IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Gold Star Realty v. Grant, 2008 NSSC 180

Date: 20080610
Docket: S. H. 285865A
Registry: Halifax

Between:

V & G Realty Limited, operating as
"Gold Star Realty", National Properties Limited,
Arthur E. Vogt and David Vogt

Appellants

v.

Victoria Maxwell Grant

Respondent

Judge:	The Honourable Justice Allan P. Boudreau
Heard:	April 1, 2008, in Halifax, Nova Scotia
Written Decision:	June 10, 2008
Counsel:	Colin D. Bryson , for the Appellants Jason Gavras for the Respondent

By the Court:

Introduction:

[1] This appeal involves the applicability of the "Implied Undertaking Rule" (the IUR) in the Small Claims Court of Nova Scotia (the Small Claims Court). The Adjudicator in this case decided that the IUR did not apply to the Small Claims Court, primarily because that court did not have the inherent jurisdiction of Superior Courts in the Province. He judged that those powers of Superior Courts were necessary in order to apply or enforce the IUR. This appeal therefore must decide whether the Small Claims Court can apply the IUR in its proceedings.

Background Facts:

[2] The Appellants, Arthur and David Vogt, are real estate brokers and salespersons. They operate a brokerage company, V & G Realty Limited, and do business under the name "Gold Star Realty". National Properties Limited (National) is a company of which Arthur Vogt is reputed to be the person named as secretary on the Nova Scotia Registry of Joint Stock Companies. The Respondent, Victoria Maxwell Grant, purchased a property through Gold Star in 2001.

[3] In June 2001, Gold Star had listed a property, 1141 Cartaret St., Halifax, for sale. The house was owned by an independent third party, a Mr. Low. Ms. Grant was interested in purchasing the property and she entered into a dual agency agreement with Gold Star. Gold Star therefore represented both she and Mr. Low. Ms. Grant made an offer to purchase the property through Gold Star. She was told by the Vogts that there was another bidder. She says that, as a result of this information, she increased her offer, which was accepted and the transaction closed. She was not told the identity of the other bidder, which turned out to be National. It is the manner in which Ms. Grant became aware that National was the other bidder which gives rise to the present appeal and application.

[4] The property which Ms. Grant had purchased turned out to have a worn out, end of life plumbing system which had to be replaced. Ms. Grant had hired a business called Pillar to Post to inspect the property before purchase, but they had not notified Ms. Grant of any problems with the plumbing system. As a result, Ms. Grant commenced an action in the Small Claims Court against Pillar to Post. During those proceedings, legal counsel for Pillar to Post caused a subpoena to be issued to David Vogt to testify at the hearing and to bring with him basically his

entire real estate file regarding the property in question. Counsel for Pillar to Post suggested that David Vogt provide the documentation to him in advance of the hearing so he could decide whether Mr. Vogt would need to testify.

[5] The Small Claims Court hearing was subsequently adjourned and counsel for Pillar to Post advised Mr. Vogt of the new date, again requesting that the property file documentation be sent to him in advance. This time Mr. Vogt obliged and he provided the requested documentation. Counsel for Pillar to Post subsequently provided a copy of this documentation to legal counsel for Ms. Grant. The claim by Ms. Grant against Pillar to Post settled before the hearing.

[6] Shortly before the scheduled hearing date, counsel for Ms. Grant forwarded the Gold Star real estate file documentation to Ms. Grant and her husband, who happens to be a lawyer, Augustus Richardson, Q.C. The file contained a copy of an offer for the same property from National. This was the first time that Ms. Grant became aware of the identity of the other bidder. Mr. Richardson did an online search of the N. S. Registry data base which revealed that Arthur Vogt was the registered secretary of National.

[7] Ms. Grant then sued the Appellants herein for breach of contract, alleging conflict of interest. The action was first commenced in the Supreme Court of Nova Scotia, but Ms. Grant later elected to have the matter transferred to the Small Claims Court. The Appellants later retained Mr. Colin Bryson to represent them. It was not until Mr. Bryson raised the issue that the applicability of the IUR in Small Claims Court proceedings came to the fore.

[8] The question of the applicability of the IUR proceeded before the Adjudicator by way of an agreed statement of fact, which was essentially as described in the factual background above; however, for the sake of completeness I shall reproduce it below:

STATEMENT OF FACT

1. Vicki Grant is married to W. Augustus Richardson, who is a barrister and solicitor in Nova Scotia.

2. In June 2001 Gold Star Realty (Arthur and David Vogt) listed 1141 Cartaret Street, Halifax, for sale. The house was owned by Gordon Low.

3. Vicki Grant saw the house. She retained Gold Star, and signed a dual agency agreement, which provided that Gold Star acted for both Ms. Grant as purchaser and Mr. Low as vendor.

4. Vicki Grant made an offer to purchase the house. She was told that there was another bidder. She was not told the identity of the bidder. She increased her offer. It was accepted.

5. The agreement of purchase and sale was subject to a satisfactory house inspection. Ms. Grant retained Pillar to Post to inspect the house. Pillar to Post inspected the house, including the plumbing, and provided a report. The sale proceeded, and closed on September 25, 2001.

