

CITATION: Gissin v. TCC/Urbancorp Bay Stadium L.P., 2025 ONSC 521
COURT FILE NO.: CV-24-00713232-00CL
DATE: 20250124

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: GUY GISSIN, SOLELY IN HIS CAPACITY AS FOREIGN REPRESENTATIVE OF URBANCORP INC. AND TRUSTEE FOR THE IMPLEMENTATION OF THE URBANCORP INC. DEBT ARRANGEMENT, Applicant

AND:

TCC/URBANCORP BAY STADIUM L.P., THE WEBSTER TRUST AND URBANCORP HOLDCO INC.

BEFORE: Kimmel J.

COUNSEL: *Neil Rabinovitch / Chloe Snider*, for the Applicant

Colby Linthwaite, for the Respondents

HEARD: December 11, 2024

ENDORSEMENT

Procedural History: The Application and Rule 39 Leave Motion

[1] The applicant, Guy Gissin, solely in his capacity as foreign representative of Urbancorp Inc. and Trustee for the Implementation of the Urbancorp Inc. Debt Arrangement, has brought this application for recognition and enforcement of an Israeli court order dated June 23, 2022 and decree dated August 12, 2022 (the "Judgments"). For reasons explained later in this endorsement, during the hearing on December 11, 2024 the application was adjourned to March 27, 2025.

[2] At the hearing on December 11, 2024, I heard the respondents' motion for leave under Rule 39 to deliver the affidavit of Odelia Minnes affirmed November 25, 2024 and the attached Expert's Report on Israeli law of Odelia Minnes dated November 25, 2024, (collectively, the "Expert's Report") for the court's consideration on this application. The respondents need leave because they first indicated an intention to introduce evidence of Israeli law after the parties had exchanged affidavits, the cross-examination of the applicant had been completed and the applicant's factum had already been delivered.

[3] This application was originally scheduled to be heard on October 17, 2024 based on a set timetable for pre-hearing steps. The parties exchanged affidavits over the summer. The applicant was cross-examined by the respondents on September 11, 2024, after which the applicant delivered answers to certain undertakings and questions taken under advisement. The applicant then

delivered a factum on October 7, 2024. On October 11, 2024 at the request of the respondents, the application was adjourned to December 4, 2024. The stated reason for the adjournment was because the respondents' lawyer was ill. The December 4, 2024 date was made preemptory to the respondents.

[4] After the adjournment was granted, there was a brief exchange of follow-up written interrogatories initiated by the respondents by a letter dated November 4, 2024, and responded to by the applicant on November 20, 2024.

[5] On November 26, 2024, the respondents then provided the Expert Report. This was the first time that the applicant was advised that the respondents had engaged an expert and were intending to tender evidence about the law of Israel. It was later disclosed that this Expert Report had been obtained based on a letter of instructions dated November 8, 2024.

[6] Over the applicant's objection, the respondents delivered a responding factum dated November 28, 2024, that relied upon the Expert Report. The respondents served a notice of motion dated November 29, 2024, seeking leave to file the report.

[7] An urgent case conference was convened on December 2, 2024 to consider what to do about the application in light of the late delivery of the respondents' Expert Report. The suggestion that the Rule 39 leave motion be heard at the same time as the application was not accepted. Instead, the court adjourned the application and directed an expedited hearing of the leave motion, which was scheduled and heard on December 11, 2024. The application was adjourned to March 27, 2025, the first available date after December 11, 2024 for a full day hearing that was convenient to counsel.

[8] After hearing the parties' submissions on the leave motion, including their responses to questions raised by the court, the parties were urged to try to agree upon terms for the withdrawal of the Expert Report on the basis that the application would proceed without reference to Israeli law by either side. The court took this decision under reserve pending the discussions between the parties that continued into January 2025. On January 6, 2025 the parties advised the court that they were unable to reach an agreement and requested that the court render a decision on the leave motion.

Rule 39 Leave Motion: Analysis

[9] For the reasons that follow, the Rule 39 leave motion is denied.

The Test for Leave Under Rule 39

[10] Rule 39.02(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, states as follows:

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.

