Federal Court  Cour fédérale

Date: 20211215

Docket: T-449-17

Citation: 2021 FC 1427

Ottawa, Ontario, December 15, 2021

PRESENT: Mr. Justice McHaffie

BETWEEN:

FARMOBILE, LLC

Plaintiff/
Defendant by Counterclaim

and

FARMERS EDGE INC.

Defendant/
Plaintiff by Counterclaim

ORDER AND REASONS

I. Overview

[1] Farmobile appeals the November 3, 2021 order of Case Management Judge (CMJ) Ring dismissing its motion to require Ronald Osborne, Chief Technical Officer of Farmers Edge, to answer questions on cross-examination. The cross-examination was conducted in the context of a motion about the propriety of redactions applied to 13 emails produced by Farmers Edge. Farmers Edge had first produced the emails with a set of redactions. After Farmobile protested,

Farmers Edge produced the emails with a second set of redactions, revealing somewhat more of what was in them. The cross-examination questions at issue on this appeal relate to the first set of redactions.

[2] For the reasons below, I agree with Farmers Edge that Farmobile has not identified a palpable and overriding error in the CMJ's conclusion that the questions were improper. Farmobile failed to satisfy the CMJ that questions about the first set of redactions were relevant to the issues on the motion, which is about the second set of redactions, and they have failed to satisfy me that the CMJ made a palpable and overriding error in this regard. While cross-examination questions that go to an affiant's sworn evidence or to their credibility may go beyond what is legally relevant to the motion on which their affidavit was filed, Farmobile has not shown that the impugned questions arise from Mr. Osborne's affidavit or that they are fair and *bona fide* questions relevant to the credibility and reliability of his evidence.

[3] Nor do I see an error in the CMJ's consequent conclusion that Mr. Osborne should not be ordered to re-attend for cross-examination. Farmobile argues Mr. Osborne should have been required to attend to answer relevant questions even if it is unsuccessful on the first aspect of its motion. I disagree. Farmobile made a tactical decision to purport to adjourn the cross-examination and seek directions when its questions about the first redactions were refused, rather than asking any further questions it may have had. They do not now have the opportunity to undo the consequences of that decision by seeking to continue their cross-examination as if it had not been adjourned.

[4] The appeal motion is therefore dismissed.

II. Issues and Standard of Review

[5] Although framed somewhat differently by Farmobile, this appeal motion ultimately raises the following issues:

A. Did Case Management Judge Ring err in concluding that Farmobile's cross-examination questions about the first set of redactions were improper?

B. Did Case Management Judge Ring err by refusing to order any further cross-examination?

[6] The parties agree that on an appeal motion from a decision of a Prothonotary of this Court, the appellate standards of review apply: *Housen v Nikolaisen*, 2002 SCC 33; *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 2, 28, 63–65, 79. On factual findings and questions of mixed fact and law, including exercises of discretion, the applicable standard is that of palpable and overriding error; on questions of law, including those extricable from a question of mixed fact and law, the applicable standard is correctness: *Housen* at paras 19–37; *Hospira* at paras 66, 79; *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 57, 72–74.

[7] Farmobile does not claim the CMJ made an extricable legal error. The parties therefore agree that the applicable standard is that of palpable and overriding error. As Farmers Edge points out, the nature of the "palpable and overriding error" standard, including the importance of both the "palpable" and "overriding" terms, was discussed by the Court of Appeal in *Mahjoub*. In essence, the error or errors must be obvious and they must, alone or in combination, affect the outcome of the case: *Mahjoub* at paras 61–65.

III. Analysis

A. *Case Management Judge Ring did not err in concluding that the questions at issue are improper*

(1) Context: The action, the productions, and the underlying redactions motion

[8] Farmobile owns a patent on a farming data collection and exchange system. It believes Farmers Edge has infringed and is still infringing this patent through the latter's "FarmCommand" system, including a device called "CanPlug." Farmers Edge denies it has ever infringed the patent. Nonetheless, in April 2021, Farmers Edge implemented a software change. It claims the change results in it not infringing the patent even on Farmobile's theory of infringement. Farmers Edge seeks to rely on this software change both in defence to the claim of infringement and in respect of damages if the pre-April 2021 system is found to infringe. Farmers Edge therefore terms the change a "non-infringing alternative" or NIA.