6. After moving into the house Ms. Grant discovered that the house's plumbing was at the end of its useful life and had to be replaced at a significant expense.

7. On April 26, 2004 Ms. Grant filed a claim in Small Claims Court against Pillar to Post, alleging negligence and breach of contract, for failing to warn her about the state of the plumbing.

8. Pillar to Post retained counsel and entered a defence on June 7, 2004.

9. The matter was originally scheduled for hearing on November 24th, 2004.

10. Mr. Karl Seidenz, counsel for Pillar to Post, caused a subpoena to be issued by the Small Claims Court to Mr. David Vogt (of Gold Star Realty). The subpoena required him to attend the hearing to give evidence at the hearing of the Grant v. Pillar to Post claim and to bring with him specified documents, including "any Offers ... by any person ... to the seller of the Property, Mr. Gordon Low." (The subpoena is attached.)

11. This subpoena was sent to Mr. Vogt by Mr. Seidenz with a letter dated November 16, 2004. In the letter Mr. Seidenz stated that although the Subpoena states which documents you are to bring to the hearing, I would certainly appreciate it if you could forward the documents to me in advance of the hearing so that I might review them and decide whether or not I will need your evidence." (The letter is attached.)

12. The hearing was subsequently adjourned to January 10th, 2005.

13. This was followed by another letter from Mr. Seidenz to Mr. Vogt dated November 23, 2004, advising of the new hearing date and

repeating the request to forward the documents in advance of the hearing. (The letter is attached.)

14. Mr. Vogt sent the documents named in the subpoena to Mr. Seidenz in a fax dated January 4, 2005. (A copy of the fax is attached.) Included in the documents sent to Mr. Seidenz was the Dual Agency Agreement between Gold Star and National Properties Limited and an offer dated June 23, 2001 from National Properties Limited to Gordon Low to purchase Mr. Low's property.

15. On January 5, 2005 Mr. Seidenz provided counsel for Ms. Grant (Jason Gavras) with "documents which I received late on January 4, 2005 from the real estate agent, David Vogt." (The letter is attached.)

16. The documents included what appear to have been the bulk if not the entirety of Gold Star's file, including:

    a. Dual Agency Agreement between Gold Star and National Properties Limited; and

    b. National Properties offer to purchase dated June 23, 2001.

17. The matter settled before the hearing.

18. On January 12, 2005 Mr. Gavras forwarded to Mr. Richardson the documents he had received from Mr. Seidenz under cover of the latter's letter of January 5th.

19. The memo and the documents forwarded are attached.

20. This was the first notice Mr. Richardson had of the identity of the other bidder.

21. He looked up National Properties on the online data base maintained by the NS Registry of Joint Stock Companies. He discovered that Arthur Vogt was listed as the Secretary of National Properties. He formed the view that Mr. Vogt and Gold Star were in a conflict of

interest when acting for both Ms. Grant and National Properties while at the same time being an officer of National Properties.

22. On August 23, 2005 Vicki Grant commenced an action in the Supreme Court against Gold Star, National Properties and David and Arthur Vogt. The action was based on the alleged conflict of interest on the part of the defendants.

23. A defence was entered on September 23rd, 2005. Mr. Raymond Riddell, Q.C., acted for all defendants.

24. The defendants' List of Documents was filed on or about March 29, 2006. The List included the Offer from National Properties to Mr. Low; and the Dual Agency Agreement between Gold Star, National Properties and Mr. Low.

25. Ms. Grant elected to have the matter transferred to Small Claims Court. The matter was transferred.

26. Mr. Riddell got off the record in the fall of 2005, when he took a leave of absence.

27. The defendants eventually retained Mr. Bryson to act for them. He then raised the issue of whether the Implied Undertaking Rule (the "IUR") applied with respect to the National Property Agreement of Purchase and Sale and the Dual Agency agreement; and if so, whether there had been a breach of the IUR by Mr. Richardson or Ms. Grant or both.

28. This was the first time the issue had been raised. It was not raised by either of the two lawyers prior to Mr. Bryson that had been retained by the defendants after Ms. Grant made her claim against them.

29. To the time of Mr. Bryson's retention, the Defendants were unaware of the IUR.

30. On these facts the following questions arise:

a. Does the Implied Undertaking Rule apply to Small Claims Court matters?

b. If it does as a general rule, did it apply in the circumstances of this case - and in particular, did it apply to the information concerning the identity of the other bidder (*i.e.* National Properties)?

c. If it does, will the Small Claims Court grant leave *nunc pro tunc* to permit the claimant Ms. Grant to proceed against the defendants in this matter?

[9] The Adjudicator found that the IUR is clearly part of the common law of Nova Scotia. He then went on to compare various powers of the Small Claims Court versus the Supreme Court of Nova Scotia. He stated the following at page 10 of his decision:

> "The Small Claims Court does not have the authority to provide injunctive relief, make declaratory orders, hold parties in contempt of court and it does not have the inherent jurisdiction to dismiss an action for abuse of process all of which are afforded to the Supreme Court of Nova Scotia.
>
> It therefore does not make sense that the Implied Undertaking Rule should apply to the Small Claims Court . . ."

