Federal Court  Cour fédérale

Date: 20181004

Docket: T-396-13

Citation: 2018 FC 992

Ottawa, Ontario, October 4, 2018

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

HOSPIRA HEALTHCARE CORPORATION

Plaintiff

and

THE KENNEDY INSTITUTE OF RHEAMATOLOGY

Defendant

AND BETWEEN:

THE KENNEDY TRUST FOR RHEUMATOLOGY RESEARCH, JANSSEN BIOTECH, INC., JANSSEN INC., CILAG GMBH INTERNATIONAL AND CILAG AG

Plaintiffs by Counterclaim

and

HOSPIRA HEALTHCARE CORPORATION, CELLTRION HEALTHCARE CO. LTD., CELLTRION, INC., AND PFIZER CANADA INC.

Defendants by Counterclaim

ORDER AND REASONS

I. Overview

[1] This decision relates to a motion brought by the Plaintiffs by Counterclaim for leave pursuant to Rules 233 and 238 of the *Federal Courts Rules*, SOR/98-106 for the production of documents from a non-party and leave to examine a non-party for discovery.

[2] As explained in greater detail below, the motion for production of documents is dismissed, because the Plaintiffs by Counterclaim have not satisfied me that the Court should exercise its discretion to order production by a non-party. There is presently no necessity for such an order, because of the availability of the evidence through production by the Defendants by Counterclaim. Further, the work associated with addressing privacy concerns associated with the evidence should be imposed upon the parties, not upon the non-party. The motion for leave to examine a non-party for discovery is granted in part, based on the non-party's consent to such examination.

II. Background

[3] This motion arises in the context of the quantification phase of the within pharmaceutical patent infringement action. By Order of Prothonotary Milczynski [the Prothonotary] dated February 24, 2014, this action was bifurcated into liability and quantification phases. In his Reasons for Judgment dated March 7, 2018 [the Liability Reasons], Justice Phelan granted the patent infringement claim of the Plaintiffs by Counterclaim, The Kennedy Trust for

Rheumatology Research, Janssen Biotech, Inc., Janssen Inc., and CILAG GmbH International [Janssen], against the Defendants by Counterclaim, Hospira Healthcare Corporation, Celltrion Healthcare Co. Ltd., and Celltrion, Inc. [Hospira]. While the Judgment in the liability phase had not yet been issued as of the time of the hearing of this motion, pending adjudication of costs and consideration of a motion by Janssen to add parties, the Prothonotary has set a schedule for the steps in the quantification phase of the action, culminating with a trial of quantification issues scheduled to begin in September 2019.

[4] Janssen's infringement claim surrounds the marketing and sale by Hospira of an anti-inflammatory product, with the commercial name Inflectra, used principally in the treatment of rheumatoid arthritis. The non-party, Innomar Strategies Inc. [Innomar], has contracted with Hospira to administer the Inflectra Patient Assistance Program [Inflectra PAP] to assist and coordinate the treatment of patients receiving Inflectra in Canada. In connection with this role, Innomar maintains information related to the Inflectra PAP in a patient information database [the Innomar Database]. As the Innomar Database contains information regarding all or substantially all of the patients across Canada who have received an infusion of the infringing product, Janssen takes the position that this information is directly relevant to determining the extent of the infringement and will assist in quantifying the damages or an accounting of profits, whichever is eventually elected by Janssen.

[5] Following the issuance of the Liability Reasons, Janssen wrote to each of Hospira and Innomar, seeking their positions on production of the Innomar Database. Innomar advised that it

was not prepared to produce documents or to have a representative examined without a Court Order. Hospira did not take a position prior to Janssen filing the within motion.

[6] In this motion, Janssen seeks an order under Rule 233 requiring Innomar to produce the Innomar Database, including certain specified categories of patient information, as well as internal documents related to data entry and/or data interpretation in the Innomar Database, and shipment documents detailing shipments of Inflectra to Innomar and from Innomar to individual clinics. Janssen also seeks an order under Rule 238 compelling Innomar to make its corporate representative available for examination for discovery regarding Innomar's productions, such discovery to be held by November 30, 2018, and permitting Janssen to bring a further motion to compel answers and produce documents, to be heard on an expedited basis, if Innomar refuses to answer proper questions or produce further documents in response to discovery questions.