[9] Farmers Edge told Farmobile about the April 2021 NIA about a week before the trial was scheduled to begin, resulting in an adjournment of the trial. The trial is now scheduled to begin in August 2022. I note parenthetically that I am currently assigned to be the trial judge, but my hearing of this motion is serendipitous, as it was coincidentally set down for general sittings in Saskatoon on a date I was assigned to those sittings.

[10] Farmobile asked Farmers Edge to produce documents relating to the April 2021 NIA. By order dated June 17, 2021, CMJ Ring set a timeline for production of those documents. Farmers

Edge produced a number of documents, including 13 emails or email exchanges from which portions had been redacted. All of these emails have Mr. Osborne as a sender or recipient.

[11] Farmobile complained of the redactions and sought unredacted copies of the emails. Farmers Edge refused. After an exchange between counsel and a case management conference (CMC), Farmers Edge provided further copies of emails with fewer redactions, without agreeing that the emails were relevant or that the original redactions were improper. Still unsatisfied, Farmobile served a notice of motion on August 9, 2021 seeking production of unredacted copies of the emails. In response, on August 23, Farmers Edge proposed to provide Farmobile's outside counsel with an opportunity to review the unredacted emails, with or without the assistance of Farmobile's outside expert. Farmobile responded the same day seeking a "brief high level summary of what the redacted information relates to."

[12] On August 27, Farmers Edge served an affidavit from Mr. Osborne in response to the redactions motion. In his affidavit, Mr. Osborne states he identified the redactions applied to the emails. He says that the emails relate to Farmers Edge's operations and ongoing projects, which included but were not limited to the April 2021 NIA. He states that the redactions contain information irrelevant to the April 2021 NIA. Attached as an exhibit to the affidavit is a table setting out the general nature of the redacted information in each email and Mr. Osborne's assessment that, in each case, the information is irrelevant and would not assist in understanding the unredacted portions of the email.

[13] The following Monday, August 30, Farmers Edge repeated its offer to give outside counsel an opportunity to inspect the unredacted documents on a "strict outside-counsel's-eyes-only basis this week," noting that Mr. Osborne's affidavit contained a summary of the nature of the redacted information as Farmobile had requested. This offer was not accepted.

(2) The cross-examination questions at issue

[14] Farmobile cross-examined Mr. Osborne on September 24 by videoconference. The examination was brief. After preliminary confirmations, counsel asked Mr. Osborne whether he performed the redactions on "both sets of emails" (Q. 8). Counsel agreed before me that since the emails were the same, it would be more precise to refer to "both sets of redactions" rather than "both sets of emails." Regardless, the meaning of the question was clear. That question was refused on the basis that the first set of redactions was irrelevant to the issues on the motion.

[15] Mr. Osborne was asked twice more whether he performed the first set of redactions (QQ. 13, 14). Again, these questions were refused. He was also asked whether Farmobile had put both sets of emails in the record (Q. 15), and whether the emails are the same but with different redactions (Q. 16). These questions were again refused on grounds of relevance. A thirteen-minute break followed. On return, Mr. Osborne confirmed that he identified the second set of redactions, but the next two questions about comparisons between the two sets of redactions (QQ. 18, 19) were refused as irrelevant, as was a further question asking whether Mr. Osborne could recall the first set of redactions without looking at them (Q. 20).

[16] At that stage, counsel for Farmobile stated that they were going to adjourn the cross-examination to seek directions of the Court pursuant to Rule 96(2) of the *Federal Courts Rules*, SOR/98-106. Counsel for Farmers Edge objected to this approach, suggesting that arguments about refused questions could be made at the hearing, and took the position that Farmobile was ending the cross-examination.

[17] The same day, Farmobile requested a CMC to address a number of matters including its intention to bring a motion for directions in respect of the cross-examination. That CMC was held on October 5, 2021 before CMJ Ring and resulted in an October 6 order requiring Farmobile to file its motion by October 13. Farmers Edge's proposal of a review of the redactions by outside counsel was apparently discussed at the CMC.

[18] On October 13, Farmobile served its notice of motion regarding the cross-examination questions. The following Monday, October 18, Farmobile responded to the August 30 proposal from Farmers Edge saying, "[g]iven the suggestion by Prothonotary Ring on the last CMC, we are prepared to review the redacted portions of the emails on an outside-counsel's-eyes-only basis." Farmers Edge responded on the Thursday, stating that counsel was unavailable that week to facilitate the review. The next day, October 22, Farmers Edge filed its responding record on the cross-examination motion in accordance with the CMJ's October 6 order, in which it took the position that having been put to the task of preparing the responding materials, it was "now too late" for Farmobile to inspect the unredacted emails.