In spite of this conclusion, the Adjudicator went on to comment on whether an exception to the IUR should apply in the circumstances of this case. He stated the following at page 11 of his decision:

> "I shall comment on the voluntary exception to the application of the Implied Undertaking Rule. The information under consideration in this case was obtained by the Applicant at a time when the Applicant had taken an action against the defendant Pillar to Post. The Defendant's Counsel had subpoenaed certain information from the Defendants in this action which Defendants were not a party to the Pillar to Post action. Before the matter was heard in open court the Defendants in this action provided Pillar to Post's counsel with documentation containing information which is the subject of this Application. That documentation was forwarded on to the Claimant and the Applicant herein by Pillar to Post's Counsel. It was not necessary to provide that information prior to trial and in my view there is solid argument to hold that the documentation was passed on voluntarily. However for purposes of this Application I do not have to make that determination.
>
> I shall also comment on the question brought forward to this Court by the Applicant and that is; whether this court will grant leave *nunc pro tunc* to the Claimant/Applicant to use the information and relieve the Claimant from the application of the Implied Undertaking Rule. Again, the Small Claims Court is limited in what it can grant by way of an order. While the circumstances may be just to do so, this Court cannot proceed beyond the specific statutory authority provided to it . . ."

He then concluded, "Therefore the determination of the Court is that the Implied Undertaking Rule does not apply to the Small Claims Court."

[10] In addition to their appeal of the Adjudicator's ruling, the Appellants commenced a proceeding in this Court by way of an Originating Notice (Application Inter Partes), basically to raise the same issues as in the Small Claims Court appeal. This was done in order that the questions could be decided in the

event that this Court should find that the IUR does not apply to the Small Claims Court. It was agreed that both the Appeal and the Application would be heard and argued together.

Issues:

[11] 1. Was the Adjudicator correct in concluding that the IUR did not apply to the Small Claims Court because that Court lacked certain powers accorded to Superior Courts?

2. If the IUR applies to the Small Claims Court, should the documents obtained as a result of the subpoena to Mr. Vogt have been admitted as evidence in the proceedings before that Court?

Authorities on whether the IUR Applies to the Small Claims Court:

Small Claims Court as a Court of General Law:

[12] Numerous authorities have considered the applicability of the IUR, but many of these have arisen in proceedings before statutory tribunals rather than Small Claims Courts. Nevertheless, the principles enunciated provide usefull and

instructive guidelines for the case at bar. The intent and purpose of the *Small Claims Court Act* is to "constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice" (emphasis added.) (See **Small Claims Court Act**, s.2) Elsewhere, the court is referred to as "a court of law and of record...". (See **Small Claims Court Act**, S. 3(1). It is well established that "[t]he Small Claims Court is a court of law and the principles of law are part of the make up that is imposed upon the litigants and those that hear the case." (See *Young v. Clahane*, 2008 NSSM 16; 2008 Carswell NS 130, at para. 24.) In *Clarke v. Collier (P.F.) & Son Ltd.* (1993), 129 N.S.R. (2d) 113 (S.C.) Haliburton J. said:

> [6] The Small Claims Court is now an autonomous, statutory court. Section 3 of the *Small Claims Court Act* establishes it as a separate "court of law and of record". As such, it has an inherent right to control its own processes. The court and its adjudicators must comply with the spirit and/or the law governing its operation. If they do so, then no superior court may interfere, except in accordance with the appeal process established by the Legislature....

[13] In *Travel Machine Ltd. v. Madore* (1983), 143 D.L.R. (3d) 94; 1983 CarswellOnt 901 (Ont. S.C.), the appellant in a small claims appeal had failed to raise a particular defence at trial. The court said:

> 8 With respect to the first point of the argument, I accept the contention of the appellant, based on the Court of Appeal decision in *Sereda v. Consolidated Fire and Casualty Insurance Co.*, [1934] O.R. 502, that the provisions of section 59 of *The Small Claims Court Act*, R.S.0. 1980, c. 476, empowering a judge to "make such order or judgment as appears to him just and agreeable to equity and good conscience" does not mean that a judge acting under that Act is not required to apply the rules of law or that he can decide an issue contrary to law. Accordingly, if on the law section 4 of *The Statute of Frauds Act* is applicable to the oral guarantee here in question, neither trial judge, nor I sitting on appeal, can properly, on the basis of "equity and good conscience" ignore the fact that section 4 of *The Statute of Frauds Act*, generally speaking, has the effect of prohibiting actions based on oral guarantees.

[14] In the British Columbia decision, *Johnston v. Morris et al*, 2004 BCPC 511

(B.C. Prov. Ct. – Civil Division), the court said:

> [21] Any dispute mechanism will have some rules for the operation of the mechanism itself. First and foremost, although small claims court is more accessible and considerably less expensive in which to have a case tried, the rule of law applies. Contract law and tort law are applied no differently in the British Columbia Provincial Small Claims Court than in the British Columbia Supreme Court. That, in my experience, sometimes confuses litigants, particularly unrepresented litigants who sometimes misconstrue the less formal small claims court as less than a court of law. [Emphasis added.]