[7] Hospira advanced the position that Janssen's motion is premature, because the liability phase of this action had not yet concluded, although I note that, subsequent to the hearing of this motion, Justice Phelan issued Judgment in the liability phase on September 28, 2018. Hospira also argues that the motion should be denied on its merits, because Janssen has failed to satisfy the requirements of Rules 233 and 238, as it has not established that it cannot obtain the relevant evidence through documentary production by Hospira and discovery examination of Hospira's representative.

[8] Innomar takes a similar position with respect to Janssen's Rule 233 motion, arguing that any relevant information and documentation is available from Hospira, and raising concerns

about third-party privacy issues associated with information in the Innomar Database. With respect to the Rule 238 motion, Innomar does not oppose an order requiring that a representative be examined for discovery but seeks to impose certain limitations and conditions on such discovery.

III. **Issues**

[9] I adopt Innomar's articulation of the issues to be decided by the Court in this motion:

A. Should the Court order production of documents from Innomar?

B. What are the appropriate terms for an order permitting examination for discovery of Innomar?

IV. **Analysis**

A. *Should the Court order production of documents from Innomar?*

[10] The principal legal issue in dispute among the parties is the test to be applied by the Court in deciding the motion under Rule 233(1). That Rule provides as follows:

Production from non-party with leave	**Production d'un document en la possession d'un tiers**
233 (1) On motion, the Court may order the production of any document that is in the possession of a person who is not a party to the action, if the document is relevant and its production could be compelled at trial.	**233 (1)** La Cour peut, sur requête, ordonner qu'un document en la possession d'une personne qui n'est pas une partie à l'action soit produit s'il est pertinent et si sa production pourrait être exigée lors de l'instruction.

[11] Janssen's position, based on the wording of the Rule, is that, provided the documentation it seeks is relevant to the issues as defined by the pleadings in the quantification phase of this action, and the production of this documentation could be compelled at trial, it is entitled to the production order it now seeks. While Hospira disagrees that all the information in the Innomar Database sought by Janssen is relevant to the quantification issues, there is no disagreement that it contains a substantial quantity of relevant information. Nor do I understand the arguments by Hospira and Innomar to relate to whether production of the requested documents could be compelled at trial. Rather, both Hospira and Innomar take the position that the test under Rule 233(1) requires more than consideration of relevance and amenability to compulsion at trial. They submit that Janssen is required to demonstrate that it cannot obtain the relevant information through the processes of production by, and discovery of, Hospira, the party to the litigation.

[12] In response, Janssen argues that Hospira and Innomar are conflating the requirements of Rule 233(1), related to production of documents by a non-party, and Rule 238, related to discovery of a non-party. It is only Rule 238 that includes a requirement, prescribed by Rule 238(3)(b), that the party seeking discovery establish that it has been unable to obtain the information informally from the person or from another source by any other reasonable means:

Examination of non-parties with leave	**Interrogatoire d'un tiers**
238 (1) A party to an action may bring a motion for leave to examine for discovery any person not a party to the action, other than an expert witness for a party, who might have information on an issue in the action.	**238 (1)** Une partie à une action peut, par voie de requête, demander l'autorisation de procéder à l'interrogatoire préalable d'une personne qui n'est pas une partie, autre qu'un témoin expert d'une partie, qui pourrait posséder des renseignements sur une

question litigieuse soulevée dans l'action.

Personal service on non-party

(2) On a motion under subsection (1), the notice of motion shall be served on the other parties and personally served on the person to be examined.

Signification de l'avis de requête

(2) L'avis de la requête visée au paragraphe (1) est signifié aux autres parties et, par voie de signification à personne, à la personne que la partie se propose d'interroger.