(3) The CMJ's decision

[19] The CMJ stated that the legal principles governing the scope of cross-examination on an affidavit were not in dispute. She referred to the principle that "[a]n affiant who swears to certain matters should not be protected from fair cross-examination on the very information he volunteers in his affidavit": *CBS Canada Holdings Co v Canada*, 2017 FCA 65 at para 29 citing *Ottawa Athletic Club Inc (Ottawa Athletic Club) v Athletic Club Group Inc*, 2014 FC 672 at paras 130–133 and *Merck Frosst Canada Inc v Canada (Minister of National Health and Welfare)*, [1996] FCJ No 1038 at para 9 [*Merck (1996)*]; see also *Thibodeau v Edmonton Regional Airport Authority*, 2021 FC 146 at paras 12–13. The CMJ noted that the central issue in the motion before her was whether the impugned questions asked during the cross-examination were relevant.

[20] To assess the question of relevance, the CMJ referred to Justice Hugessen's decision in *Merck Frosst Canada Inc v Canada (Minister of Health)*, 1997 CarswellNat 2661, [1997] FCJ No 1847 (TD), aff'd [1999] FCJ No 1536 (CA) [*Merck (1997)*]. At paragraphs 6 to 8 of *Merck (1997)*, Justice Hugessen said the following:

> For present purposes, I think it is useful to look at relevance as being of two sorts: formal relevance and legal relevance.
>
> Formal relevance is determined by reference to the issues of fact which separate the parties. In an action those issues are defined by the pleadings, but in an application for judicial review, where there are no pleadings (the notice of motion itself being required to set out only the legal as opposed to the factual grounds for seeking review), the issues are defined by the affidavits which are filed by the parties. Thus, cross-examination of the deponents of an affidavit is limited to those facts sworn to by the deponent and the deponent of any other affidavits filed in the proceeding.

> Over and above formal relevance, however, questions on cross-examination must also meet the requirement of legal relevance. Even when a fact has been sworn to in the proceeding, it does not have legal relevance unless its existence or non-existence can assist in determining whether or not the remedy sought can be granted. (I leave aside questions aimed at attacking the witness's personal credibility which are in a class by themselves). Thus, to take a simple example, where a deponent sets out his or her name and address, as many do, it would be a very rare case where questions on those matters would have legal relevance, that is to say, have any possible bearing on the outcome of the litigation.
>
> [Emphasis added.]

[21] The CMJ concluded the cross-examination questions about the first set of redactions were not relevant. She found that even if she accepted that the first set of redactions was formally relevant as having been referred to in Mr. Osborne's affidavit, Farmobile had not shown that they were legally relevant. She noted that the underlying redactions motion sought production of unredacted copies of the emails "at Exhibits S to EE" of the paralegal's affidavit sworn in support of the redactions motion. Those exhibits showed the second set of redactions. The CMJ concluded that it was the propriety of the second set of redactions, and not the first set, that was at issue on the motion and that Farmobile had not satisfactorily explained how a comparison between the two sets of redactions "can or will assist" in determining that issue. She noted that if Farmobile genuinely sought further information about the redacted content, counsel could have accepted the offer to inspect the unredacted documents "in a timely manner."

[22] The CMJ went on to address Farmobile's argument that Mr. Osborne's evidence "cannot be trusted," since Farmers Edge had resiled from its initial position. She concluded that Farmers Edge had not resiled from its first position, given its statement at the time the second set of redactions were produced that it did not concede any impropriety in the first set of redactions.

Further, even if Farmers Edge had resiled from its initial position, the CMJ reasoned that "it does not inevitably follow" that the second set of redactions contains relevant information, noting that "[t]he propriety of the redactions applied in the Second Set of Redacted Emails is assessed by examining the nature and scope of those redactions."

(4) There is no palpable and overriding error

(a) *The scope of permissible cross-examination on an affidavit*

[23] The CMJ noted that there was no dispute before her as to the applicable principles regarding the scope of cross-examination on an affidavit in support of a motion. Before me, neither party directly challenged the CMJ's statement of those principles. Nevertheless, the parties' submissions emphasized different aspects of the case law and drew different conclusions regarding the applicable principles. It is therefore worth reviewing those principles at the outset.

