave to file a further affidavit should be granted.
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> [16] Thus, when entertaining a Rule 84(2) application, regard must be had to:
>
> a. relevancy of the proposed affidavit
>
> b. absence of prejudice to the opposing party
>
> c. assistance to the Court

d. the overall interest of justice.

[41] It is significant to note that in *Pfizer* this Court held that these are relevant factors to be taken into account in deciding whether leave to file a further affidavit should be granted; it does not characterize them as mandatory requirements (while this version of the test does not include the availability of the evidence factor referenced in other statements of the test, the inclusion of that factor is not at issue). *Pfizer* also does not say that the test is conjunctive or that it is not open to the Court to weigh the factors in arriving at a conclusion.

[42] The Prothonotary also referred to *Campbell*, which decision does address the discretion afforded to the Court in allowing a party to file additional affidavit evidence:

> [24] Further, a party should not be allowed to "split its case" and must put its best case forward at the first opportunity. Accordingly, the supplementary material must not deal with evidence that could have been made available at the time the initial affidavits were filed, unless its relevance could not have been anticipated at that time (*Atlantic* at para. 9; *Pfizer Canada Inc. v. Canada (Minister of Health)*, [2007] 2 F.C.R. 371 at paras. 21-22, 2006 FC 984; *Pfizer Canada Inc. v. Canada (Minister of Health)*, [2007] F.C.J. No. 681 (QL) at paras. 11-23, 2007 FC 506).
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> [25] However, there are particular situations where the fourth requirement mentioned above has been applied with some flexibility (*Robert Mondavi Winery v. Spagnol's Wine & Beer Making Supplies Ltd.*, [2001] F.C.J. No. 1412, at paras. 10-17 and 18;*Tint King of California Inc. v. Canada (Registrar of Trade-Marks)*, [2006] F.C.J. No. 1808 (QL) at paras. 22 and 23, 2006 FC 1440).
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> [26] **To sum up, the Court possesses vast discretion to allow a party to file additional material. Such discretion is incompatible with a mechanical application of any set test or formula, whether threefold or fourfold. The factors mentioned above are not exhaustive and the jurisprudence does not prescribe how they are to be weighed by the judge or the prothonotary. Further, because each decision is discretionary**

> **and will be fact-specific, there may be other factors in any given case.**
>
> [27] **Thus, it is fair to say that each case will involve a different weighing depending on the individual circumstances before the decision maker** (*Solvay Pharma Inc. v. Apotex Inc.*, [2007] F.C.J. No.1190 (QL) at para. 12, 2007 FC 913). Overall, in exercising its discretion, the Court must always have in mind the general principle mentioned at rule 3 of the Rules that "[t]hese Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits".
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> [Emphasis added]

[43] However, the Defendant Owner submits, in the alterative, that the Prothonotary failed to give proper effect to the requirement that the proposed evidence not be available prior to the cross-examinations. More specifically, that the Prothonotary misapplied the factor based on her misunderstanding of *Campbell.* The Defendant Owner submits that the paragraphs above amount only to obiter, given that *Campbell* found that the proposed evidence was not available in advance (at para 51). Further, that *Campbell* does not serve to permit the Court to entirely disregard the requirement that the proposed evidence not have been previously available.

[44] I do not agree that the description of the discretionary nature of decisions made pursuant to Rule 84(2) in paragraphs 26 and 27 of *Campbell* is mere *obiter* or that the Prothonotary erred in her understanding of the case.

[45] The Defendant Owner acknowledges that *Campbell* was followed in *Canada (Attorney General) v United States Steel Corporation*, 2011 FC 742 [*US Steel*]. They submit, however, that while *US Steel* applied Rule 312 in a flexible manner, relying on *Campbell*, this served only to

relax the requirement that the relevance of the proposed evidence must not have been anticipated in advance, to a less stringent requirement, whereby the relevance must not have been entirely anticipated. The Defendant Owner submits that *US Steel* did not, however, suggest that the requirement could be entirely disregarded.

