SUPREME COURT OF NOVA SCOTIA
Citation: *Langille v. Nova Scotia (Attorney General)*, 2019 NSSC 340

Date: 2019 11 19
Docket: Hfx No. 427762
Registry: Halifax

Between:

Eric Langille and Maritime Financial Services Incorporated, a body corporate

Plaintiffs
(Defendants by Counterclaim)

v.

The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia, PPI Solutions (Atlantic) Inc., a body corporate, and Transamerica Life Canada, a body corporate

Defendants

DECISION: DISCOVERY PRIVILEGE

Judge: The Honourable Justice Joshua M. Arnold

Heard: June 17, 2019, in Halifax, Nova Scotia

Counsel: John O'Neill, on behalf of the Plaintiffs
Matthew Moir, on behalf of the Defendant PPI

By the Court:

Introduction

[1] This is a motion for leave to use documents obtained in discovery and disclosure for a purpose outside the present litigation, by lifting the implied undertaking not to use information disclosed or discovered in a proceeding for a purpose outside the proceeding, without the permission of a judge. The moving party is the defendant PPI Solutions (PPI).

[2] The proceeding is presently adjourned without day after a scheduled trial did not proceed in 2016. In August 2018 the individual plaintiff, Eric Langille (Langille), along with his wife, made a consumer proposal under the *Bankruptcy and Insolvency Act*. PPI is a creditor in the proposal.

[3] PPI says the implied undertaking should be set aside to allow it to put documents respecting the corporate plaintiff, Maritime Financial Services (Maritime) – of which Langille holds the shares – before the other creditors. PPI maintains that Maritime's financial statements are relevant to the consumer proposal.

[4] In support of this application, on June 3, 2019, PPI filed the affidavit of Angela C. Haskett. Langille filed the affidavit of his counsel, John O'Neill, on June 11, 2019.

Background

[5] This action was commenced by the plaintiffs in 2014. PPI is a defendant and plaintiff by counterclaim. The matter proceeded through discovery and disclosure, an expert witness report was filed, and the trial was scheduled for late 2016. During discovery and disclosure, the plaintiffs produced Maritime's financial statements. The matter was adjourned in the fall of 2016 and the trial has never been rescheduled.

[6] In August 2018, Langille and his wife made a consumer proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, Division II. In order to qualify for a Division II proposal, a consumer debtor's cumulative debts must not exceed $250,000. The Langilles pooled their respective limits and claimed just under $500,000 in cumulative debt. They reported an estimated net realizable value

of $107,788, later amended to $103,292. This amount apparently did not include Mr. Langille's interest in the corporate plaintiff, Maritime, or his interest in an investment company he owned.

[7] At a meeting of creditors in the proposal proceeding in October 2018, Mr. Langille confirmed that he held the shares of Maritime and indicated that the company was no longer operating and had no assets. The matter was adjourned for further inquiry. Through his proposal administrator, Mr. Langille asked PPI's counsel to deliver a copy of Maritime's 2014 tax return, as disclosed in the original litigation. Mr. Langille waived the implied undertaking to that extent. The 2014 return showed Maritime reporting nominal income and gave a breakdown of assets and liabilities, but did not identify their nature.

[8] At the further request of Mr. Langille's counsel, counsel for PPI also forwarded him the Maritime financial statements, but Mr. Langille refused to waive the implied undertaking in respect of those documents.

[9] During a subsequent meeting of creditors in November 2018, the administrator indicated that Mr. Langille had told him that that he did not have access to the Maritime financial statements or bank statements. However, the financial statements had been provided to his counsel by counsel for PPI.

Positions of the parties

[10] The Maritime financial statements are subject to the implied undertaking rule. Mr. Langille has refused to waive the undertaking. Mr. Langille says Maritime has stopped operating and has no assets. PPI suggests that Mr. Langille may have transferred some of Maritime's earnings to his investment company and to a family trust. PPI wants to put the Maritime documents before the proposal administrator in the *BIA* proceeding. PPI says the creditors should know about any related-party debt before deciding whether to accept the proposal.

[11] Counsel for Langille says PPI has not established a superior public interest justifying the disclosure of the information such that the prohibition against a collateral use should be overridden. He also argues that "collateral use" includes confirming the existence of information that is subject to the implied undertaking rule, with the result that counsel for PPI has already violated the undertaking. PPI says the scope of the implied undertaking is not this broad, but submits that if there has been a breach of the implied undertaking, leave should be granted *nunc pro tunc*, that is, after the fact.

