SUPREME COURT OF NOVA SCOTIA
Citation: ***Grafton Connor Group v. Murphy, 2022 NSSC 7***

Date: 20220107
Docket: Halifax, No. 293148
Registry: Halifax

Between:

Grafton Connor Property Incorporated, a body Corporate, c.o.b. Grafton Connor Group, and Beaufort Investments Incorporated, a body corporate, c.o.b. North End Beverage Room

Plaintiffs

v.

Sean Murphy, in his quality as Attorney in Fact, in Canada for Lloyd's of London Underwriters and Marsh Canada Limited, a body corporate

Defendant

DECISION

Judge:	The Honourable Justice John Bodurtha
Final Written Submissions:	July 14, 2021
Written Decision:	January 7, 2022
Counsel:	Roderick Rogers, Q.C., Counsel for the Plaintiffs Ian Dunbar and Robert Mroz, Counsel for the Defendant

By the Court:

Overview

[1] Marsh Canada Limited ("Marsh") brought an application in the Nova Scotia Supreme Court to waive the implied undertaking pursuant to Rule 14.03 of the *Nova Scotia Civil Procedure Rules ("CPR")* in respect of materials disclosed during the prior proceedings: *Grafton Connor Group v. Murphy*, 2021 NSSC 153 ("*Grafton Connor Property*"). I declined to waive the implied undertaking because Marsh's request was "overbroad" and I determined some of the documents were covered by settlement privilege: see *Grafton Connor Property*, at para. 4.

[2] At the Court's request, Marsh submitted a list of the materials sought. In broad terms, the materials consist of financial information obtained through discoveries during the trial proceedings and the subsequent examinations in aid of execution. The Plaintiffs, Grafton Connor Property Incorporated et al. ("Grafton") have agreed to waive the implied undertaking in relation to some of the documents contained in Marsh's list of the materials sought. Given the Plaintiffs' consent to the waiver over these documents, the implied undertaking is lifted from them. The remaining documents in dispute from the list are attached as Schedule "A".

[3] The application now stands to be decided on its merits.

[4] The decision of Justice Arnold in *Langille v. Nova Scotia (Attorney General)*, 2019 NSSC 340, is relevant and persuasive to this issue. In *Langille*, the Court upheld the proper functioning of the *BIA* as a superior public interest that justified lifting the implied undertaking. In reaching my decision, I conclude (in lifting the implied undertaking) that there is a superior public interest in creditors pursuing enforcement in subsequent proceedings over the interests of debtors.

[5] I am convinced that the greater weight accorded to creditors' interests reflects the understanding that prejudice to debtors in proceedings involving their creditors is negligible, as the parties and issues are usually the same or similar. In this case, I find that the parties in both proceedings will be similar. The issue of Grafton's solvency is engaged in both proceedings.

[6] I find that the interests of creditors pursuing enforcement in subsequent proceedings raised by Marsh outweigh the interests protected by the implied undertaking, namely, privacy and the efficient conduct of litigation.

[7] It is notable that the civil procedure rules in other provinces exempt the deemed undertaking in these circumstances.

Relevant Facts

(a) Prior Proceedings

[8] The Plaintiff, Grafton, obtained a judgment against the Defendant, Marsh, in the Nova Scotia Supreme Court decision *Grafton Connor Property Inc. (c.o.b. Grafton-Connor Group) v. Murphy*, 2015 NSSC 195. The Grafton Connor Group of companies is solely owned by its President, Gary Hurst. Marsh insured a building owned by Beaufort Investments Inc. ("Beaufort"), one of the companies in the Grafton Connor Group. When that building was destroyed by fire, Grafton successfully claimed that Marsh, along with the defendant underwriter, was negligent. Marsh paid Grafton over $2.7 million pursuant to the judgment.

[9] To make out their claim for consequential damages, Grafton voluntarily disclosed specific details about the group's weak financial position.[1]

[10] The Supreme Court decision was overturned on appeal: *Marsh Canada Ltd. v. Grafton Connor Property Inc.*, 2017 NSCA 54. Grafton now owes Marsh the money it was paid. Grafton has not repaid Marsh and claims it is insolvent. Marsh took steps to attempt to enforce the judgment, conducting examinations in aid of execution with Mr. Hurst and Mr. McMullin, Vice President of Finance.