Where Court may grant leave

(3) The Court may, on a motion under subsection (1), grant leave to examine a person and determine the time and manner of conducting the examination, if it is satisfied that

(a) the person may have information on an issue in the action;

(b) the party has been unable to obtain the information informally from the person or from another source by any other reasonable means;

(c) it would be unfair not to allow the party an opportunity to question the person before trial; and

(d) the questioning will not cause undue delay, inconvenience

Autorisation de la Cour

(3) Par suite de la requête visée au paragraphe (1), la Cour peut autoriser la partie à interroger une personne et fixer la date et l'heure de l'interrogatoire et la façon de procéder, si elle est convaincue, à la fois :

a) que la personne peut posséder des renseignements sur une question litigieuse soulevée dans l'action;

b) que la partie n'a pu obtenir ces renseignements de la personne de façon informelle ou d'une autre source par des moyens raisonnables;

c) qu'il serait injuste de ne pas permettre à la partie d'interroger la personne avant l'instruction;

d) que l'interrogatoire n'occasionnera pas de retards,

or expense to the person or to the other parties.	d'inconvénients ou de frais déraisonnables à la personne ou aux autres parties.

[13] I disagree with Janssen's position that the Court's analysis under Rule 233(1) should be narrowly confined to the requirements expressly prescribed by the Rule. As argued by Innomar, the language of Rule 233(1) is permissive, stating that the Court "may" order production if the express requirements are met. I agree with Innomar's submission that the Rule contemplates a discretion on the part of the Court, available to be exercised if the express requirements are met, but that the factors to be considered in the exercise of that discretion may extend beyond the express requirements of the Rule. Innomar refers the Court to various authorities which it submits inform considerations that should be taken into account by the Court in the exercise of its discretion. Innomar argues that these authorities support its position that the availability of relevant evidence from a party to the litigation, as well as third-party privacy considerations, should be taken into account by the Court in considering whether to grant an order under Rule 233(1).

[14] In *Main Fisheries Ltd. v R.*, [1980] 1 FC 104, the Federal Court considered the application of Federal Court Rule 464, a predecessor to Rule 233, which is worded differently but addresses the same circumstances. In that case, the applicants sought production of a report prepared by a non-party accounting firm, which the firm was not prepared to release without the consent of a non-party client. The Court awarded production of the report, and Innomar points out that, in arriving at that result, the Court noted, at paragraph 18, the submission by counsel that there was no other source from which the information could be obtained.

[15] In *Eli Lilly Canada Inc. v Sandoz Canada Inc.*, 2009 FC 345 [*Eli Lilly*], the Court considered a motion by the plaintiffs seeking to compel the defendant to produce further documents, including compelling the defendant to obtain documents from a non-party supplier, and seeking to compel the Minister of Health to produce relevant documents in its possession. The Court's analysis of the relief requested in relation to the non-parties is relevant to the issue under consideration in the present matter. In declining to order production by the non-party Minister of Health, the Court explained at paragraph 16 that the documents in the possession of the Minister were also in the possession of the defendant's supplier, that the defendant had undertaken to request these documents from the supplier, and that the supplier had expressed a willingness to provide them. Similarly, in deciding that it was premature to order the defendant to request certain documents from its supplier, the Court held at paragraph 18 that its discretion to order production from a third party extended beyond mere relevance and may require weighing the necessity and probative value of the documents sought in light of the documents already disclosed.

[16] In response to Innomar's reliance on *Eli Lilly*, Janssen notes that the defendant in that case had provided an undertaking to request production from the third party supplier, which Janssen submits distinguishes that case from the circumstances currently before the Court. I will return to this point later in these Reasons.

[17] Innomar also relies on recent jurisprudence surrounding the issuance of so-called *Norwich* orders, a mechanism by which a party can obtain an order against a third party compelling disclosure of information and documentation which assists in identifying a

wrongdoer. In *Voltage Pictures, LLC v John Doe*, 2017 FCA 97 [*Voltage Pictures*] at para 17, the Federal Court of Appeal explained that *Norwich* orders can be obtained under Rule 233 of the *Federal Courts Rules* and, at paragraphs 18 to 19, described the requirements for obtaining a *Norwich* order. These requirements include necessity, in the sense that the third party is the only practical source of the information, and the need to balance the benefit to the applicant against the prejudice to the alleged wrongdoer in releasing the information, including considering the degree of confidentiality associated with the information. Innomar relies on this jurisprudence both in support of its position that Janssen must demonstrate it is unable to obtain the requested evidence from Hospira and in support of its position that the privacy interests of the patients and physicians whose information is contained in the Innomar Database must factor into the exercise of the Court's discretion under Rule 233.