[24] I begin with the Federal Court of Appeal's 2017 decision in *CBS*, cited by the CMJ. In that case, while not purporting to discuss all of the relevant principles, the Court of Appeal said the following at paragraph 29:

> The scope of cross-examination on an affidavit has been the subject of a number of decisions in which the relevant principles are set out: see *Ontario v. Rothmans Inc.*, 2011 ONSC 2504 at para. 143 and [*Ottawa Athletic Club*] at paras. 130-33. For the purposes of this motion, I am prepared to accept as correct the following statement taken from paragraph 132 of *Ottawa Athletic Club*:
>
> > However, there seems to be a consensus that "[a]n affiant who swears to certain matters should not be protected from fair cross-examination on the very information he volunteers in his affidavit," and "should submit to cross-examination not only on

> matters set forth in his affidavit, but also to those collateral questions which arise from his answers": [*Merck (1996)*] at para 9, quoting *Wyeth-Ayerst Canada Inc v Canada (Minister of National Health and Welfare)* (1995), 60 CPR (3d) 225, [[1995] FCJ No 240] (FCTD).

[Emphasis added; some citations omitted or varied.]

[25] The *Rothmans* decision cited with approval in the above passage is a frequently cited decision of Justice Perell of the Ontario Superior Court of Justice. While *Rothmans* was decided under Ontario's *Rules of Civil Procedure*, the Federal Court of Appeal in *CBS* referred to paragraph 143 of *Rothmans* in particular as setting out "the relevant principles" for a cross-examination in this Court. In *Rothmans*, Justice Perell undertook a thorough review of the law on the permissible scope of examinations. At paragraph 143, he set out a series of principles applicable to cross-examinations on an affidavit filed in support of an application or motion, including the following:

- The examining party may not ask questions on issues that go beyond the scope of the cross-examination for the application or motion.

- The questions must be relevant to: (a) the issues on the particular application or motion; (b) the matters raised in the affidavit by the deponent, even if those issues are irrelevant to the application or motion; or (c) the credibility and reliability of the deponent's evidence.

- If a matter is raised in, or put in issue by the deponent in his or her affidavit, the opposite party is entitled to cross-examine on the matter even if it is irrelevant and immaterial to the motion before the court.

- The proper scope of the cross-examination of a deponent for an application or motion will vary depending upon the nature of the application or motion.

- A question asked on a cross-examination for an application or motion must be a fair question.
- The test for relevancy is whether the question has a semblance of relevancy.

[Emphasis added; citations omitted.]

[26] Justice Perell's statement that the matters raised in a deponent's affidavit may be the subject of examination even if irrelevant to the motion are consistent with the Court of Appeal's express confirmation that an affiant cannot be protected from fair cross-examination on the information they volunteer in an affidavit: *CBS* at paras 29–30 citing *Ottawa Athletic Club* at para 132 and *Merck (1996)* at para 9.

[27] At the same time, the CMJ also referred to Justice Hugessen's "formal and legal relevance" analysis in *Merck (1997)*. As both the CMJ and Farmers Edge note, the Federal Court of Appeal confirmed in *Fink* that Justice Hugessen's analysis was correct and the "proper governing authority": *Canada (Attorney General) v Fink*, 2017 FCA 87 at para 7. In *Merck (1997)*, Justice Hugessen concluded that "[e]ven when a fact has been sworn to in the proceeding, it does not have legal relevance unless its existence or non-existence can assist in determining whether or not the remedy sought can be granted."

[28] There seems to be an inconsistency between this statement and the principle recognized in *CBS* that a party may be cross-examined on information in their affidavit. This is particularly so given the citation with approval in *CBS* of *Rothmans*, which states clearly that an affiant may be cross-examined on matters in their affidavit "even if it is irrelevant and immaterial to the motion": *Rothmans* at para 143; *CBS* at para 29.

[29] In my view, neither *Merck (1997)* nor *Fink* can be read as detracting from the general principle recognized in *Merck (1996)* and confirmed in *CBS* that an affiant can be cross-examined on the subject matter of their affidavit. Indeed, *CBS* expressly adopts *Ottawa Athletic Club*, in which Justice Russell confirmed the principle in *Merck (1996)* after considering *Merck (1997)*: *Ottawa Athletic Club* at paras 130–132. Notably, *Merck (1997)* does not appear to have considered the principle in *Merck (1996)*, although the latter was in turn based on jurisprudence of this Court and the Court of Appeal: *Merck & Frosst Canada Inc v Canada (Minister of National Health and Welfare)*, [1994] FCJ No 662 (CA) at para 26, leave to appeal refused [1994] SCCA No 330; *Wyeth-Ayerst* at para 11. Similarly, the Court of Appeal decided *Fink* about a month after its decision in *CBS* without purporting to correct or disapprove of *CBS*, and did not directly deal with the issue of whether an affiant may be cross-examined on the contents of their affidavit even if they are not relevant to the issues on a motion or application.