[46] The Court in *US Steel* stated, in terms of Rule 312 motions, that Justice Martineau "neatly described the full discretion afforded to the judge hearing the motion" in paragraph 26 of *Campbell*, quoted above. The Court then found that it was in the interest of justice to allow the subject affidavits to be filed, that it would be of assistance to the Court's understanding if they were filed, and that the opposing party would not be unduly prejudiced. Because US Steel had conceded that all of the information contained in the affidavits was available prior to the filing of its evidence, the Court stated that it was difficult for it to conclude that the relevance of the material could not have been anticipated at that time. Regardless, the affidavit evidence did address issues that could not have been in their entirety previously anticipated. The Court stated that it exercised its discretion provided by Rule 312 in a flexible manner and that it agreed with the approach taken by Justice Martineau in para 27 of *Campbell* that, in exercising its discretion, the Court must always have in mind the general principle contained in Rule 3, that the Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits (*US Steel* at para 33).

[47] In my view, *US Steel* adopted the description in *Campbell* of the discretionary nature of Rule 312 decisions and supports that the Court similarly has discretion in the application of the Rule 84(2) factors to the circumstances of the matter before it.

[48] *Tint King of California Inc v Canada (Registrar of Trade-Marks)*, 2006 FC 1440 [*Tint King*] also demonstrates that the prior availability factor need not be rigidly enforced:

> [21] In this case, the first three factors identified by Justice Nadon in *Atlantic Engraving* are easily met. The sympathetic circumstances of the Applicant merit some leniency, the Court requires more evidence to effectively evaluate whether the Mark has been in use, and it is difficult to see how the submission of additional evidence could prejudice the other side when the Respondent has not participated in the appeal and has not submitted any material.
>
> [22] An issue does arise, however, with respect to the additional requirement that the evidence must not have been available at an earlier date. But the circumstances of this case suggest there is no practical logic for rigidly enforcing this factor. There is no evidence that the Applicant is attempting to split its case. In fact, there would appear to be no incentive or advantage in doing so. Furthermore, there are situations where this requirement has been interpreted with flexibility. In this regard, the Applicant refers to the decision in *Larson-Radok v. Minister of National Revenue*, [2000] 3 C.T.C. 163, 2000 DTC 6322 at paragraphs 6-7, where Prothonotary Hargrave stated, after noting that the supplemental affidavit met the first three requirements under Rule 312, as follows:
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> > The difficulty is that a supplementary affidavit ought not to deal with material which could have been made available at an earlier date. Yet, I do not believe that this concept ought to be slavishly applied, where innocent confusion on the part of counsel, confusion not shared by the other side, confusion which would prejudice the applicants is involved. Counsel and client are not always, for all purposes, one entity, with the oversight of counsel an inescapable consequence for client: […] In the present instance, for justice to be done, a supplemental affidavit is in order.
>
> [23] Although the decision in *Larson-Radok* was driven by the fact that counsel for the applicant had not followed the applicant's instructions, the situation of the Applicant in the present case also suggests that allowing a supplemental affidavit to be filed is necessary "for justice to be done." Given that the interests of justice will in no way be compromised by allowing an additional affidavit to be filed, it would appear that this is an appropriate case

> for the Court to exercise its discretion in favour of the Applicant and allow the supplemental affidavit (Supplemental Affidavit) of Mrs. Starkman.

[49] And, while the Defendant Owner attempts to distinguish *Tint King* as a recognised exceptional circumstance that permitted the Court to "read down" the prior availability factor, in my view, the case more aptly demonstrates that the Court has discretion, when considering the Rule 84(2) factors, to weigh them, and in doing so, the Court can grant leave, even when one of those factors has not been satisfied.