[18] *Voltage Pictures* was overturned by the Supreme Court of Canada in *Rogers Communications Inc. v Voltage Pictures, LLC*, 2018 SCC 38 [*Rogers Communications*], although on grounds unrelated to the principles described above. Indeed, at paragraph 18, the Supreme Court of Canada described the elements of the test, or factors to be considered, in seeking a *Norwich* order as including: (a) the person from whom the discovery is sought being the only practical source of information available to the applicants; and (b) the public interest in favour of disclosure outweighing legitimate privacy concerns. In describing these elements or factors, the Court referenced the decision of the Federal Court of Appeal in *BMG Canada Inc. v John Doe*, 2005 FCA 193 [*BMG*] at paras 15 and 32.

[19] In response to Innomar's submissions on this line of authority, Janssen argues that it is an error to compare the present motion to one seeking a *Norwich* order, as the nature of the information sought differs, as does the potential risk to the third parties whose information is sought. A third party whose identity is revealed through issuance of a *Norwich* order faces risk of being subject to litigation and potentially liability, while the patients and physicians whose personal and professional information may be in the Innomar Database face no such jeopardy.

[20] Notwithstanding the Court's explanation in *Voltage Pictures* that it was considering a motion under Rule 233, I would not suggest that the Court should necessarily import the test for obtaining a *Norwich* order into consideration of all motions under Rule 233. However, relying on the above authorities cited by Innomar, including the *Norwich* order jurisprudence, I would consider the necessity of seeking production from a non-party and the impact upon privacy rights to be factors to be taken into account, in appropriate cases, where a Rule 233 order is sought. As noted above, I do not read Rule 233(1) as removing the Court's discretion to consider factors other than the express requirements of demonstrating the relevance of the evidence sought and that it could be compelled at trial. As observed by Innomar, while *BMG* is a decision under Rule 238 rather than Rule 233, its prescription of the requirement to consider privacy concerns is not based on any express requirement to that effect in Rule 238.

[21] I have also considered Janssen's reliance on the decision in *Remo Imports Ltd. v Jaguar Canada Inc.*, (2000) 6 CPR (4^{th}) 62 [*Remo Imports*], in which the Federal Court relied on the availability of production from a non-party under Rule 233(1) in overturning a prothonotary's decision, which had ordered that a defendant obtain and produce documents from the non-party.

In that case, the plaintiff sought to compel the defendants, Jaguar Canada Inc. and Jaguar Cars Limited, to obtain production of sales documents from a number of Jaguar dealers. In reversing the prothonotary's decision compelling such production, Justice O'Keefe held as follows at paragraph 16 (where it appears that the reference to the plaintiff is erroneous and should have referred to the defendants):

> [16] There is no doubt that the documents requested are relevant as the defendants have pleaded sales of the goods in Canada. Although the discovery rules are to be interpreted broadly, there is a need to apply a specific rule to a certain set of facts if those facts fit the rule. Here we have the dealers, who are non-parties, specifically covered by Rule 233(1). It is my opinion that it is an error of law to order the dealers' documents to be produced by the plaintiff when Rule 233(1) sets out a simple process to obtain the documents of a non-party. I would therefore reverse the prothonotary's decision with respect to paragraph 22 and rule that the defendants need not produce the sales documents of its dealers or retailers.

[22] Janssen argues, based on *Remo Imports*, that the fact that the requested productions might be available from Hospira should not be an impediment to an order compelling production by Innomar directly. Indeed, Jensen submits that this authority casts doubt on whether it would even be entitled to compel Hospira to obtain evidence from the Innomar Database from Innomar, because that evidence can be obtained directly from under Rule 233(1).

[23] I disagree with this interpretation of *Remo Imports*. I read Justice O'Keefe's decision as turning significantly on his finding that the prothonotary was incorrect in concluding that there was a contractual relationship between the Jaguar defendants and dealers pursuant to which the defendants could compel the production by the dealers. It was on that basis that the Court

concluded that the defendants need not produce the sales documents of its dealers, and the Court's comments on Rule 233(1) must be read in that context.