[11] Mr. Hurst is the directing mind of the Plaintiffs. He is the President and owner of the Grafton Connor Group of companies. He consolidated 100% of the ownership interest in the Grafton Connor Group of companies as of 2001. Marsh argues that Mr. Hurst's financial position and, in particular, his ability to finance the Plaintiffs' litigation (and his receipt of any dividends, salary, or other benefit from the insolvent Plaintiffs) is relevant to the bankruptcy proceedings.

[12] Mr. Hurst described the Plaintiff, Grafton Connor, as a "clearing house" for other entities within the Grafton Connor Group of companies[2]. In *Grafton Connor Property Inc. v. Murphy*, 2015 NSSC 195, Justice LeBlanc noted that Grafton Connor "operated and insured" the related companies, at para. 36:

---

[1] *Grafton Connor Property Inc. v. Murphy*, 2015 NSSC 195, at paras 442-488.

[2] See Exhibit "F" to the Affidavit of Robert Mroz affirmed March 9, 2020, which is an excerpt from the transcript of Mr. Hurst's October 31, 2018 discovery in aid of execution (at page 37, line 6).

> 36 In addition to the North End Pub, Grafton Connor has operated and insured a number of businesses in Nova Scotia. Since 1995, Grafton Connor has insured the downtown building known as the Five Fishermen building, which contains the Five Fishermen Restaurant, Five Fishermen Grill, and part of the Liquor Dome business. It insures the Cornwallis Property Limited building and the Grafton Connor Building, a joint venture of Five Fishermen Limited and Cornwallis Properties Limited, that houses Cheers, Grafton Street Dinner Theatre, Taboo, and a Pizza Pizza outlet. Outside of downtown Halifax, Grafton Connor operates and insures Sunnyside One, Sunnyside Two, the Riverside Pub, the True North Restaurant, and the Esquire in Bedford, Kempster's restaurant on Kempt Road in Halifax, the Redwood Grill on Lacewood Drive, Brewster's restaurant at the end of Hammonds Plains Road, and Tomorrow's Lounge in Bridgewater.

(b) Current Proceedings

[13] Marsh filed two applications for a bankruptcy order under section 43(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*") in the Nova Scotia Supreme Court against Beaufort and Grafton. To succeed in their bankruptcy order application, Marsh must establish on a balance of probabilities that Grafton committed an "act of bankruptcy", listed under section 42(1) of the *BIA*. Marsh is relying on section 42(1)(j):

> **Acts of bankruptcy**
>
> **s. 42(1)** A debtor commits an act of bankruptcy in each of the following cases:
>
> …
>
> (j) if he ceases to meet his liabilities generally as they become due.

[14] Marsh seeks to use evidence of Grafton's financial position to support the bankruptcy applications.

Issue – Whether the Implied Undertaking Should be Lifted to Enable the Enforcement of a Judgment via Bankruptcy Order Application

Applicable Law

[15] The common law implied undertaking is codified in *CPR* 14.03 ("Collateral Use"), which states:

> **(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.

> **(2)** The implied undertaking extends to each of the following, unless a judge orders otherwise:
>
> > (a) documentation used in administering a test, such as test documents supplied to and completed by a psychologist;
> >
> > (b) all notes and other records of an expert;
> >
> > (c) anything disclosed or produced for a settlement conference.

[16] *Juman v. Doucette,* 2008 SCC 8 ("*Juman*"), is the leading case on the implied undertaking. Binnie J. for the Court stated the "implied undertaking is imposed in recognition of the examinee's privacy interest, and the public interest in the efficient conduct of litigation …" (see para. 30). Protecting the litigant's privacy interest by limiting collateral use of disclosed information is meant to encourage full and candid discovery (see paras. 25-27).

[17] The Court stated that the implied undertaking may be modified or varied "in exceptional circumstances" 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 ... 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.

[18] The Court went on to provide "some guidance to the exercise of the court's discretion" from the case law, at paras. 35 and 36:

> 35 … 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. …
>
> 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 ...