[30] In any event, neither party argued the CMJ was wrong in quoting the principle from *CBS* that an affiant should not be protected from cross-examination on the very information they put forward in their affidavit. Fairness certainly suggests that a party should not, as a general matter, be permitted to put evidence before the Court through an affidavit and then purport to limit cross-examination on that evidence on the basis that the very evidence it put forward was irrelevant. This is not to say that parties will be permitted to "waste their own and the Court's time and effort (to say nothing of money) in interminable questioning on matters that can have no conceivable impact on the outcome": *Merck (1997)* at para 9. However, in my view the CMJ made no error in citing the general principle in *CBS*.

[31] I therefore understand the principles applicable to cross-examination on an affidavit filed in support of an application or motion in the Federal Court to be that a question on cross-examination must be a fair and *bona fide* question relevant to: (a) the issues on the application or motion; (b) the matters raised by the deponent in the affidavit, even if those matters are not relevant to the application or motion; or (c) the credibility and reliability of the deponent's evidence.

[32] The first of these categories confirms that an affiant may be asked questions about matters relevant to the issues in the motion, even if those matters are not addressed in the affidavit. This is often expressed in the principle that cross-examination is not restricted to the "four corners" of the affidavit: *Ottawa Athletic Club* at para 132 citing *Almrei (Re)*, 2009 FC 3 at para 71. As a corollary to the principle that an affiant cannot avoid fair questions on matters raised in their affidavit, they also cannot avoid fair questions on relevant matters about which they have knowledge simply by leaving those matters out of their affidavit.

[33] I note that whether the second category above is formulated as being "matters raised by the deponent in the affidavit, *even if those matters are not relevant to the issues*" (the formulation of *Rothmans*, referred to with approval in *CBS*), or the narrower "matters raised by the deponent in the affidavit, *if those matters are relevant to the issues*" (effectively the formulation of *Merck (1997)*, referred to with approval in *Fink*), the result in this case does not change, as I find the CMJ did not err in finding Farmobile's questions about the first set of redactions irrelevant even on the more expansive formulation.

[34] With respect to the third category, Farmers Edge argues that questions going to credibility must also meet the requirement of being formally and legally relevant as set out in *Merck (1997)*. I disagree. In *Merck (1997)*, Justice Hugessen expressly left aside questions aimed at attacking the witness' credibility, which he described as being "in a class by themselves": *Merck (1997)* at para 8. In *Almrei*, Justice Mosley noted that cross-examination was permitted if it was "relevant, fair and directed to an issue in the proceeding or to the credibility of the applicant" [emphasis added]: *Almrei* at para 71; *Ottawa Athletic Club* at para 132. A question may therefore be relevant and proper if it fairly goes to the credibility of the witness's evidence and thus to the Court's ability to rely on that evidence in deciding the motion.

[35] Of course, a question cannot be justified simply by asserting that it goes to credibility. There are limits on questions going to credibility as well. They cannot, for example, be questions designed simply to impeach the character of the deponent: *Rothmans* at para 143. Questions going to credibility are also subject to the general rule against "fishing expeditions": *Castlemore Marketing Inc v Intercontinental Trade and Finance Corp*, [1996] FCJ No 201 at para 1; *Sawridge Band v Canada*, 2005 FC 865 at paras 4, 9.

[36] Against this background, I turn to Farmobile's arguments that the CMJ made a palpable and overriding error in finding its questions about the first set of redactions irrelevant. I will address these arguments in the context of each of the three categories of proper cross-examination questions.

(b) *Were the questions relevant to the issues in the motion?*

[37] The relief sought in Farmobile's redactions motion is the production of unredacted copies of the 13 emails. Since the only redactions currently in place are those in the second set of redactions, the CMJ concluded that the issue on the motion was the propriety of these redactions. She found that Farmobile had not explained how questions about the first set of redactions "can or will assist" the Court in deciding that issue. She therefore held that the questions were not legally relevant to the issues on the motion.