[50] This is also demonstrated by *Mondavi* which concerned Rule 84(2). There, the first factor of the test to be considered – relevancy – was conceded. With respect to the second factor, prior availability of the evidence, procedural fairness was the primary concern given that further affidavits are not to repair answers which cross-examining counsel wishes that they did not get, nor to allow a party to split their evidence (*Mondavi* at para 10 citing *Salton Appliances (1985) Corp v Salton Inc*, 181 FTR 146, 2000 CanLII 14828 (FC) at para 18 [*Salton*]). In *Mondavi*, the applicant acknowledged that the supplementary affidavits contained evidence that was available prior to cross-examination. The Court stated that, "[c]learly the decision by counsel to withhold the information, on the expectation that it could possibly come out on cross examination, was wrong. This was a significant factor which militates against granting of the relief sought by the Applicant" (at para 11). The Court then considered the third factor, prejudice to the other party, and found that this could be addressed by allowing the respondent to conduct further cross-examination and to adduce further evidence, as well as by costs. The Court noted that there had been no attempt by the applicant to conceal information for strategic purposes and although the

diligence of the initial search could be questioned, there was no suggestion of bad faith (at para 13).

[51] Significantly, although the Court in *Mondavi* found that the prior availability factor had not been met and that this was a significant factor militating against granting leave to file the new affidavit evidence, the Court nonetheless concluded, having weighed all three factors in the exercise of its discretion under Rule 84(2), that it served the interest of justice to allow the filing, subject to appropriate safeguards being effected to ensure that the respondent was able to fully respond.

[52] In my view, this clearly demonstrates that when considering the Rule 84(2) factors, including the prior availability factor, the Court has discretion in how it weighs them. Further, the approach taken in *Mondavi* is precisely the approach taken by the Prothonotary in this case.

[53] The issue of the discretionary nature of granting leave pursuant to Rule 84(2) is perhaps best demonstrated, for purposes of this appeal, in a decision not referenced by the parties, *Apotex Inc v Canada (Minister of Health)*, 2005 FC 1401 [*Apotex*]. This was an appeal from a prothonotary's order refusing leave to file a supplementary affidavit under Rule 84(2).

[54] In the challenged order, the prothonotary stated, "the parties are *ad idem* that the factors to be taken into account in exercising the discretion conferred by Rule 84(2) of the *Federal Courts Rules* to allow the filing of an affidavit after cross-examinations are not a list of criteria to be met, but factors to be weighed" (quoted at para 14 of *Apotex*). The prothonotary found that the

new evidence was available before cross-examination, and cross-examination did not make it more relevant than it was before. In light of that finding, the new evidence also could not assist the court, nor was it in the interests of justice to allow it. As to prejudice, she noted that the respondent did not dispute that allowing the filing of the proposed evidence would not cause prejudice to the respondent, but found that, "absence of prejudice alone does not, in my view, counterbalance the findings I have made in respect of the other factors to be weighed" (*Apotex* at para 20) [Emphasis removed].

[55] On appeal from the prothonotary's order, Apotex argued, amongst other things, that the prothonotary's comments about prejudice were in error. This Court rejected Apotex's argument stating, "Apotex suggests that absence of prejudice trumps all other factors. I do not read the relevant jurisprudence as supporting this proposition**. Absence of prejudice is but one factor amongst others all of which must be weighed which is precisely what the Prothonotary did**" (at para 36) [Emphasis added].

[56] Therefore, this Court in *Apotex* found that all of the factors are to be weighed and that one factor is not necessarily determinative. In other words, while all of the Rule 84(2) factors must be considered, they are not mandatory and conjunctive requirements.

[57] And, significantly, the Federal Court of Appeal dismissed the appeal of *Apotex* (*Apotex Inc v Canada (Minister of Health)*, 2005 FCA 397), stating:

> [5] In support of its motion to introduce the affidavit, **the Appellant relied heavily on the absence of any claim of prejudice by the Respondent. However, this is but one factor to**

> **be considered and by itself is not determinative. It does not trump all other factors.**
>
> [6] The appellant has failed to demonstrate that Mr. Justice Lemieux made any reviewable error and accordingly the appeal will be dismissed with costs.
>
> [Emphasis added]

[58] In my view, Federal Court of Appeal's finding in *Apotex* is determinative of this issue. It demonstrates that the Rule 84(2) factors are not discreet, mandatory requirements of a conjunctive test. Rather, they are factors that must be considered and weighed when making a discretionary ruling under Rule 84(2). The failure to establish any one factor is not necessarily fatal to the request for relief.