[19] Grafton argues that the test laid out in *Juman*, and accepted by *Armoyan v. Armoyan,* 2015 NSSC 230, *requires* that both the parties and the issues are the

same or similar. I disagree with that argument because neither *Juman* nor subsequent Nova Scotia jurisprudence on this issue *requires* that the issues and parties be the same or similar to succeed on an application to waive or modify the implied undertaking. To frame *Juman* as requiring that both the parties and the issues are the same or similar is contrary to the discretionary balancing exercise intended by the Court. As Binnie J. states, "What is important is the identification of competing values, and the weighing of one in light of the others, rather than setting up an absolute barrier to occasioning any 'injustice to the person giving discovery.'" (See *Juman*, at para. 33).

[20] Both *Langill*e and *Nassar v. Capital District Health Authority*, 2011 NSSC 464, follow this approach. The central focus of the Court's reasoning is the weighing of competing public interests, with no focus on the similarity of parties and issues. In *Armoyan*, the Court noted that the similarities of parties and issues was but one of many factors that helped establish a superior public interest and granted relief (see para. 23).

Analysis

The Positions of the Parties

[21] Marsh, the applicant on this motion, argues that the public interest in "(i) the efficient administration of the justice system, (ii) the enforceability of civil judgments, and (iii) the proper functioning of the *BIA*" weigh in favor of waiving the implied undertaking.

[22] Marsh further argues that "the Bankruptcy Proceedings involve the same parties and the same or similar issues; namely the Plaintiffs' solvency and their ability to repay a monetary obligation awarded within the very proceeding giving rise to the obligation."

[23] Grafton submits that the interests raised by Marsh are not sufficient to trump "the privacy of the separate corporate entities which comprise the Grafton Connor Group." Grafton argues that the scope of relevant financial documentation differs between the insurance proceeding (the initial trial) and the bankruptcy matters, with the insurance dispute having a much wider general scope of relevant financial documentation than the bankruptcy matters. Grafton argues the risk of the invasion of privacy is heightened in the bankruptcy matters and the case law supporting the interests of the *BIA* as a sufficient public interest is distinguishable.

[24] Further, Grafton argues that neither the issues nor the parties are the same or similar. Grafton argues that "if the Trustee brought a claim for fraudulent preference or a transfer of value under the *BIA*", the Trustee (not Marsh) would be the party in the bankruptcy proceedings. Grafton argues that the negligence claim in the prior proceedings bears no resemblance to the issues in the bankruptcy proceedings.

The Implied Undertaking in the BIA Context

[25] In weighing the competing public interests in this motion, it is helpful to review how Courts and legislatures have treated the implied undertaking in the bankruptcy context.

[26] *Langille* establishes that the proper functioning of the *BIA* may, depending on the circumstances, weigh in favour of a waiver of the implied undertaking. The Court in *Langille* found the functioning of the BIA as a superior public interest.

[27] The Plaintiffs, Langille and Maritime (an insurance agency owned by Langille), began an action against the Defendant, PPI. The Plaintiffs disclosed corporate financial statements at discovery. The matter never proceeded to trial. In 2018, Langille and his wife filed a consumer proposal under the *BIA*, which did not include their ownership interest in Maritime. PPI, a creditor, wished to disclose Maritime's financial statements in their possession to the proposal administrator for the benefit of the other creditors, so they could decide whether to accept the proposal. Langille refused to waive the implied undertaking, despite having previously told the proposal administrator that he had no access to those documents.

[28] The Court concluded 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." (see para. 26). The Court reasoned as follows at para. 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.

[29] Marsh cites *Langille* to argue that the proper functioning of the *BIA* should favor lifting the undertaking. Grafton argues that *Langille* is distinguishable on the facts, as it concerns a different mechanism of the *BIA.* Under the Division II consumer proposal mechanism, creditors who accept a proposal lose their rights to recover in bankruptcy (see section 69.2(1) of the *BIA*). They argue the distinction is that Grafton did not willingly enter bankruptcy. Therefore, the balance of interests on the present facts is more analogous to the criminal context in *Juman*. The argument is laid out in Grafton's initial brief of July 7, 2020 (prior to the first decision) at para. 77:

> … If the Supreme Court of Canada ruled that implied undertaking was to apply even if that evidence revealed criminal misconduct, so too should the implied undertaking apply even if that evidence allegedly reveals bankruptcy or conduct entitling Marsh to relief under the BIA…

[30] In my view, this analogy fails to appreciate the heightened interests at stake in the criminal context, namely, the right against self-incrimination as stated by the Court in *Juman,* which are not engaged in this case (see para. 33). Next, I will consider situations where the interest in the proper functioning of the *BIA* may be sufficient to waive the implied undertaking.