[11] The applicant does not consent. Thus, leave of the court is required. The respondents ask the court to apply the following test adopted by the Court of Appeal for Ontario in *1944949 Ontario Inc. (OMG ON THE PARK) v. 2513000 Ontario Ltd.*, 2019 ONCA 628, at paras. 33-34:

[33] The court must consider the following criteria in determining whether a party should be granted leave to respond to a matter raised on cross-examination:

- 1) Is the evidence relevant?
- 2) Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?
- 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?
- 4) Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

See: *Lockridge*, at para. 24; *First Capital Realty Inc. v. Centrecorp Management Services Ltd.* (2009), 258 O.A.C. 76 (Div. Ct.), at para. 13.

[34] In *First Capital Realty*, at para. 14, the Divisional Court articulated the preferred approach to these criteria:

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.]

[12] In my view, the respondents have not satisfied these four criteria, nor does the denial of leave lead to an unfairness to the respondents. The applicant has not put forward any admissible evidence on the law of Israel, so the respondents do not need to be granted leave to rely on the Expert Report opinion on the law of Israel. Put another way, it is not unfair for the respondents to be unable to respond, with the Expert Report, to a theory and evidence that the applicant is not relying on, or to be prevented from putting forward evidence of Israeli law that supports the respondents' theory and position without any reasonable or adequate explanation for why it was not tendered in the first place.

a) The Expert Report is Not Relevant

[13] The applicant's primary and stated position is that its total recoveries are irrelevant to this recognition and enforcement application because "the claims in respect of which the Judgments were granted against the Respondents have not been the subject of any recovery either in Canada or Israel". This is described by the respondents' factum (at paragraph 31) as the applicant's "Total Recovery" theory.

[14] The law of Israel regarding whether and how the Foreign Administrator is required to account for any recoveries that is addressed in the Expert Report is, according to the respondents, only relevant to support the "Israeli Legal Theory" of the applicant. The Israeli Legal Theory, according to the respondents, is that there is "no upper limit" on the recovery available to the applicant; specifically, that recovery is not limited by the amount of the allowed and other claims recognized in the Israeli bankruptcy proceeding.

[15] The applicant has not delivered an expert report on the law of Israel about whether there is, or is not, an upper limit on the Total Recoveries. Without such a report, it would not be open to the applicant to rely on the law of Israel or advance any arguments in this recognition and enforcement application that are dependent upon proof of Israeli law. The respondents correctly state in their factum on this motion that:

[The applicant] has chosen not to file an expert's report establishing the law of Israel upon which he relies. The Court of Appeal has held that in Ontario, foreign law is treated like a fact, the proof of which requires opinion evidence from a properly qualified expert. [citing: *Grayson Consulting Inc. v. Lloyd*, 2019 ONCA 79. at paragraph 29]

[16] Accordingly, if the Expert Report is only necessary to respond to an unproven Israeli Legal Theory, in the absence of any proof of that theory by the applicant, the respondents' Expert Report is not relevant to any issue that is to be determined on this application.

[17] At a more fundamental level, the respondents have not explained how the Expert Report is relevant to the any of the available defences to a party resisting enforcement of a foreign judgment, where the judgment meets the requirements for enforcement (which the respondents have acknowledged). The available defences are fraud, denial of natural justice and public policy. These defences are narrow and do not allow an Ontario court to examine the merits: see *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 SCR 416, at paras. 39-41, 64.

[18] The respondents make the general assertion that it would be contrary to public policy for the applicant to recover more from the enforcement and recognition of the Judgment than the amount of the allowed and other claims that are recognized in the Israeli bankruptcy proceeding, but they do not suggest that the Expert Report contains opinion evidence relevant to this assertion. Importantly, even if the Expert Report did do so, it would run afoul of the fourth requirement (discussed later in this endorsement).

b) The Expert Report Does Not Respond to a Matter Raised on Cross-Examination

[19] The Israeli Legal Theory is not mentioned in either of the First or Second affidavits of Mr. Gissin filed in support of this application. The theory was articulated for the first time during Mr. Gissin's cross-examination.