[59] In view of the foregoing, in this matter the Prothonotary was required to consider each of the Rule 84(2) factors when deciding whether to exercise her discretion to grant leave. It is clear from her reasons that the Prothonotary did this. It is also significant to note that, when weighing the prior availability factor, the Prothonotary considered the Oland Affidavit evidence and found that the justification offered for the delay in containing the Lim Affidavit or bringing on the motions was wholly unsatisfactory. She also found that this was a significant factor that militated against the granting of the relief sought. However, while that factor had not been established, the Prothonotary exercised her discretion to afford other factors greater weight in granting the motion. In doing so, the Prothonotary recognized that the prior availability factor is aimed at preventing moving parties from splitting their case and requiring them to put their best foot forward at the first opportunity (*Rosenstein* at para 9). The Prothonotary addressed that issue in the context of the prejudice factor stating that there was no evidence that the Plaintiffs are

attempting to split their case. Put otherwise, the purpose and significance of the prior availability factor was appropriately considered by the Prothonotary.

[60] In my view, the Prothonotary did not err in law, or in mixed fact and law, by failing to treat the prior availability factor as a distinct, mandatory element of a conjunctive test. She was entitled to weigh the Rule 84(2) factors, which she did, in reaching her discretionary decision. The failure to meet one of those factors, the prior availability of the evidence, was not fatal.

[61] In conclusion on this issue, contrary to the submissions of the Defendant Owner, the Prothonotary did not err in her treatment of the test to be met in order for leave to be granted under Rule 84(2). In effect, the Defendant Owner does not agree with the manner in which the Prothonotary exercised her discretion to permit the admission of the affidavit evidence, which they oppose. However, this is not an error of law, nor is it a palpable and overriding error. It is a disagreement with the outcome.

ii. Shifting the burden of proof

[62] The Defendant Owner also submits that the Prothonotary erred in law as she appears to have shifted the burden of proof to the Defendant Owner, requiring it to establish that it would suffer prejudice if leave were granted. Further, that the Prothonotary appears to have held the Defendant Owner to an inconsistent standard.

[63] In my view, there is no merit to this submission. The Prothonotary, in paragraphs 31 to 34 of her reasons, was describing the Defendant Owner's position that it would suffer significant

prejudice if the Lim Affidavit were permitted to be filed – which position was taken in response to the Plaintiffs' position that there would be no prejudice – and explaining why she was not persuaded that the Defendant Owner would suffer serious prejudice. Nothing in her reasons suggests that she shifted the burden to the Defendant Owner. She simply did not accept the Defendant Owner's submission on that point. Nor does anything turn on the fact that the Prothonotary, in setting out the test in paragraph 18 of her reasons, described the absence of prejudice, while in paragraphs 31 and 32 she refers to "serious prejudice". Her conclusion was that any procedural unfairness suffered by the Defendant Owner could be remedied by allowing it to conduct further cross-examination and to adduce further evidence and could also be mitigated by way of costs, as her Order reflects. No error of law has been established.

iii. Relevancy of the proposed evidence

[64] The Defendant Owner submits that the Prothonotary also erred in law by finding that the Lim Affidavit was *prima facie* relevant and by only considering its *prima facie* relevance rather than engaging with the Defendant Owner's arguments on the merits of its relevance. According to the Defendant Owner, the law requires a threshold finding of relevance at the Rule 84(2) motion stage, which threshold required consideration of its arguments on the merits.