[15] Similarly, in *Jenica Holdings Inc. v. Larromana*, 1998 CarswellOnt 1207

(Ont. C.J. – Gen. Div. (Sm. Cl.)), the court said:

> 8 Another lesson to be taken from this series of cases touches on the jurisdiction of small claims courts. This inferior court has a unique

> jurisdiction. In Ontario, for example, Small Claims Courts are to "... hear and determine in a summary way all questions of law and fact and may make such order[s] as [are] considered just and agreeable to good conscience." (s. 25, *Courts of Justice Act*). To assist it to achieve such ends, this court is endowed with informal procedure and relaxed evidentiary rules. But it is still very much a court of law. As I have already noted, many of the authorities on this point involving postdated cheques are a study in how small claims courts regard their mandate by siding with writers or drawers of postdated cheques. Such cases have, however, been consistently overturned when appealed to provincial superior courts. These cases serve as a guide to small claims courts to interpret their mandate as one, above all, to work within the scope of legal precedent and principle. The modest judicial freedom given to small claims courts may allow appeals to equity and good conscience, but its exercise still demands a principled and predictable approach. [Emphasis added.]

The Implied Undertaking and Statutory Tribunals

[16] Several Ontario statutory tribunals have considered the application of the implied undertaking (or, in some cases, the “deemed undertaking” later mandated by Rule 30 of the Ontario Rules of Civil procedure).

[17] In *Shaw-Almex Industries Limited*, [1984] OLRB Rep. 659; 1984 CarswellOnt 1013, the Ontario Labour Relations Board considered the implied undertaking in circumstances where parties produced documents pursuant to a summons *duces tecum* issued and enforced by the Board. The Board held that a breach of such an undertaking – to the Board as well as to another party – would be

punishable by contempt in the Supreme Court of Ontario pursuant to the *Statutory Powers Procedures Act* (see *Shaw-Almex* at para. 19).

[18] In *U.S.W.A. v. Maxi*, [1998] O.L.R.B. Rep. 448; 1998 CarswellOnt 6128, the Ontario Labour Relations Board considered the implied undertaking rule. The document in question in the application was subject to an explicit undertaking, which the Board noted. The Board added:

> 6 ... In any event, all three parties agreed that there is in Ontario an implied undertaking on a party who obtains production of a document from another party in the course of litigation not to use the document for a purpose other than that of the proceeding in which the document was obtained, except with consent of the other party or with the leave of the court or tribunal. While there has been some confusion in Ontario over the status of this common law rule, it appears to have resolved by the decision of the Court of Appeal in *Goodman v. Rossi*, (1995) 24 O.R. (3d) 359, where the court determined that the implied undertaking should be applied where production of otherwise private documents is obtained through litigation.
>
> 7 The Board has concluded that such an undertaking ought to be implied where documents are produced in the course of proceedings before it in several cases, including *Shaw-Almex Industries Limited*.... It seems clear that documents produced in compliance with a Board order would also be subject to the implied undertaking limiting their use.

[19] The Board concluded that "it makes sense that the rule should apply where the parties in proceedings before the ... Board produce documents to each other and

file them with the Board in compliance with the Board's rules of procedure." (See *Maxi* at para. 8).

[20] In *Hornick v. State Farm Mutual Automobile Insurance Co.*, 2000 CarswellOnt 4920, the issue for an arbitrator of the Financial Services Commission of Ontario was whether to order production to the insurer of the applicant's discovery transcript from a court action arising from the same facts as the arbitration. The applicant objected to production and contested the arbitrator's jurisdiction to make such an order. The rule did not permit an arbitrator to apply the exceptions relied upon by the insurer. (See *Hornick* at para 11.) The arbitrator took the view that relief against the implied undertaking could only be granted by the relevant court:

> 16 ... [R]eflecting on both the analysis set out in *Goodman v. Rossi* and the language of Rule 30.1.01(8), a court must ensure the integrity of its own processes. Oral discovery is a compulsory part of the court process; it is not any part of the process before this tribunal. I, therefore, find that it is a court, and not this tribunal, which must determine whether, in particular cases, relief against the implied undertaking rule is in the interests of justice or whether it undermines full and frank disclosure at discovery.
>
> 17 I note that this finding does not mean that evidence or information obtained at an examination for discovery cannot be used in proceedings

> before this tribunal. It only means that where the other exceptions recognized by Rule 30.1.01 do not apply, the party seeking to make use of the evidence or information must seek relief, not from this tribunal, but from a court under subsection 8 of that Rule....