[20] The applicant says that it was the lawyer for the respondents who drew this theory out of Mr. Gissin by the questions that were asked - it was not something that Mr. Gissin proffered of his own accord. That is also a fair observation of what transpired during the cross-examination, when considered in the context of all of the questions asked about the recoveries, and the justification for seeking recoveries in excess of the amount of the Judgment.

[21] To be a matter "raised on cross-examination", it is not sufficient that the lawyer seeking leave merely asked about the issue while examining witness: see *246192 Ontario Ltd. v. Paramount Franchise Group Inc.*, 2019 ONSC 593, at paras. 55-57.

[22] Furthermore, and in any event, the fact that those questions were asked, and answers were given that purport to provide evidence about the law of Israel, does not render those responses to be admissible in this proceeding as evidence of Israeli law; they are not: see *Grayson Consulting*, at para. 29.

[23] There is no suggestion that the evidence about the law of Israel given by Mr. Gissin during his cross-examination meets the requirements for opinion evidence on Israeli law or that the witness is, or could be, qualified as an expert in Israeli law in this area. The applicant agreed in general terms at the hearing that it is not seeking to rely on Mr. Gissin's answers in cross-examination that purport to give evidence about the law of Israel. The applicant's factum delivered after the cross-examination (and after the follow-up written questions and answers), but before the Expert Report was delivered, does not refer to or rely upon the impugned evidence of Mr. Gissin regarding the "Israel Legal Theory". The applicant is prepared to proceed on the basis of the factum previously filed and without reference to or reliance upon any evidence given by Mr. Gissin during his cross-examination about the law of Israel.

[24] This makes it clear that the Israel Legal Theory was not a matter raised on the cross-examination of the applicant that requires a response from the respondents.

c) The Applicant Will Not Suffer Non-Compensable Prejudice

[25] The need for Rule 39 leave for the delivery of the Expert Report resulted in the application being adjourned to March 27, 2025, due to the court's and counsel's availability. The respondents now wish to take advantage of the time that has opened up, and suggest that there is no prejudice because there would be sufficient time for the applicant to deliver its own expert report on Israeli law, if so advised, and for the experts to be cross-examined and factums for the application to be updated to take this Israeli Legal Theory and the law of Israel into account. The respondents acknowledged that the costs of any delay attributable to the late request to tender the Expert Report could have been determined and awarded in favour of the applicant.

[26] However, this court has held that a party's attempt to bolster and supplement their position after having had the benefit of testing the evidence and theories in cross-examination constitutes

non-compensable prejudice: see *Brock Home Improvement Products Inc v. Corcoran*, 58 OR (3d) 722 (S.C.), at para. 11; *Sure Track v. Kaisersingh*, 2011 ONSC 7388, at para 35; *Skrobacky v. Frymer*, 2011 ONSC 3295, 16 CPC (7th) 199, at para. 18. That is a procedural unfairness and non-compensable prejudice that exists in this case and should not be lightly displaced.

d) The Respondents have not Provided a Reasonable or Adequate Explanation for Why the Expert's Report was not Included at the Outset

[27] The respondents have not filed any affidavit to explain the timing of the delivery of the Expert Report. They submit that it flows from their assertion that the Israeli Legal Theory was only first mentioned during the cross-examination of Mr. Gissin. Mr. Gissin stated that the estate has a legal right to recover under the Judgment an amount that exceeds the court approved claims. The respondents contend that assertion demanded a response, hence the Expert Report. The respondents say they did not need the Expert Report earlier as there was no need to prove Israeli law on this point, but now there is.

[28] As was the case in *Wu v. Di Iorio*, 2024 ONSC 77, at paras 22-27, it is less persuasive to rely upon a submission without supporting evidence to satisfy the requirement to provide a reasonable explanation for why the Expert Report was not delivered earlier (before the cross-examination of Mr. Gissin). The respondents have not provided any explanation as to why they did not address through an expert on the law of Israel the scope of the applicant's legal authority (limits on recoveries) if it was relevant to the premise of their response from the outset.

[29] In their responding materials, prior to the cross-examination of Mr. Gissin, the respondents raised issues that put into play the amount that the applicant was entitled to recover under the Judgments. Further, the contingent interest claim (another aspect of the Expert Report) was raised expressly in the reply materials (and previously in the decision of the Israeli court from April 2019), before cross-examinations.