[65] The Defendant Owner offers no authority in support of its position that there is a threshold level of relevance and that this threshold exceeds a *prima facie* finding of relevancy. Nor am I able to discern why it would be necessary on a Rule 84(2) motion, when considering the relevancy factor, to delve into the merits of the dispute when the Prothonotary was satisfied that the evidence in the Lim Affidavit was, on its face, relevant to the jurisdictional issues raised

in the stay motion. As the Case Management Judge for the 11 related Actions, she was very familiar with the jurisdictional issue. She also stated in her reasons why she held the view that that the Lim Affidavit provides additional factual information relevant to the jurisdictional issue (Order at paras 21-23). After making that finding, she stated that while the Defendant Owner advanced various arguments as to why the Service Contract does not apply to the dispute, that those went to the merits of the Owner's stay motion and, therefore, were more appropriately addressed by the Motions Judge based on the full evidentiary record, which would be available at that hearing.

[66] I see no error in the Prothonotary's approach.

Issue 2: Did the Prothonotary make errors of fact or mixed fact and law that amounted to palpable and overriding errors?

[67] The Defendant Owner's overarching position is that the Prothonotary incorrectly assessed and weighed the facts. It identifies three asserted errors as to the Prothonotary's misapprehension of the facts.

i. Relevance of Lim Affidavit

[68] On this issue, the Defendant Owner first submits that the Prothonotary erred by finding, without any evidence, that the Lim Affidavit is relevant or of assistance to the Court.

[69] The Defendant Owner submits that the Plaintiffs provided no evidence to establish that the Service Contract has any relevance to the Actions. In this regard, the Defendant Owner again

argues that it was not sufficient for the Prothonotary to find that the evidence was *prima facie* relevant and was of assistance to the Court (Order at paras 21, 23 and 35).

[70] As discussed above, the Prothonotary reviewed the Lim Affidavit. She found that it provides factual information relating to the Service Contract between Havi Container Line Limited and K-Line. Further, that the Plaintiffs will rely on Article 12 of the Service Contract to refute the Defendant Owner's position that the parties agreed that the disputes are to be decided in accordance with Japanese law and by the Tokyo District Court, as Article 12 provides that the substantive law of the State of New York will govern the contract and that the parties still submit to the jurisdiction of the stated U.S. court.

[71] The Prothonotary found that the Lim Affidavit includes additional relevant information regarding the Service Contract, such as the duration of the contract. Mr. Lim states that on behalf of Havi Container Line Limited, he negotiated Service Contract with K-Line America Inc. as agents for Kawasaki Kilian Kaisha Ltd., which he signed on March 30, 2017. He asserts that Havi Global Solutions LLC, Havi GS Asia Pacific(s) and Havi Logistics Taiwan Ltd. (Plaintiffs in the underlying action and in Court File No. T-298-19), and Havi Container Line Limited (the party to the Service Contract) are all part of the Havi Group, which is a privately owned transportation and logistics organization group of companies. Mr. Lim also deposed that the Service Contract was in force from April 4, 2017 to March 31, 2018, which covers the timeframe when the engine fire on the Ship is alleged to have occurred.

[72] The Defendant Owner says that Havi Container Line Limited is not a party to any of the Actions and it has not been established that the Service Contract extends to any of them. In particular, that there is no evidence that Havi Container Line Limited's supposed membership in the Havi Group extends to the Service Contract to other members of that group.

[73] In my view, these are matters that speak to the merits of the jurisdictional issue. They are also questions that can be addressed on cross-examination of Mr. Lim, which the Prothonotary's Order permits. I am not persuaded that the Prothonotary's reliance on a finding of *prima facie* relevance amounts to a palpable and overriding error.

ii. Prejudice to the Defendant Owner

[74] The Defendant Owner submits that the Prothonotary erred in finding that the Defendant Owner would not suffer serious prejudice by granting leave, despite clear evidence to the contrary.

[75] Further, that the Prothonotary misunderstood the importance of not having the benefit of the Lim Affidavit when conducting the prior cross-examination of Leona Baxter and Shuji Yamaguchi.