Issues

[12] The issues can be summarized as follows: (1) Does "collateral use" of information subject to the implied undertaking include confirming the existence of such information without actually disclosing it?; (2) Is there a superior public interest in these circumstances such that the Court should grant leave to use the financial statements?; (3) Should the Court grant such leave *nunc pro tunc*?

(1) Scope of the implied undertaking

[13] In Nova Scotia, the common law implied undertaking rule is recognized in Civil Procedure Rule 14.03:

> Collateral use
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> 14.03 (1) Nothing in Part 5 diminishes the application of the implied undertaking not to use information disclosed or discovered in a proceeding for a purpose outside the proceeding, without the permission of a judge.
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> (2) The implied undertaking extends to each of the following, unless a judge orders otherwise:
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> (a) documentation used in administering a test, such as test documents supplied to and completed by a psychologist;
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> (b) all notes and other records of an expert;
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> (c) anything disclosed or produced for a settlement conference.

[14] The implied undertaking rule is intended to balance the public interest in encouraging full disclosure so that the truth may be discovered against a desire to minimize intrusions on privacy. The scope of the rule was described by the Supreme Court of Canada in *Juman v. Doucette*, [2008] 1 S.C.R. 157:

> [4] Thus the rule is that both documentary and oral information obtained on discovery, including information thought by one of the parties to disclose some sort of criminal conduct, *is* subject to the implied undertaking. It is not to be used *by the other parties* except for the purpose of that litigation, unless and until the scope of the undertaking is varied by a court order or other judicial order or a situation of immediate and serious danger emerges. [Italics in original.]

[15] Counsel for the Langilles submits that "collateral use" of information subject to the implied undertaking includes confirmation of the existence of information that is subject to the rule, even where the information itself is not disclosed. Counsel has not provided any authority to support this argument. In my view, to

interpret the scope of the implied undertaking rule as encompassing the mere existence of information subject to the rule would not adhere to the principles stated in the caselaw. The law indicates that documents produced (or information contained in such documents) must be used for a purpose outside the proceeding for the undertaking to be impacted.

[16] As a practical matter, it is unclear how a party could ever seek to have the implied undertaking lifted if they could not publicly confirm the existence of information that they believed was relevant in another proceeding or for another purpose. There is no automatic confidentiality order for such a motion. The very act of bringing the motion amounts to a public announcement that there is material in existence which the moving party proposes to use for another purpose.

[17] I am not satisfied that the bare assertion of the existence of information, subject to the implied undertaking, that is relevant in a second proceeding constitutes collateral use. It follows that PPI has not breached the implied undertaking merely by the act of raising the possible existence of such information in the bankruptcy proceeding.

(2) Should the implied undertaking be lifted

[18] The leading authority on lifting the implied undertaking rule is the Supreme Court of Canada's decision in *Juman*. In that case, Binnie J., for the court, discussed the circumstances that will permit the court to lift the undertaking:

> [30] The undertaking is imposed in recognition of the examinee's privacy interest, and the public interest in the efficient conduct of civil litigation, but those values are not, of course, absolute. They may, in turn, be trumped by a more compelling public interest. Thus, where the party being discovered does not consent, a party bound by the undertaking may apply to the court for leave to use the information or documents otherwise than in the action, as described in *Lac d'Amiante*, at para. 77:
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> > Before using information, however, the party in question will have to apply for leave, specifying the purposes of using the information and the reasons why it is justified, and both sides will have to be heard on the application.
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> In such an application the judge would have access to the documents or transcripts at issue.
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> …

> [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.
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> …
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> [34] Three Canadian provinces have enacted rules governing when relief should be given against such implied or "deemed" undertakings (see *Queen's Bench Rules*, M.R. 553/88, r. 30.1 (Manitoba); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 30.1 (Ontario); *Rules of Civil Procedur*e, r. 30.1 (Prince Edward Island)). I believe the test formulated therein (in identical terms) is apt as a reflection of the common law more generally, namely:
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> > If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that [the implied or "deemed" undertaking] does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

[19] This analysis applies to the implied undertaking rule in Nova Scotia. In *Nassar v. Capital Health Authority*, 2011 NSSC 464, for instance, Wright J. stated that on a motion to lift the implied undertaking, "[t]he ultimate question … is whether the plaintiff has demonstrated a superior public interest in the disclosure and use of these documents sought, that should trump the implied undertaking rule" (para. 24).