[38] Farmobile argues the CMJ erred in this finding. It first argues the CMJ conflated the principal issue in the proceeding with the relief being sought on the motion. In particular, it tries to distinguish between the issue raised by Mr. Osborne's affidavit, which it defines as "whether the redactions made by Mr. Osborne were proper," and the issue on the motion, which it defines as whether the Court will "permit the redactions to remain in the Second Version of Redacted Emails." I am unable to understand the distinction Farmobile is trying to make. As discussed in the next section, the redactions made by Mr. Osborne are the second set of redactions. The Court will permit the redactions to remain if they are "proper" in the sense of being in accordance with the relevant law. The two issues as stated by Farmobile therefore appear identical to me. I can see no error, let alone a palpable and overriding one, in the CMJ's statement of what is at issue in the redactions motion.

[39] Nor can I see a palpable and overriding error in the CMJ's finding that questions about the propriety of the first set of redactions are not relevant to the issue of the propriety of the

second set of redactions. The CMJ was not satisfied that questions about the first set of redactions could assist in assessing whether the second set of redactions are properly made. Farmobile has similarly not satisfied me that this is in error. On the redactions motion, the Court will have to decide whether the redacted information is "clearly irrelevant" to the issues in the litigation and whether it would "clearly not assist" in understanding unredacted portions of the emails, among other factors: *Janssen Inc v Apotex Inc*, 2018 FC 407 at para 9 citing *Eli Lilly Canada Inc v Sandoz Canada Incorporated*, 2009 FC 345 at para 14. Farmobile has not explained how questions about the first set of redactions, whether related to the process followed or the substance of the redactions, would help decide those issues.

[40] Farmobile argued before the CMJ that the change in the redactions is relevant to the issues in the redactions motion because it shows that Mr. Osborne's evidence "cannot be trusted." Farmobile did not use the term "credibility" in its written submissions to the CMJ. However, it was effectively arguing, as it argued more expressly before me on appeal, that its questions on the first set of redactions go to Mr. Osborne's credibility. I address this argument below, which relates to the third proper area of cross-examination questions.

(c) *Did Mr. Osborne's affidavit speak to the first set of redactions?*

[41] Farmobile argues Mr. Osborne's affidavit refers to the first set of redactions and that it is therefore "only fair" that it be allowed to ask questions about those redactions. Farmers Edge counters that the CMJ found that Mr. Osborne did *not* refer to the first set of redactions and that, in any event, questions on those redactions did not meet the test for legal relevance based on the *Merck (1997)* approach. For the foregoing reasons, I will approach the question on the

understanding that cross-examination may be directed to matters raised in the affidavit even if they are not relevant.

[42] The question becomes whether Mr. Osborne's affidavit speaks to the first set of redactions, as Farmobile contends. To begin, I cannot agree with Farmers Edge's assertion that the CMJ found that the affidavit did not refer to the first set of redactions. The CMJ did not directly assess this question, stating simply that "even if" she accepted that the affidavit deals with the first set of redactions, they did not meet the test for legal relevance.

[43] At the same time, I see no foundation for Farmobile's claim that Mr. Osborne spoke of the first set of redactions in his affidavit. Farmobile points to the second paragraph of the affidavit, where Mr. Osborne says the following:

> Counsel for Farmers Edge has informed me that [Farmobile] seeks to remove some redactions from some emails that were produced in July 2021. The redactions were applied to those emails were identified by me.

[44] A plain reading of this passage is that Mr. Osborne is referring to the redactions that Farmobile is seeking to remove. That is the second set of redactions. This reading is confirmed by the fact that the affidavit goes on to refer to the nature of the redactions, including by attaching the table of explanations as an Exhibit, as described above. These all again refer to the second set of redactions. Farmobile argues that the reference to "some emails produced in July 2021" includes both the first and second sets of redacted emails, each of which were produced in July 2021. I am not persuaded in the least that this is a reasonable or fair reading of Mr. Osborne's affidavit. There is only one set of emails. Mr. Osborne is discussing the

redactions to the emails, and specifically to the redactions Farmobile is seeking to remove. I cannot read this as a reference to anything but the second set of redactions. As the CMJ underscored, it is these redactions that are at issue on the motion.

[45] Farmobile says that it was precluded by Farmers Edge's objections during the cross-examination from even confirming whether Mr. Osborne was referring in his affidavit to the first set of redactions, and thereby establishing the basis for its questions about the first set of redactions. The difficulty with this argument is that Farmobile never asked Mr. Osborne such a question on cross-examination. If it had done so, it might have been a relevant question to confirm the scope of the affidavit and thereby the scope of cross-examination. It did not, despite Farmobile's attempts to suggest that the question was implicit in its other questions. The Court is therefore left with the reading of the affidavit on its face. It does not refer to the first set of redactions. Farmobile's questions about the first set of redactions therefore do not fall into the second category of proper cross-examination questions.