[31] I have been unable to find any decisions tackling the issue of judgment enforcement through a section 43 bankruptcy application; however, the Court, in *Branconnier, Re,* 2017 BCSC 1896, exempted discovery transcripts from the undertaking to be used in a section 163(2) examination. The transcripts at issue were obtained at an examination in aid of execution of the judgment debtor and the judgment creditor, as part of the creditor's enforcement proceedings. The judgment creditor used portions of the transcript in an application to examine the judgment creditor's wife. The debtor then filed for bankruptcy. The creditor, though not a party to the bankruptcy proceedings, refiled the same application under section 163(2) of the *BIA,* thus inadvertently breaching the implied undertaking.

[32] The Court concluded that "the interests of justice outweigh any prejudice that would result" and granted the waiver *nunc pro tunc* (see paras. 38 and 54). In weighing the interests, the Court noted that the central issues in both proceedings were the same and noted the ongoing debtor-creditor relationship between the parties (see paras. 38 and 39). The Court also found it "pertinent that both Rule 13–4(5) and s. 163(2) of the *BIA* provide a creditor with the ability to apply to examine a third party who may have information about, in the one case, the assets

of the judgment debtor or, in the other case, the administration of the estate of the bankrupt." (See para. 40). Incidentally, Rule 79.24 of the *CPR* also allows for the examination of a person other than a debtor in similar circumstances.

[33] Like Grafton, the judgment debtor's wife argued that the section 163(2) examination was sought for the collateral purpose of supporting additional claims under the *BIA.* The Court rejected this argument in its analysis of whether she should be required to attend the examination at para 77:

> 77 The fact that the Alberta Securities Commission indicated, in its Notice of Application, that the Examination of Mrs. Branconnier might subsequently support a fraudulent preference action does not, without more, indicate that her examination is being sought for collateral purpose. The Alberta Securities Commission seeks to examine Mrs. Branconnier as a person who has knowledge that might shed light on her husband's assets or estate. This is a legitimate and proper purpose. It is a purpose that advances the interests of all creditors. Whatever information Mrs. Branconnier may provide at her examination will be made available to the Trustee and the Trustee will determine whether or not to use that information. Thus, the fact that Mrs. Branconnier may provide answers that may or may not give rise to other proceedings does not transform the purpose of the Alberta Securities Commission's application. Nor does it mean that that application is being brought to pursue a private remedy.

[34] The Court's remarks above align with Justice Binnie's discussion of "extraneous purpose" in *Juman* (see para. 36). I find that the *potential claims* arising from Marsh's bankruptcy application and the prospect of the Trustee as a party to those hypothetical proceedings do not render the application 'collateral'.

[35] *Branconnier* suggests that judgment creditors may use the mechanisms of the *BIA* to aid in enforcing past judgments without undue prejudice to the debtor.

The Implied Undertaking and Creditors' Enforcement Efforts

[36] Beyond the framework of the *BIA*, there are several cases which touch on the circumstances in which judgment creditors may use information obtained through discovery to pursue enforcement efforts against judgment debtors.

[37] In *Hauerbilt Construction Ltd. v. Legendary Developments*, 2021 BCSC 775, the judgment creditor obtained a judgment against the debtors in a foreclosure action. The Court allowed the creditor to rely on financial documents and transcripts obtained at an examination in aid of execution for their ongoing civil

claim that the debtors engaged in a series of transactions intended to delay, hinder, or defraud its creditors.

[38] In *Hauerbilt*, the balance of interests favored the creditors seeking to use information disclosed in a prior proceeding to pursue a new claim against the judgment debtor for the purposes of enforcement. In contrast, the creditors in *Langille* were simply evaluating the debtor's consumer proposal. The Court in *Hauerbilt* found that there was "an overlap between the parties" (para. 58) and that "the documents will be used in respect of similar issues […] the enforcement and collection of amounts owed to Hauerbilt by Legendary Developments pursuant to the Guarantee Agreement and a court order." (para. 49).