[20] The onus to establish the existence of a superior public interest rests on the party seeking to lift the implied undertaking. Relief should be granted where the party's interest in using information that was obtained subject to the rule outweighs the privacy interest at stake. The Court must balance the interests of the parties involved and determine the harms and benefits to each party. In *Juman*, the court commented on the weighing of competing interests:

> [33] Reference was made to *Crest Homes plc v. Marks*, [1987] 2 All E.R. 1074, where Lord Oliver said, on behalf of the House of Lords, that the authorities "illustrate no general principle beyond this, that the court will not

> release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery" (p. 1083). I would prefer to rest the discretion on a careful weighing of the public interest asserted by the applicant (here the prosecution of a serious crime) against the public interest in protecting the right against self-incrimination as well as upholding a litigant's privacy and promoting an efficient civil justice process. What is important is the identification of the competing values, and the weighing of one in the light of the others, rather than setting up an absolute barrier to occasioning any "injustice to the person giving discovery". Prejudice, possibly amounting to injustice, to a particular litigant may exceptionally be held justified by a higher public interest, as in the case of the accused whose solicitor-client confidences were handed over to the police in *Smith v. Jones*, [1999] 1 S.C.R. 455, a case referred to in the courts below, and discussed hereafter. Of course any perceived prejudice to the examinee is a factor that will always weigh heavily in the balance. It may be argued that disclosure to the police of the evil secrets of the psychopath at issue in *Smith v. Jones* may have been prejudicial to him but was not an "injustice" in the overall scheme of things, but such a gloss would have given cold comfort to an accused who made his disclosures in the expectation of confidentiality. If public safety trumps solicitor-client privilege despite a measure of injustice to the (unsympathetic) accused in *Smith v. Jones*, it can hardly be disputed in this jurisdiction that the implied undertaking rule would yield to such a higher public interest as well.
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> …
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> [35] The case law provides some guidance to the exercise of the court's discretion. For example, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted...
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> [36] On the other hand, courts have generally not favoured attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest...
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> [37] Some applications have been refused on the basis that they demonstrate precisely the sort of mischief the implied undertaking rule was designed to avoid. In *755568 Ontario*, for example, the plaintiff sought leave to send the defendant's discovery transcripts to the police. The court concluded that the plaintiff's strategy was to enlist the aid of the police to discover further evidence in support of the plaintiff's claim and/or to pressure the defendant to settle (p. 655).

[21] The Court in *Juman* provided a non-exhaustive list of categories which may prevail as demonstrating a superior public interest. The list includes examples such as statutory exceptions, public safety concerns, impeaching inconsistent testimony

and the prosecution of crimes (paras. 39-50). On the question of impeaching inconsistent testimony, the Court stated in *Juman*:

> [41] Another situation where the deponent's privacy interest will yield to a higher public interest is where the deponent has given contradictory testimony about the same matters in successive or different proceedings. If the contradiction is discovered, the implied undertaking rule would afford no shield to its use for purposes of impeachment. In provinces where the implied undertaking rule has been codified, there is a specific provision that the undertaking "does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding": see Manitoba r. 30.1(6), Ontario r. 30.1.01(6), Prince Edward Island r. 30.1.01(6). While statutory, this provision, in my view, also reflects the general common law in Canada. An undertaking implied by the court (or imposed by the legislature) to make civil litigation more effective should not permit a witness to play games with the administration of justice: *R. v. Henry*, [2005] 3 S.C.R. 609, 2005 SCC 76. Any other outcome would allow a person accused of an offence "[w]ith impunity [to] tailor his evidence to suit his needs in each particular proceeding" (*R. v. Nedelcu* (2007), 41 C.P.C. (6th) 357 (Ont. S.C.J.), at paras. 49-51).

[22] It does not appear to be disputed that counsel for PPI provided the administrator with the 2014 Maritime tax return at Langille's request. PPI also requested that Langille waive the implied undertaking over the financial statements that are the subject of this motion, so that they could be put before the administrator. At Langille's counsel's request, PPI's counsel forwarded copies of the documents in question, but ultimately Langille refused to waive the undertaking over them. This was communicated to PPI's counsel in October 2018. At a creditors' meeting in November 2018, the administrator indicated that Langille had told him that he did not have access to Maritime's financial or bank statements. Langille was present on speaker phone, and did not deny having said this. PPI takes the position that Langille gave inconsistent evidence by stating that he did not have access to the Maritime financial statements after they had been provided to his counsel.