[21] The arbitrator held that, where none of the exceptions provided by the rule applied, the implied undertaking rule rendered the transcript inadmissable before the tribunal. In addition, the arbitrator held that the tribunal's power to admit evidence under the *Statutory Powers Procedure Act* did not override the implied undertaking. Under the Act a tribunal was authorized to admit any oral evidence or document, "whether or not ... admissible as evidence in court..." (See *Hornick* at para. 18.) The evidentiary provision involved is virtually identical to s. 28 of the Nova Scotia *Small Claims Court Act.*

[22] The same view was expressed by another arbitrator of the same tribunal, in similar circumstances, in *Gocan v. State Farm Mutual Automobile Insurance Co.*, 2001 CarswellOnt 5765:

> 10 In my view, since the obligation is one owed to the Court, relief from the undertaking may only be sought before the court to which the undertaking is impliedly given, or deemed to have been given. In this case that court would be the one in which the tort action was commenced. It follows that I have no authority to grant relief from the implied or deemed undertaking rule in relation to the transcript of Mr. Gocan's examination for discovery. [Emphasis added]

[23] The arbitrator in *Gocan* expressly disagreed with a line of arbitration decisions that found that the tribunal did have jurisdiction:

> 12 Arbitrators have taken different approaches to the question of whether they have the authority to relieve a party from the implied or deemed undertaking rule. In the case of *Reid v. Royal & SunAlliance Insurance Co. of Canada* [(January 19, 2000), Doc. FSCO A99-000959 (F.S. Trib.) reversed on appeal on other grounds (August 1, 2000), Doc. FSCO P00-00014 (F.S. Trib.).] Arbitrator Blackman concluded that he had authority to relieve against the deemed undertaking rule based on the implicitly inherent adjudicative jurisdiction to do so. He reasoned that "If the deemed undertaking rule is part of the general law of Ontario, then implicitly, the adjudicative discretion inherent in the common law rule is also accorded to this Commission." He went on to grant relief from the rule in relation to three defence medical reports obtained in a tort action. [...]
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> 14 In *Chin v. Coseco Insurance Co./HB Group/Direct Protect* (April 18, 2001), Doc. FSCO A00-001024 (F.S. Trib.), Arbitrator Allen ordered production of the discovery transcripts in a tort action where the Insurer was the same in the accident benefits case before FSCO as in the tort action. She found express authority to make such an order on the basis of sections 20 (2) and 22 (1) of the *Insurance Act*....
>
> 16 Arbitrator Allen reasoned "I find that section 22 of the Act expressly vests in arbitrators the same powers as the Ontario Court, General Division, to among other things, order the production of documents. Section 20 authorizes arbitrators to decide any question of fact or law brought before them. I find that by extension, arbitrators have the authority to grant the relief provided by the Rule 30.1.01(8) exception to the implied undertaking rule. In exercising this power, like the courts, arbitrators should be guided by considerations of relevance, the balance between competing access and privacy rights, fairness and any possible prejudice to a party."

> 17 Arbitrator Allen noted that Arbitrator Leitch [in *Hornick*] had not considered arbitrators' exclusive jurisdiction under sections 20(2) and 22 of the *Insurance Act*. Arbitrator Allen's approach in *Chin* has been followed by Arbitrator Wacyk in the cases of *Sandhu v. CAA Insurance Co. (Ontario)* (October 3, 2001), Doc. FSCO A99-001031 (F.S. Trib.), and *V. (J.) v. State Farm Mutual Automobile Insurance Co.* (November 27, 2001), Doc. FSCO A00- 001002 (F.S. Trib.) and by Arbitrator Sone in *Mizzi v. York Fire & Casualty Insurance Co.* (July 17, 2001), Doc. FSCO A01-000176 (F.S. Trib.). In *Sandhu* Arbitrator Wacyk noted that "This parallel authority avoids the inefficiency and delay which would otherwise result from having to deal with a single matter in two different forums."
>
> 18 With respect, I disagree with the views of Arbitrators Blackman, Allen, Wacyk, and Sone, that an arbitrator at FSCO has jurisdiction to decide these questions. The undertaking is made before the Court. In my view, the only adjudicative body with the authority to make such a decision to relieve against the implied or deemed undertaking would be the court before which the undertaking was given, namely the court in which the applicant's tort action was commenced.

[24] In *Tanner v. Clark* (2003), 224 D.L.R. (4th) 635; 2003 CarswellOnt 594 (Ont. C.A.), the Ontario Court of Appeal held that the common law implied undertaking rule did not protect medical reports arising from an arbitration hearing from being disclosed in a parallel tort action, “essentially because the principle behind the rule is directed to protecting against use by the recipient of the information, not to protect the information from all uses.” (See *Tanner* at para. 3.) The court said:

> 6 ... The applicants in the AB proceedings submitted to medical examinations knowing that the information they impart will not be used by the two insurance companies except in those proceedings, and will not be communicated to others for their use in other proceedings. That has not happened here. The insurers in the tort proceedings are different companies and the information is sought, not from the insurers in the AB proceedings, but from the source of that information, the respective plaintiffs in the tort actions. Those plaintiffs are not constrained in any way from the use of their medical information for any purpose. What they argue for is not enforcement of an undertaking, but a protective shield against production of very relevant evidence.
>
> 7 In my view, it would do no service to the implied undertaking rule to extend it in this fashion and would, indeed, be a considerable disservice. It would wrap a cloak of privilege around evidence given in any administrative tribunal hearing where a related issue arose in other proceedings. It would stand in the way of courts and tribunals having available the best evidence, or all of the evidence, bearing upon the issue in dispute.