(d) *Were the questions fair questions going to credibility?*

[46] Farmobile argues that the questions about the first set of redactions go to Mr. Osborne's credibility. Mr. Osborne's affidavit, and in particular his statements regarding the contents of the redacted portions of the emails, is the primary evidence Farmers Edge relies on to support its assertion that the second set of redactions is appropriate. As noted above, I agree with Farmobile that fair questions going to Mr. Osborne's credibility can be asked. However, in my view, Farmobile has failed to show that the CMJ made a palpable and overriding error in addressing Farmobile's arguments on this ground.

[47] The CMJ rejected Farmobile's arguments that the questions went to Mr. Osborne's credibility (or whether he could be "trusted") for two reasons. First, the CMJ noted that Farmobile could not rely on Farmers Edge having resiled from its initial position since they did not formally resile. Second, she found that even if Farmers Edge had resiled from its earlier position, the fact that the first set of redactions covered relevant information did not mean that the second set of redactions also covered relevant information.

[48] Farmobile effectively argues that the first set of redactions covered clearly relevant information such that, on the assumption that Mr. Osborne also did those redactions, his approach to the redactions generally was unsound and his evidence on the second set of redactions is less credible as a result. I cannot accept that these arguments show an error on the part of the CMJ.

[49] Farmobile relies on two emails to show the claimed importance of the previously redacted information: one from January 23, 2021 and one from March 29, 2021. However, the importance of the information that became unredacted, even if relevant, is far from clear on its face. Farmobile filed no evidence as to that importance and counsel was unable to explain it to the Court in any way that suggests that a change in their redaction status would reflect on Mr. Osborne's credibility. Indeed, Farmobile's arguments about one of the redactions seemed to change during the course of submissions. Farmobile first suggested that the appearance of a "PGN" component in the second redaction of the January 23, 2021 email showed the component was "being discussed much much earlier" than was known from the first set of redactions. However, when counsel was pointed to the same "PGN" component being seen in the first set of

redactions in an email dating from November 2020, the argument morphed into an unpersuasive one about the amount of time, effort, and the people involved.

[50] Farmobile has not persuaded me that the CMJ erred in concluding that questions about the first set of redactions were not proper questions going to credibility. To the contrary, it appears that the questions are in the nature of a fishing expedition, hoping to discover some impropriety in Mr. Osborne's handling of the redactions that could then be used to challenge his evidence.

[51] In this regard, I see no error in the CMJ's conclusion that if Farmobile genuinely sought information regarding what was redacted, even in the second set of redactions, it could have accepted "in a timely manner" Farmers Edge's offer to inspect the unredacted documents. While Farmobile raised a number of arguments as to why it did not and could not have accepted the offer earlier, such as the status of second counsel (see *Farmobile, LLC v Farmers Edge Inc*, 2021 FC 1200), none of these were raised with Farmers Edge and none of them appear persuasive. I note in this regard that the CMJ, being involved in ongoing case management of the matter and having presided at the October 5, 2021 CMC, was singularly well placed to assess whether Farmobile could have accepted Farmers Edge's offer in a timely manner. As Farmers Edge argues, this Court has recognized that it is appropriate to have a mechanism to provide outside counsel with an opportunity to view unredacted documents: *Janssen* at para 9 citing *Eli Lilly* at para 14. It is in my view unpersuasive for Farmobile to effectively decline such an offer for well over a month while pursuing cross-examinations, only to argue that it ought to be allowed to

cross-examine on an earlier set of redactions to demonstrate that Mr. Osborne's evidence about the current redactions is not credible.

[52] I therefore conclude that Farmobile has not shown a palpable and overriding error with respect to the CMJ's conclusion that the questions about the first set of redactions were improper, based on any of the permissible categories of cross-examination. This aspect of Farmobile's appeal is dismissed.

B. *Case Management Judge Ring did not err in not ordering further cross-examination*

[53] The penultimate paragraph of the CMJ's reasons reads as follows:

> For these reasons, I conclude that Farmobile's motion for an order that questions regarding the First Set of Redacted Emails are relevant questions shall be dismissed. Consequently, Farmobile's request for an order requiring Mr. Osborne to re-attend for cross-examination shall also be dismissed.
>
> [Emphasis added.]