[76] This assertion is based on the paragraphs 9 and 10 of the affidavit of Mr. Kostyniuk, which was before the Prothonotary, and deposes that had the Lim Affidavit been available, Mr. Kostyniuk would have considered it in his approach to the Baxter and Yamaguchi cross-examinations including by selection of specific areas upon which to question, the depth of

inquisitorial probing, and that the process of seeking admissions would have been different; he deposes his belief that this resulted in significant prejudice to the Defendant Owner.

[77] The Prothonotary acknowledged the Defendant Owner's arguments but was not persuaded that the Defendant Owner would suffer serious prejudice if the Plaintiffs were granted leave to file the Lim Affidavit. As acknowledged by the Defendant Owner, the Prothonotary referenced *Zhu* (at para 8) and *Mondavi* (at para 12) and found that any procedural unfairness the Defendant Owner may suffer due to the manner in which its counsel crafted its case did not amount to prejudice and could be addressed by allowing the Defendant Owner to conduct further cross-examination and to adduce further evidence. Further, that there was no evidence that the Plaintiffs were attempting to split their case.

[78] On appeal, the Defendant Owner reargues its position and disagrees that any procedural fairness or prejudice is remedied by the provisions of the Order. The Defendant Owner says this is because these measures would not address the "restrictions on the questions asked" at the prior cross-examinations.

[79] In my view, no palpable and overriding error arises from the Prothonotary's assessment of the potential for procedural unfairness or in her effecting of appropriate safeguards to address any such procedural unfairness. Mr. Kostyniuk's affidavit evidence was broad and general in nature; it offered no specifics of alleged prejudice.

[80] Likewise, the assertion that questioning was restricted because the Defendant Owner was not aware of the Lim Affidavit is not supported with any examples of how this was so. For example, the Defendant Owner cross-examined Ms. Baxter on her eight-paragraph affidavit, which attached a copy of the Service Contract. Ms. Baxter is Canadian co-counsel for the Plaintiffs with respect to the Actions. It is difficult to see how, when cross-examining Ms. Baxter, the information contained in the Lim Affidavit restricted the Defendant Owner's approach. And, as seen from the transcript of cross-examination, the only "admission" the Defendant Owner relies on from that cross-examination is that Ms. Baxter had no personal knowledge of when the Service Contract was in force or if it had been agreed to by both parties. As Ms. Baxter is Canadian counsel with respect to the container damage alleged to arise from the engine room fire, this would not seem to be a particularly surprising or significant admission. Further, in *Salton* this Court stated that Rule 84(2) is designed to deal with matters that arise during cross-examination for which there is a need to address by way of further affidavit with leave of the Court (*Salton* at para 16). Given that Ms. Baxter had no personal knowledge of the issues raised by the Defendant Owner on cross-examination, it was open to the Plaintiffs to seek leave to file the Lim Affidavit to address this.

[81] In that regard, the Defendant Owner submits that the Plaintiffs are attempting to split or repair their case by the filing of the Lim Affidavit as the Lim Affidavit will allow the Plaintiffs to buttress their case after the Defendant Owner "crafted its case" to meet the case presented to them. And that, based on the Baxter admission, the Prothonotary was mistaken in finding that there was no evidence that the Plaintiffs were attempting to split their case.

[82] In my view, the Defendant Owner simply disagrees with the Prothonotary's finding. The Defendant Owner did not establish how its case was crafted such that it would be seriously prejudiced by allowing the Lim Affidavit to be filed together with the effecting of the procedural safeguards implemented by the Order. Further, the Prothonotary found as a fact that there was no evidence that the Plaintiffs were attempting to split their case. In other words, she did not accept the Defendant Owner's position that the Baxter acknowledgement and the subsequent filing of the Lim Affidavit had that effect. She also noted that the Plaintiffs agreed that the Defendant Owner was entitled to cross-examine Mr. Lim and she stated that there did not appear to be any incentive or advantage to the Plaintiffs in splitting their case, given that they have proactively sought the Court's assistance to move the stay motion forward to hearing.