[25] The *Tanner* decision is distinguishable in that it did not involve production before an administrative tribunal. In *Majer v. Kingsway General Insurance Co.*, 2003 CarswellOnt 5511 (F.S.C.O.), the arbitrator said:

> 8 *Tanner v. Clark et al.* can be distinguished from the circumstances of this case in two significant respects. First, the production request concerns a transcript of an examination for discovery and not medical reports. Second, the transcript was produced in the course of a civil action. Kingsway is seeking to import this transcript to the dispute resolution process at FSCO, rather than the reverse process - the use of material from an accident benefits case in a civil action.

[26] The arbitrator concluded:

> 11 I agree with Director's Delegate McMahon's reasoning in ... *[CAA Insurance Co. (Ontario) v. Sandhu*, 2002 CarswellOnt 5577 (F.S. Trib.)] where he found that a production request such as this should be treated as a request made in the context of a FSCO proceeding for an order requiring the insured to produce documents from a related civil action. This request involves the exercise of the arbitrator's authority to control the process by ruling on the production of documents that would not ordinarily be compellable as part of FSCO's pre-hearing discovery process. The exercise of my discretion involves a consideration of the principles underlying the prohibition against the use of evidence for some collateral purpose.
>
> 12 This does not require a reference to the implied undertaking rule nor does this result in an undermining of the rule. The foundation of the rule is the prohibition against collateral use. As expressed by Director's Delegate McMahon:
>
> > ...the undertaking is simply a legal construct that allows the court to punish someone who has used documents for some unauthorized purpose. In these circumstances, considering the matter without reference to an implied undertaking does not and, by extension, operates as a deterrent. In circumstances such as this case, where the insurer is not in possession of the documents, neither punishment for misuse, or deterrence is an issue. <u>The inappropriate use of such documents can be controlled by dismissing the motion to compel production. Conversely, where the arbitrator concludes that the insurer should be able to use the document, they need only order its production</u>. [Emphasis added]

[27] This reasoning was followed in *Plummer v. Farmers' Mutual Insurance Co.*, 2005 CarswellOnt 2836 (F.S.C.A.), where the arbitrator said:

> 9 I agree that ordering production of the transcript for discovery would give Farmers' Mutual an unfair advantage by effectively importing the discovery process into the FSCO proceeding, something which is not available pursuant to the Insurance Act. Therefore, Mr. Plummer is not required to order and disclose his transcript of discovery in the tort action to Farmers' Mutual.

[28] The view that the court with the power to relieve against the implied undertaking is the court under whose auspices the undertaking arises was canvassed by the Tax Court of Canada in *Welford v. R.*, 2006 TCC 31; 2006 CarswellNat 280:

> 15 The respondent's motion in this Court also requests, as mentioned above, an order directing the appellant to consent to the disclosure of the transcript of the appellant's examination for discovery in the action brought against him by Bell Canada in the Ontario courts with respect to allegations of fraud. I have already made reference to the implied undertaking rule found in the Ontario Rules of Civil Procedure, in particular in subrules 30.1.01(3) and (4). Subrule 8 makes provision for an order that subrule (3) does not apply to the evidence or information obtained if the court is satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed the evidence. Such an order may impose terms and give such directions as are just. [...]
>
> 18 In addition to this heavier burden having to be met, a determination must be made as to the proper forum in which such an order as that requested here may be granted. By law, the implied undertaking rule applies to every proceeding. In Ontario and British Columbia, the rule has been codified and is part of the rules of civil procedure of those provinces. The implied undertaking rule is also applicable in both Federal Court and Tax Court of Canada proceedings. If the proceeding to which the implied undertaking rule applies was before the Tax Court of Canada and, for example, one of the parties wants to be relieved of this undertaking in order

> to use the examination for discovery evidence in another, separate, proceeding before the Ontario Superior Court of Justice, in my opinion, the Tax Court of Canada has the power to relieve that party of that undertaking. [...]
>
> 19 It seems to me that if the proceeding giving rise to the application of the implied undertaking rule was before the Ontario Superior Court of Justice and one of the parties to that proceeding wants to use in the Tax Court an examination for discovery from that proceeding, it is the Ontario Superior Court of Justice that would have the power to permit the production of the document protected by the implied undertaking rule and to release the party from that undertaking. [Emphasis added]

Analysis on whether the IUR Applies to the Small Claims Court:

[29] If one concludes that the Small Claims Court is a court of general law (common and otherwise) it is difficult to rationalize why the IUR should not apply to its proceedings. In my opinion, the applicability of the IUR is more a question of admissibility of evidence as opposed to a ruling requiring "inherent powers" in order to enforce its application. It is not a question of remedies requiring any such powers; such as contempt, injunctive relief, etc. The Small Claims Court is mandated, and I might add qualified, to apply the common law, of which the IUR is a part. It appears the Adjudicator erroneously concluded that "inherent powers" were necessary to apply the IUR. If one were to decide that the IUR could not be applied by Small Claims Court Adjudicators, in my opinion, this would

unnecessarily fragment proceedings before that court. The only exception would be, as pointed out in the foregoing authorities, where the impunged evidence originated in another court or tribunal. It is logical that the courts or tribunals in which the evidence arises should be able to decide on what use can be made of such evidence. In this case the impunged evidence originated in the Small Claims Court and that court should therefore be able to apply the common law, of which the IUR is a part.