[39] The Court additionally relied on factors which are not engaged in the current case. First, the debtors failed to disclose the documents at issue pursuant to their obligation under the British Columbia Civil Procedure Rules, *Supreme Court Civil Rules*, B.C. REG 168/2009 (see para. 54). Under section 43 of the *BIA*, debtors have no obligation to hand over relevant documents to the applicant creditor; the burden is on the applicant to show "proof of facts". Second, the facts of the case engaged Rule 13-4(8) of the British Columbia *Supreme Court Rules* which states:

> Use of examination
>
> Any part of an examination for discovery under this rule may be given in evidence in the same or any subsequent proceeding between the parties to the proceeding or between the judgment creditor and the person examined for discovery.

[40] There is no equivalent in the Nova Scotia Civil Procedure Rules. However, it is notable that British Columbia, along with Ontario, Manitoba, and Prince Edward Island all adopt a similar rule exempting discoveries between debtors and creditors from the deemed undertaking.[3] This rule establishes in those jurisdictions that the interest of allowing creditors to enforce judgments outweighs debtors' privacy interests and supports the efficient conduct of litigation.

[41] Marsh argues that this matter involves a request for discovery evidence provided in the course of a proceeding giving rise to the very liability which resulted in the (related) bankruptcy proceedings. The bankruptcy proceedings are

---

[3] Rules of Civil Procedure, RRO 1990, Reg 194 (Ontario): The deemed undertaking (Rule 30.1.01) does not apply to Examinations out of court (Rule 34.01), which includes examinations in aid of execution under Rule 60.18; Court of Queen's Bench Rules, Manitoba Regulation 553/88 (Manitoba): Examinations in aid of execution (Rule 60.17) are not covered by the deemed undertaking (Rule 30.1(3)); Rules of Civil Procedure (PEI): Examinations in aid of execution (Rule 60.19) are not covered by deemed undertaking (Rule 30.1).

the logical continuation of Marsh's execution efforts arising from those decisions after having exhausted all execution options within the current proceeding.

[42] In both *Branconnier* and *Hauerbilt*, the Court granted the use of the discovery transcripts to a creditor after weighing the privacy interests of debtors against the interests of creditors to enforce judgments.

[43] The next line of cases demonstrates the tendency of Courts to waive the implied undertaking to further an applicant's extensive efforts to recover what they are owed against an allegedly fraudulent or evasive party. *Piche v. Chiu*, 2013 BCSC 747; *Resolution and Collection Corporation v. Nishiyama*, 2017 BCSC 2085; *XY, LLC v. Canadian Topsires Selection Inc*., 2015 BCSC 1617, and *Armoyan v. Armoyan*, *supra*, exemplify the "exceptional" nature of the remedy, where the applicant has exhausted all other avenues of recovery. Marsh argues that the present circumstances satisfy the "exceptional" threshold addressed in these cases.

[44] *Piche* is a matrimonial proceeding where a wife sought disclosure of her husband's business finances to establish his income prior to separation. A large portion of his net worth was intertwined in a company he owned and controlled, with assets held outside the country. The information at issue was disclosed in an examination in aid of execution in a prior commercial dispute involving the company as a party. The wife was previously granted a *Mareva* injunction to freeze his assets. The Court agreed to waive the undertaking, finding that "there is a strong public interest favouring disclosure in matrimonial proceedings, especially in a case such as this where the financial information is so complex and where the claimant has chosen to intermingle his finances so extensively." (See para. 29).

[45] *Piche* supports Marsh's argument that the proceedings involve similar parties and similar issues. In *Piche*, although the husband was not technically a party to the commercial proceeding, the Court agreed that his company was "effectively his alter ego." (See para. 22). This interpretation supports Marsh's argument that the companies in the Grafton Connor Group, owned by Mr. Hurst, the directing mind, sharing intertwined financial relationships, are similar parties. As well, in *Piche*, both the commercial proceedings and the matrimonial proceedings revolved around the financial position of the husband's company. Grafton's financial position is an issue in both the insurance proceeding and the bankruptcy proceeding, both proceedings may involve a similar issue.