[83] I find no palpable and overriding error in the Prothonotary's finding that the Defendant Owner would not suffer serious prejudice if the Lim Affidavit were accepted for filing on the terms set out in her Order.

iii. Exercise of discretion

[84] Finally, the Defendant Owner submits that the Prothonotary erred in the exercise of her discretion to grant leave when the facts weigh strongly in favour of a denial. The Defendant Owner says that the Lim Affidavit has little or no relevance and cannot assist the Court and that the Prothonotary gave undue weight to these factors. In this regard, the Defendant Owner again argues that the Plaintiffs have not proven that the Service Contract has any relevance or will be of assistance to the Court because it has not been established that the Service Agreement is connected to the Plaintiffs in the Actions. The Defendant Owner again argues that the

Prothonotary should have dealt with these issues on the merits rather than simply finding the Service Contract to be *prima facie* relevant. Further, even if it is marginally relevant it should not be accepted because of its prior availability.

[85] These arguments, as well as the Defendant Owner's repeated submissions about serious prejudice and delay, have been addressed above. Here, the Defendant Owner simply disagrees with the Prothonotary's weighing of the factors. However, as I have already found, it was open to her to weigh the factors in making her discretionary decision. It is not the role of the Court, on appeal, to reweigh the factors simply because the Defendant Owner disagrees with them (see, for example, *Whitefish Lake First Nation v Grey*, 2019 FCA 275 at paras 10-11). And, as stated in *Hospira*, "…it is always relevant for motions judges, on a Rule 51 appeal, to bear in mind that the case managing prothonotary is very familiar with the particular circumstances and issues of a case and that, as a result, intervention should not come lightly" (at para 103).

[86] Here the Prothonotary weighed all of the factors. As to the fourth factor, she found that the evidence in the Lim Affidavit, which is limited to matters already at issue between the parties, i.e. the Service Contract, would assist the Motions Judge in properly addressing the jurisdictional issues raised in the Defendant Owner's stay motion, and concluded that it would be in the interests of justice to allow the Plaintiff to file the Lim Affidavit, subject to the appropriate safeguards being put in place to ensure that the Defendant Owner is able to fully respond to the proposed evidence in the Lim Affidavit. I see no palpable and overriding error in her approach, her assessment or findings of fact, or her conclusion.

ORDER

THIS COURT'S JUDGMENT is that

1. The Rule 51 motion by the Defendant Owner, appealing the June 30, 2020 Order of the Prothonotary, is dismissed;

2. Given that the Prothonotary's Order stipulates that costs will be payable to the Defendant Owner in any event of the cause, there shall be no order as to costs with respect to this appeal.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-296-19
STYLE OF CAUSE:	HAVI GLOBAL SOLUTIONS LLC, HAVI GS ASIA PACIFIC(S), GOLDEN ARCHES DEVELOPMENT CORPORATION, HAVI LOGISTICS TAIWAN LTD., MARTIN-BROWER SINGAPORE PTE, AND MARTIN-BROWER MALAYSIA CO. SDN. v IS CONTAINER PTE LTD., THE SHIP MV "MOL PRESTIGE", HER OWNERS, AND ALL OTHERS INTERESTED IN HER, KAWASAKI KISEN KAISHA LTD., AND YANG MING MARINE TRANSPORT CORPORATION
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	JULY 23, 2020
ORDER AND REASONS	STRICKLAND J.
DATED:	JULY 30, 2020

APPEARANCES:

A. Barry Oland	FOR THE PLAINTIFFS
Jason R. Kostyniuk and Matthew Crowe	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Oland Baxter Vancouver, British Columbia	FOR THE PLAINTIFFS
Alexander Holburn Beaudin + Lang LLP Vancouver, British Columbia	FOR THE DEFENDANTS