Conclusion on the applicability of the IUR:

[30] On this first question, I conclude that the IUR applies in the Small Claims Court of Nova Scotia and that the Adjudicator has the jurisdiction to decide this question with regard to evidence which originated in that Court. The Adjudicator was therefore in error when he concluded that the IUR did not apply. The application of the IUR in the Small Claims Court does not require any "inherent powers" in order to decide on the admissibility of the evidence, consistent of course with the principles established by the common law.

[31] I have considered whether the matter should be sent back to the Small Claims Court to decide whether the IUR should be waived or relief given and the impunged evidence admitted in the action or claim under appeal. In my view, the Adjudicator made it clear that he would have waived the IUR and admitted the evidence in the circumstances of this case. The facts are clear and undisputed. Therefore, it remains to be determined if the Adjudicator was correct in forming this opinion.

Authorities on waiving or relieving from the IUR:

[32] The circumstances in which courts could consider giving relief from the IUR are quite varied. In the end, it appears to be a discretionary call in order that justice be served. It is important to note at the outset that most of the jurisprudence in this area deal with evidence obtained from a party in a proceeding and not from independent witnesses who are not party to the original proceeding. Most of those also deal with evidence obtained at discovery and not evidence produced in answer to a subpoena. The parties to the present litigation did not take issue with the conclusion of the Adjudicator that the IUR rule was applicable to evidence obtained by subpoena as well as evidence obtained on discovery. Therefore, the

questions to be decided are whether the IUR applies in the circumstances of this case; and, if it does, whether Ms. Grant should be relieved from the effects of the rule and the impunged documents admitted as evidence in the present litigation.

[33] In *Sezerman* v. *Youle*, [1996] N.S.J. No. 172 (C.A.) The Nova Scotia Court of Appeal commented on some general principles applicable to the IUR. Referring to a 1990 article by John B. Laskin titled the "The Implied Undertaking in Ontario" (1989-90), 11 The Advocates' Quarterly, 298, the Court said the following at para. 25 of *Serzerman*:

> ¶ 25 Laskin addresses relief from the undertaking at p. 313, noting that it is only with leave of the court that a party obtaining the disclosure is free to use it in a manner not contemplated by the implied undertaking. The House of Lords in Crest Homes plc v. Marks and others, [1987] 2 All E R 1074 set a high threshold for the granting of such leave. The party seeking it must demonstrate "cogent and persuasive reasons" and the court will not release or modify the implied undertaking except in special circumstances and where no injustice would result to the party giving discovery. Laskin says at p. 314:
>
> > Where leave is sought to use the material in other proceedings, an important factor is the extent to which those proceedings are connected with the proceedings in which disclosure was made. Where the two sets of proceedings involve the same or similar parties and the same or similar issues, leave will most readily be granted. That was the case, for example, in Lac Minerals Ltd. V. New Cinch Uranium Ltd., where Mr. Justice Craig pointed out that the Ontario and the British Columbia actions both arose

> out of the same series of transactions and that all of the parties to the British Columbia action could have been parties to the Ontario proceedings but for the inability of the Ontario Court to compel the submission of non-residents to its juristiction.
>
> . . .
>
> Also important is the use to which the party seeking leave wishes to put the material. Use for the purpose of related proceedings is regarded as a proper use consistent with the purposes for which discovery was made available and with the public interest in the administration of justice. Use to found an independent cause of action is however regarded with disfavour, and use for commercial or other purposes unconnected with litigation would presumably be even less likely to justify the granting of leave. [Emphasis added]

¶ 26 Laskin concludes the article by saying the implied undertaking is an important aspect of the civil litigation process which has to date attracted relatively little notice in Ontario. The law relating to the undertaking is still in a state of evolution, both in Ontario and England, and the author suggests the subject may be a proper one for consideration by the rules committees. [Emphasis added]

[34] The Court further remarked at paras. 35 and 45:

> ¶35 The primary rationale for the implied undertaking rule is the protection of privacy and confidential information and the secondary rationale for it is that collateral use would inhibit full and frank disclosure. In considering limits or any exceptions to the rule, there must be balanced against these, the public interest in the full disclosure of and use of the truth. In any given case, the injustice resulting from the application of the rule must be balanced against that which would result from not applying it. [Emphasis added]

> ¶45 It is clear from the foregoing review of the authorities that there are no authorities directly binding on this Court, either as to the implied undertaking rule or its exact scope. I have no hesitation, however, in adopting the rule in the terms stated by Laskin as being of general application.