[46] *Armoyan*, also took place in the matrimonial context. The applicant wife received a substantial judgment in the divorce proceedings, but her husband evaded enforcement efforts by stashing most of his assets offshore. The wife hired an international asset recovery team to assist. The Court granted her request to waive the implied undertaking to use her husband's financial information to further her international enforcement claims. The Court granted relief from the implied undertaking rule for the following reasons at para. 23:

> …
>
> • The proceedings involve the same parties and similar issues. Ms. Armoyan simply seeks collection of the monetary judgements granted to her from assets which existed prior to separation and which Mr. Armoyan strategically removed from this jurisdiction. Given the clear relationship between this proceeding and the proposed action in other jurisdictions, there is little prejudice to Mr. Armoyan.
>
> • The public interest in ensuring Ms. Armoyan collects the fruit of the litigation, which include child and spousal support arrears, outweighs any value the implied undertaking rule is designed to protect, in the circumstances of this case.

[47] Marsh relies on *Armoyan* and *Piche* to support their claim that the interest in the enforcement of judgments outweigh Grafton's privacy interests. I do note that the Court's decision in each case turned on the strong public interests at stake in matrimonial proceedings, which are not engaged in this case.

[48] In *Nishiyama*, the Court granted a waiver to a judgment creditor to examine a party with knowledge of the judgment debtor's finances, to further the creditor's international enforcement efforts. Similar to *XY* and *Piche,* a *Mareva* injunction was previously granted.

[49] *XY* arose from a lengthy and complex commercial dispute. XY was granted a judgment in the "original action" and was a plaintiff in several other interrelated actions against many of the same parties in Canada and Hong Kong. In the 2015 "Recovery Action", XY sought a waiver of the undertaking to use information disclosed during discovery for the "Original Action" to support the other actions. XY was granted a *Mareva* injunction to prevent the respondent from fraudulently disposing of their assets. The Court granted the waiver in recognition of the overlapping parties and issues in all actions and to "advance the interests of justice" (see para. 59), stating at paras. 37 and 59:

> 37 Accordingly, all of these actions are extant, either as efforts by XY to recover the fruits of the judgment and enforce the permanent injunction that it earlier obtained, or they are bound up in efforts by XY to prevent further wrongdoing, and to enforce the permanent injunction against other parties who are now apparently involved in these activities.
>
> …
>
> 59 … Limiting XY in respect of the prosecution of its various actions does not serve the truth-seeking objective of the court and, in that vein, it is not in the public interest.

[50] Regarding prejudice to the respondents, the Court in *XY* stated, at para. 60, that in the circumstances of the case:

> In terms of the competing factors identified in *Juman*, the issues of privacy and trial efficiency are also, in my view, met or not engaged by reason of granting the relief sought here. It seems to me that there can be no privacy concerns on the part of the IND Defendants in respect of these documents. These are documents that they themselves have or had in their possession or power and which were produced in the two actions, nor are there issues concerning the efficient conduct of litigation by encouraging complete and candid discovery. Again, these are all related parties. They know what the issues are and they know what these documents relate to. It is clear that these documents will be very important to XY in advancing its claims, not only in terms of the involvement of certain people, for example, Ms. Shuli Wang and Mr. Vanderwal, but also in terms of the other important issue, that is credibility.

[51] In the present case, Grafton argues that the privacy interests of the corporate group outweigh the interests raised by Marsh. I am not persuaded by this argument. Following the Court's reasoning in *XY*, it is difficult to see what prejudice Grafton and its constituent companies will suffer, given that they themselves put their financial position at issue at trial, and claim they are currently insolvent. Their finances will continue to be the focus of the bankruptcy proceeding, and the impugned transcripts are necessary for Marsh to make out their section 43(1)(j) bankruptcy application. I agree with the Court's statement in *Langille*: "it is not clear what serious harm could come from disclosing the financial statements of a defunct company." (See para. 25). In addition, any privacy concerns can be addressed by limiting the level of disclosure to what is necessary to satisfy the bankruptcy application: *Juman*, 2008 SCC 8, at para. 25.

Are These "Exceptional Circumstances"?

[52] I am convinced that the parties and issues in the proceedings are similar, and that the prejudice to Grafton is negligible; however, Marsh must still convince me, based on the facts, that this is an "exceptional circumstance" which warrants granting a waiver. The Court in *Juman* warned at para. 32:

> … 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.