[54] Farmobile argues that the CMJ erred in not requiring Mr. Osborne to re-attend for further cross-examination. It argues the CMJ recognized that there were relevant areas of cross-examination with respect to the second set of redactions, noting in particular the CMJ's earlier statement that "Farmobile is entitled to ask questions relating to the [second set of redactions]." Farmobile argues it was inconsistent and a palpable and overriding error for the CMJ to nonetheless decline to allow Farmobile to continue its cross-examination to ask those questions, particularly without giving a substantive rationale for doing so.

[55] I disagree, for two reasons.

[56] First, the CMJ's order must be considered in the context of the arguments Farmobile made before her. As is clear from Farmobile's written representations to the CMJ, its request that Mr. Osborne re-attend for further cross-examination was entirely premised on its argument that Farmers Edge had improperly refused its questions about the first set of redactions. As counsel conceded, Farmobile did not submit in the alternative that re-attendance should be ordered even if it was incorrect in its position with respect to the propriety of the refused questions. In this context, it is understandable that the CMJ limited herself to the brief conclusion that "consequently," the request for a re-attendance order would also be dismissed.

[57] Second, even if Farmobile had made a request for re-attendance or continuation of the cross-examination regardless of its success on the merits of the refusals, it has not persuaded me that such a request ought to have been granted. To the contrary, Farmobile undertook what is a fairly aggressive litigation tactic in purporting to adjourn a cross-examination in the face of refusals rather than completing its examination and arguing about refusals at a later date. Having done so over the objections of Farmers Edge's, who made its position clear, Farmobile cannot now expect to simply return and continue its cross-examination as if it had not adjourned.

[58] On this point, I agree with Farmers Edge that Farmobile purported to engage Rule 96(2) in inappropriate circumstances. The Rule permits a person conducting an examination to adjourn and bring a motion for directions "if the person believes answers to questions being provided are evasive or if the person being examined fails to produce a document or other material requested

under rule 94.” Neither of these situations apply. There was no failure to produce a document at issue. There was also no question of Mr. Osborne providing evasive answers. Rather, there was a disagreement between counsel over the relevance of questions on cross-examination. This is a reasonably common occurrence. It is not one that generally allows frustrated counsel to adjourn an examination. Farmobile has not given any reason it was unable to continue its cross-examination with other areas of questioning in the face of refusals with respect to the first set of redactions. In these circumstances, Farmobile effectively elected to terminate its cross-examination when it purported to adjourn: *Direct Source Special Products Inc v Sony Music Canada Inc*, 2003 FC 1227 at paras 2–4, 20–21.

[59] I therefore also dismiss Farmobile’s appeal on the second issue.

C. *Farmers Edge is entitled to its costs*

[60] Farmers Edge seeks its costs of this motion in the amount of $10,000, payable forthwith and in any event of the cause. It argues this appeal on a “motion-within-a-motion” is a waste of the parties’ and Court’s resources and should be sanctioned with such an order. Farmobile argues that costs in any event of the cause are appropriate, and suggests costs should be in the range of $2,500 to $3,000, commensurate with the amount payable on similar motions.

[61] I agree with Farmers Edge. In my view, Farmobile need not have asked questions about the first set of redactions, particularly when other avenues, including an outside-counsel’s-eyes-only review of the documents, had been made available. Having obtained a refusal on those questions, it should not have adjourned its examination. Having adjourned, it need not have

brought an interlocutory motion within an interlocutory motion, but could have argued about the refusals at the hearing of the redactions motion. Having brought its motion unsuccessfully, it then chose to prolong matters and further increase costs through this unnecessary appeal, despite the deferential standard to the CMJ's decision it acknowledged was applicable. I am satisfied that this appeal motion should not have been brought and that Rule 401(2) applies. I am satisfied that in all of the circumstances, Farmers Edge's request for $10,000 is reasonable and that it should be payable forthwith and in any event of the cause.

IV. Conclusion

[62] For the foregoing reasons, Farmobile's motion for appeal is dismissed with costs payable forthwith in the amount of $10,000, inclusive of all taxes and disbursements.

ORDER IN T-449-17

THIS COURT ORDERS that

1. The motion for appeal is dismissed.
2. Costs are payable by the plaintiff/defendant by counterclaim to the defendant/plaintiff by counterclaim in the amount of $10,000, inclusive of all taxes and disbursements, forthwith and in any event of the cause.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-449-17
STYLE OF CAUSE:	FARMOBILE, LLC v FARMERS EDGE INC.
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 9, 2021
ORDER AND REASONS:	MCHAFFIE J.
DATED:	DECEMBER 15, 2021

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