[30] This raises a further concern for the court that what the respondents are really seeking to do here is tender evidence on the law of Israel to support the theory that they have been advancing from the outset of this application: that the applicant should not be permitted by this court to recover more than the amount of the allowed and other claims recognized in the Israeli bankruptcy proceeding through the recognition and enforcement of the Judgment in Canada.

[31] There are unanswered questions about why the respondents did not tender an expert report on Israeli law earlier. The submission about the timing for its delivery after the cross-examination does not address these questions.

Summary of the Leave Test

[32] The respondents have not satisfied any of the requirements of the leave test. Failure of any one of them would be sufficient to deny leave. The primary weakness in their position is that the Expert Report has not been shown to be relevant and is not responsive to any admissible evidence

on Israeli law that was raised on cross-examination. If what the respondents are really seeking to do is rely on the Expert Report in support of a theory that they have been propounding all along about permitted recoveries, no adequate explanation has been provided for why the Expert Report was not included in the agreed timetable for the motion and delivered earlier.

[33] The Rule exists for a reason. Just because the hearing ended up having to be adjourned for a longer period than the parties had hoped for does not mean that the court delay wipes the slate clean.

[34] When a party fails to address all issues at the outset, and tries to add evidence after cross-examination, they split their case. One of the purposes of Rule 39.02 is to prevent that from happening without good reason: see *Corporation of the Municipality of Temagami v. Temagami Barge Limited et al*, 2024 ONSC 571, at para. 12, citing *1013952 Ontario Inc (Silverado Restaurant and Nightclub) v. Sakinofsky*, 2009 CanLII 55279 (ON SC), at paras. 9-11.

[35] In *Temagami* (at para. 13) the court endorsed with approval the following passage from *Sure Track* (at para. 30):

I believe that the words "ought to be permitted to respond" found in rule 39.02(2) impose a burden on a party who seeks leave to show more than an absence of non-compensable prejudice to the opposite party. In my view, those words import a requirement for the party who seeks leave under rule 39.02(2) to provide, by way of evidence on the motion for leave, a satisfactory explanation for its failure to include the proposed additional evidence as part of its pre-cross-examination case. The court should scrutinize carefully the reasons for the omission and the evidence offered in support of that explanation. To approach the issue otherwise undermines the integrity of the evidentiary framework for motions and applications that is mandated by the rules. Absent some reasonable explanation for the original omission, leave should be refused. [emphasis in original]

[36] Granting leave for the delivery of the Expert Report now would allow the respondents to split their case, which is prejudicial to the applicant. When evaluating fairness, the court often considers and balances the relative prejudices. Here, there is no apparent prejudice to the respondents if leave is denied because the Expert Report has not been shown to be relevant or necessary to respond to any admissible expert evidence about the law of recoveries in a restructuring proceeding in Israel.

[37] The respondents delivered their report a week before the rescheduled hearing date, forcing an adjournment when the case was ready to be heard on the merits on a hearing date that was already peremptory on them.

[38] In all of the circumstances of this case, I am not prepared to grant the leave the respondents seek to deliver the Expert Report. The respondents' Rule 39 leave motion is dismissed.

Costs

[39] The costs of the previous adjournments were reserved to the application's judge. The costs of this motion are as well.

[40] The respondents are directed to deliver a fresh as amended factum that removes all references to the Expert Report by no later than February 3, 2025. Under the Commercial List Consolidated Practice Direction, the applicant may file a reply factum of up to five pages double spaced (if appropriate), and shall have until February 17, 2025 to do so. Aside from these factums and the parties' respective bills of costs for the application, there shall be no further material delivered by either side in advance of the March 27, 2025 hearing date for this application, which is preemptory to the respondents.

[41] Since all of the pre-hearing steps will be completed by the middle of February, the parties may contact the Commercial List Scheduling office to find out if any dates have become available for a one-day hearing prior to March 27, 2025 (aside from the earlier dates in March on which one or both counsel indicated they were unavailable).

Kimmmel J.

Date: January 24, 2025