[24] Turning to the application of the above legal principles to the facts underlying the present motion, I note that it appears uncontested that some of the information in the Innomar Database is in the possession of Hospira. The record before the Court on this motion includes an affidavit by Phil Peters, Innomar's Director, Payer & Pharmacy Strategy, and the transcript of Mr. Peters' cross-examination by Janssen's counsel. Mr. Peters' evidence is that much of the data collected by Innomar through the Inflectra PAP is provided to Hospira on a periodic basis, although to some extent it is anonymized by removing patients' personal identifiers. He expresses concern that, if Innomar were required to produce all the data and documents collected through the Inflectra PAP, there would be significant issues regarding the disclosure of personal information, and potentially the need to redact or remove information that may not be relevant to the litigation between the parties.

[25] Mr. Peters also states that information collected by Innomar in connection with the delivery of services to patients under the Inflectra PAP, and generated by Innomar in connection with the Inflectra PAP, belongs to Hospira, with the exception of information unrelated to Inflectra which is developed by Innomar relating to its own processes, reports, and services. At the hearing of this motion, Innomar's counsel confirmed that Hospira has a contractual right to data generated by Innomar in connection with the Inflectra PAP.

[26] Hospira's counsel also confirmed at the hearing that Hospira will request from Innomar and produce to Janssen information that is relevant to the issues in the quantification phase of this litigation. Janssen's response is that this confirmation is inadequate, falling significantly short of the undertaking to request production from the third party underlying the decision in *Eli Lilly*, described earlier in these Reasons. Janssen argues that Hospira's submissions in this motion include arguments to the effect that some of the information sought by Janssen from the Innomar Database is not relevant to the quantification issues. Janssen is therefore concerned that, if it does not receive production of the complete Innomar Database directly from Innomar pursuant to this motion, it will encounter refusals from Hospira to its production requests, leading to subsequent refusals motions and delays in obtaining the necessary evidence. It submits that it will therefore be prejudiced in preparing for trial, which is a year away.

[27] I note that the quantification phase of this proceeding is governed by a schedule imposed by the Prothonotary in her case management function. This schedule includes affidavits of documents and productions to be exchanged by September 28, 2018, examinations for discovery to be completed by November 30, 2018, a case management conference to discuss items including refusal motions on December 10, 2018, all discovery including written answers and third-party discovery to be completed by March 31, 2019, and then a series of dates associated with expert reports, leading to trial commencing on September 30, 2019.

[28] It is therefore significant that Janssen's motion was brought and heard before it had received initial documentary production from Hospira and before any examinations for discovery were performed. I appreciate that, as productions and discoveries between the parties proceed,

disputes surrounding requests for further productions and their relevance may develop. However, the potential for such disputes is inherent in the litigation process. To the extent that such disputes develop, their parameters will presumably be identified through the parties' documentary productions and discoveries, and any unresolved disputes, including, potentially, third-party productions if required, can be addressed by the Court with the benefit of the increased definition of the outstanding issues that will then be available. It is also my view that the upcoming steps in the proceeding, including the deadlines associated with those steps, provide an appropriate framework to address any such issues in a timely manner.

[29] Against that backdrop, I do not consider the position presently expressed by Hospira's counsel, that it will request from Innomar and produce to Janssen information that is relevant to the quantification issues, to be problematic at this stage of the litigation. Hospira has committed to request relevant evidence from Innomar, and Innomar's position is that Hospira owns and is entitled to information related to Inflectra that Hospira may request. The circumstances of this case are therefore distinguishable from *Remo Imports*, and in my view the Court should not exercise its discretion to order third-party production when there is presently no necessity for such an order, because of the availability of the evidence through production by Hospira.

[30] The concerns raised by Innomar, about the third-party privacy interests of patients and physicians whose personal and professional information is contained in the Innomar Database, also factor into my exercise of discretion. The evidence indicates that Hospira receives information from Innomar in a form that is anonymized to protect privacy interests. To the extent that, following the parties' exchange of productions, it is subsequently determined, either by

agreement or upon further motion, that Janssen is entitled either to documents that contain personal information or to the information itself, work will be required either to redact that information or to appropriately protect its confidentiality if disclosed. I agree with Innomar's position that, in the circumstances of this case where there is no dispute as to Hospira's entitlement and willingness to request information in the Innomar Database, or Innomar's willingness to provide that information to Hospira, the work associated with navigating the privacy concerns should be imposed upon the parties, not upon Innomar.