[35] In *Brown* v. *Health Authority* (2006) 249 N.S.R. (2d) 40, Justice Warner, in considering the IUR said the following at para. 47:

> ¶47 The text, **Phipson On Evidence**, Fifteenth Edition (2000: Sweet & Maxwell, London), while referring for the most part to the English civil procedure rules, makes general statements applicable to this issue:
>
> (a) At page 595:
>
> "The rationale is based partly on the protection of privacy, partly in order to ensure candour and the giving of proper disclosure." (Per **Home Office v. Harman**, [1983] A.C. 280);
>
> (b) At page 596 - 597:
>
> "The implied undertaking applies to documents disclosed in proceedings by compulsion. If a party puts forward evidence of documents voluntarily, even if the effect of failing to do so would be that he failed in litigation or the application in question, the implied undertaking does not apply." [Emphasis added by Warner J.]
>
> (c) At page 597, by a quote from **Derby v. Weldon (No.2)**, [1998] 1 All E.R. 1002:

> "In relation to documents voluntarily disclosed the Court has not invaded the privacy of the party. The party has, for his own purposes in defending a case, decided himself to use the documents rather than maintain his privacy. It is the party who has destroyed the privacy of the document, not the plaintiff nor the court . . . it is true as [counsel] says that apart from litigation the defendants would not have disclosed the documents. They had the unhappy choice of deciding whether to defend the proceedings at that stage, maintaining that privacy or, to put in the documents. But it is an unavoidable consequence of all litigation that a party who chooses to put in evidence, necessarily risks such evidence becoming available to others. In my judgment the special protection given to documents disclosed under compulsion of discovery procedures does not apply to any wider class of documents." [Emphasis added]

The Appellants rely on the Supreme Court of Canada case, *Juman* v. *Doucette*, 2008 S.C.C. 8 in support of their arguments that the appellant should not be relieved of the IUR in the present circumstances. The *Juman* case involved very serious public interests regarding open and frank investigations of child protection cases. We do not have such overriding public interests in this case. Quite the contrary. The public interest could be said to favour giving relief from the rule. In *Jurman*, Binnie J. For the unanimous court, said the following at para. 32:

> ¶32 An application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect,

> namely privacy and the efficient conduct of civil litigation. In a case like the present, of course, there weighs heavily in the balance the right of a suspect to remain silent in the face of a police investigation, and the right not to be compelled to incriminate herself. The chambers judge took the view (I think correctly) that in this case that factor was decisive. In other cases the mix of competing values may be different. What is important in each case is to recognize that unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose. [Emphasis added]

Analysis on waiving or relieving from the IUR:

[36] As I stated earlier, the Adjudicator in his decision, although obiter in view of his ruling, appeared to find that relief from the IUR would be appropriate in the circumstances of the case before him. The Respondent argues strongly that this would be an appropriate result; but firstly, the Respondent contends that the documents were produced voluntarily by Mr. Vogt, albeit after being issued a subpoena in the original proceedings before the Small Claims Court. The Respondent equates this to "the voluntary disclosure of documents in the course of interlocutory proceedings" as described in the *Derby & Co. Ltd.* v. *Brown (supra)*. The Appellants contend that the documents would have to have been disclosed at the hearing in any event, and thus early disclosure is of no consequence. With all due respect, I do not find this argument very convincing. The agreed statement of

fact indicates more a convenience to Mr. Vogt in order to avoid attending at the hearing. In any event it is not necessary to decide the appeal or the application on this issue because I am satisfied on a balance of probabilities that Ms. Grant should be relieved from the application of the IUR in the circumstances of this case. There are overriding public policy considerations that dictate the admissibility of the impunged evidence. I agree that it is highly unlikely the Appellants were entitled to keep secret the fact that a company (National) of which Mr. Vogt was the registered secretary was the competing bidder to Ms. Grant; or the fact that National also had a dual agency agreement with the vendor, Mr. Low. These are serious public interest issues to be litigated, especially if, as it appears, the Appellants owed a fiduciary duty to Ms. Grant.

Conclusion:

[37] The appeal is allowed in part. In summary, even though I find that it is doubtful the evidence in question was not voluntarily disclosed and produced, it is not necessary to decide that question because I find that the Adjudicator was correct in his assertion that this appears to be an appropriate case to provide relief from the IUR, which applies to the Small Claims Court in this case. I would grant

leave, if required, for Ms. Grant to be able to use the evidence in question in the present litigation. As I said earlier, I believe the Adjudicator made that opinion clear in his decision; however, in the event that it is not clear, I would hereby grant leave to use this evidence in the Small Claims Court, pursuant to the Application made contemporaneously with this appeal.

[38] I would entertain written submissions on the issue of costs if these can't be agreed upon. Being primarily a Small Claims Court Appeal, I would expect costs to be rather minimal in any event.

[39] If agreement can be reached on costs, I will issue an order accordingly.

Boudreau J.