[23] PPI argues that the administration of justice and the proper functioning of Division II of the *Bankruptcy and Insolvency Act* are a prevailing public interest. PPI submits that the proper functioning of the *BIA* requires fulsome disclosure to the creditors of the debtor's affairs, and particularly the debtor's assets. PPI argues that there would be little harm in lifting the implied undertaking. It will either demonstrate that the company dissolved at the end of 2014, or it will place Mr.

Langille's present business affairs before the creditors as required for the consumer proposal process.

[24] Counsel for Langille submits that PPI has not established that setting aside the undertaking would advance a superior public interest. He argues that the motion by PPI is no more than an attempt to undermine the consumer proposal and force the Langilles into a Division I bankruptcy, even though the other creditors favour the proposal and the administrator has not called for disclosure of the Maritime statements. I do not accept that this is established on the record before the court. It is clear that PPI has indicated its opposition to the proposal at this point. Counsel for Mr. Langille appears to argue that the motion should fail because the proposal administrator was satisfied with the state of the information available, including Mr. Langille's representations that he did not have access to the Maritime documents. He further argues that the other creditors are likewise apparently uninterested in the documents. But that is not determinative on this motion. Finally, he submits that the required information is already in the hands of the administrator, based on notes to file attached to the administrator's report of April 15, 2019. It is not clear, however, that these brief notes actually provide a clear explanation as to what became of Maritime's assets, which is the essential issue PPI seeks to pursue by way of the lifting of the implied undertaking.

[25] Langille has made various assertions about the Maritime financial statements. The information in the documents may impact the decision of the creditors as to whether to accept the proposal. In these circumstances, the interest in ensuring the necessary information is made available in deciding on the proposal is pronounced, while it is not clear what serious harm could come from disclosing the financial statements of a defunct company. Langille already waived the undertaking with respect to Maritime's 2014 income tax return.

[26] While the undertaking must not be set aside lightly, I conclude on a balance of probabilities that in the particular circumstances of this motion, the proper functioning of the *BIA* process is a superior public interest that justifies lifting the implied undertaking.

Setting aside the undertaking *nunc pro tunc*

[27] I have determined that PPI has not breached the implied undertaking by disclosing the existence of the information in question. If I am wrong in that determination, PPI asks me to lift the undertaking *nunc pro tunc*. In *Professional Components Ltd. v. Rigollet*, 2010 BCSC 688, the court said:

> [34] The plaintiff applies for a retroactive order to remedy the breach. I propose to proceed by first considering the likelihood that the court would have granted leave if the plaintiff had applied initially. If leave would have been granted, I will then address whether leave should now be granted *nunc pro tunc*.
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> …
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> [55] While the defendants are correct that the process of requiring leave is important, I endorse the response in *Chonn* where a similar argument was made. There, Voith J. stated at para. 57:
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> > ... I expect that lawyers who understand the ambit and content of the implied undertaking rule and who appreciate the breadth and potential severity of the remedies available to the court to address a breach of the rule will act appropriately.
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> In the present case, it would have been preferable for the plaintiff to ask permission rather than arguing now for forgiveness, but I doubt that a *nunc pro tunc* order here will have the effect of encouraging lawyers to use disclosed material without first seeking the consent of the other party or leave of the court.
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> [56] I am satisfied that the interests of justice favour granting the plaintiff leave to use the discovery evidence, including the meta data in the expert's report, *nunc pro tunc* for the purposes of the Copyright Action. The plaintiff may not use the disclosed information outside of the two proceedings without the defendants' consent or leave of the court.

[28] *Professional Components* was cited in *Re Branconnier*, 2017 BCSC 1896, where the Court determined that leave would have been granted had the plaintiff applied ahead of time, then the interests of justice were served by granting leave *nunc pro tunc*.

[29] As previously discussed, PPI has established on a balance of probabilities a public interest that justifies lifting the implied undertaking. Had PPI brought an application to lift the implied undertaking before alerting the proposal administrator to the existence of the information, I am satisfied that the result would have been the same. Therefore, if there was a breach by virtue of the disclosure of the existence of the information, I find that it is appropriate to grant the order *nunc pro tunc*.

Conclusion

[30] I conclude that the order sought by PPI should be granted. While I find that there has been no violation of the implied undertaking to this point, if I am wrong in that conclusion, I would grant the order *nunc pro tunc*.

Arnold, J.