[31] I therefore decline to issue the requested order under Rule 233(1).

B. *What are the appropriate terms for an order permitting examination for discovery of Innomar?*

[32] Innomar does not oppose an order requiring that a representative be examined for discovery, but seeks to impose certain limitations and conditions on such discovery. It submits that such examination should not take place until after the discovery processes for the parties are complete, that the examination should be limited to documents produced by Hospira related to Innomar's administration of the Inflectra PAP, that the examination should be limited to two hours, and that Janssen should pay Innomar's reasonable legal and business costs of attending the examination.

[33] At the hearing of this motion, counsel for both Janssen and Innomar agreed that appropriate timing for the discovery of a representative of Innomar was following the discoveries

of the parties' representatives, required to be completed by November 30, 2018. Janssen's counsel acknowledged that two hours might be a reasonable length for the Innomar discovery but expressed concern that it was difficult to know this with certainty at this stage in the proceeding. Janssen also takes the position that Innomar has not identified any special circumstances, as contemplated by Rule 239(3), which would warrant the Court ordering that Janssen should pay the costs of a solicitor assisting Innomar's representative at the examination.

[34] I agree with Janssen's position on the length and legal costs of the examination. Also, while I am inclined to agree that the examination should be limited to documents produced by Hospira related to Innomar's administration of the Inflectra PAP, in my view it is premature to impose such a condition at this stage in the proceeding, prior to the production of such documents and the completion of the discoveries of the parties' representatives.

[35] My Order will therefore provide for the discovery of a representative of Innomar following completion of the discoveries of the parties' representatives. If disputes subsequently develop surrounding the terms of Innomar's discovery, those disputes can be addressed when they are better defined.

V. **Costs**

[36] Each of the parties took the position that it should be awarded costs if successful on the motion. Only Innomar made representations on the quantification of costs, providing the Court with a draft Bill of Costs, calculated based on items involved in preparation for and appearance on the motion as well as preparation for and attendance at the cross-examination of Mr. Peters.

Employing the high end of the range in Column V of Tariff B, Innomar calculates 37 units or $5,550.00 in fees, plus HST of $721.50 and disbursements (inclusive of HST) of $493.87, for a total of $6,765.37.

[37] Speaking to Innomar's draft Bill of Costs at the hearing, Janssen's counsel did not take issue with the items included but argued that there was no basis to depart from Column III. I agree with this position. Innomar refers to its status as a non-party and argues that Janssen's motion should never have been brought. While Janssen's motion under Rule 233 has been dismissed, I do not consider its motion to have been so bereft of merit as to warrant departing from Column III. Nor has Innomar cited any authority for the proposition that its status as a non-party warrants an increased costs award.

[38] Each of Hospira and Innomar is entitled to its costs of the motion. With respect to Innomar, as it is a non-party, I consider it appropriate to fix those costs at this juncture. Employing the figures in its draft Bill of Costs, but recalculating each item based on the middle of Column III, I arrive at 15 units or $2,250.00 in fees, plus HST of $292.50 and the disbursements of $493.87, for a total costs award of $3,036.37.

ORDER

THIS COURT'S ORDERS that:

1. Innomar Strategies Inc. shall make its corporate representative available for examination for discovery following completion of the examinations for discovery of the parties' representatives.

2. Otherwise, the motion of the Plaintiffs by Counterclaim is dismissed.

3. Costs of this motion are awarded to the Defendants by Counterclaim and to Innomar Strategies Inc., with the costs of Innomar Strategies Inc. fixed at $3,036.37.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-396-13
STYLE OF CAUSE:	HOSPIRA HEALTHCARE CORPORATION v THE KENNEDY INSTITUTE OF RHEAMATOLOGY RESEARCH AND THE KENNEDY TRUST FOR RHEUMATOLOGY RESEARCH, JANSSEN BIOTECH, INC., JANSSEN INC., CILAG GMBH INTERNATIONAL AND CILAG AG AND HOSPIRA HEALTHCARE CO. LTD., CELLTRION, INC. AND PFIZER CANADA INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 25, 2018
ORDER AND REASONS:	SOUTHCOTT J.
DATED:	OCTOBER 4, 2018

APPEARANCES:

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