[53] In considering the "exceptional circumstances" of the applicants in the cases discussed above, for various reasons they had no option but to apply for a waiver of the deemed undertaking to proceed in their claims or recover what they were owed. To review:

- The creditors in *Langille* required the information to make an informed decision on a consumer proposal, which terminated their right to recover under the *BIA* upon acceptance.
- In *Piche,* the wife could not access her husband's financial information because he hid his assets offshore. The wife was granted a *Mareva* injunction, an extraordinary remedy which requires showing a strong *prima facie* case and strong evidence of the risk of imminent removal or dissipation of assets, such as fraud (see *Aetna Financial Services Ltd v. Fiegelman*, [1985] 1 SCR 2, at paras. 30 and 32 for commentary on a *mareva* injunction)
- In *Armoyan,* the wife went further than in *Piche* to recover her husband's hidden assets, enlisting the services of an international asset recovery team. She was also granted a *Mareva* injunction.
- *XY* and *Nishiyama* both occurred in the context of international enforcement efforts, where the debtors hid their assets in foreign jurisdictions and the information was necessary to aid in enforcement and, in *XY*, proceed at trial.

[54] The case before me does not present similar exigent circumstances, such as substantiated allegations of international fraud or the heightened public interests of matrimonial litigation. In reviewing *Branconnier* and *Hauerbilt*, those decisions can also be distinguished on the facts. The creditors in those cases either had a legal entitlement to acquire the information, or the debtor breached a clear legal obligation:

- In *Branconnier*, the creditors in an *ongoing bankruptcy proceeding* were entitled under section 163(2) of the *BIA* to examine the debtor's wife about his property and assets.

- The debtors in *Hauerbilt* breached their legal obligation to disclose the relevant material to the creditors.

[55] To avoid eroding the seriousness of the deemed undertaking, Marsh would have to show exceptional circumstances to justify resorting to a waiver to succeed in their bankruptcy application. For example, by demonstrating that Grafton had evaded execution efforts or some other fraudulent behavior.

[56] As in *Langille*, these facts do arguably give rise to issues of credibility, which was discussed extensively in *Juman*, at para. 41:

> [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).

[57] In *Langille*, Langille made inconsistent statements to the creditors and the administrator about the documents at issue, and the Court cited *Juman*, in deciding to waive the undertaking (see paras. 21-26). In this case, Grafton claims it used the money from the judgment to pay legal bills, whereas Marsh contends that:

> Mr. Hurst testified at his October 31, 2018 discovery in aid of execution that the Plaintiffs were insolvent, despite being fully solvent at trial and having received $2,758,207.26 from Marsh after the judgment at trial. Marsh should be permitted

> to have Mr. Hurst's claims of insolvency tested by a Trustee in Bankruptcy, an independent Officer of the Court as part of its statutory mandate.[4]

[58] I find that Marsh's application falls within the "exceptional circumstances" laid out in *Juman* because it involves a creditor seeking to prove a debtor committed an act of bankruptcy by attempting to impeach inconsistent testimony of the debtor from a previous proceeding. Limiting Marsh in its efforts to obtain payment for an unpaid judgment is not in the public interest nor does it serve the truth finding role of the Court.

Conclusion

[59] The documents at issue relate to the financial affairs of the Plaintiffs and related companies within the Grafton Connor Group. The issue that may arise in the bankruptcy proceeding is the purpose of transactions that took place between the Plaintiffs and related entities, after the Plaintiffs received funds from Marsh following the initial trial and before the Plaintiffs became insolvent.

[60] The discovery evidence provided by the Plaintiffs involves evidence about the Plaintiffs' financial position and the position of related companies within the Grafton Connor Group of Companies. I find that the Grafton Connor Group of Companies conducted business as one entity and not as separate entities. I find the parties and the issues in the bankruptcy proceedings are the same or similar to the original insurance trial. In addition, the evidence given at Mr. Hurst's discoveries in aid of execution, and the documents produced in connection with the execution process, were provided in response to Marsh's requests for financial information to satisfy its judgment. This evidence (the discovery evidence of Mr. Hurst and the documents) has *prima facie* relevance and is necessary to use for the bankruptcy proceedings.

[61] The relief Marsh seeks is no broader than necessary to advance the compelling public interest in ensuring that civil judgments are meaningful. Marsh, as a creditor, should be able to take all necessary steps to obtain payment of an unpaid judgment.

[62] Marsh's motion is allowed with costs on the basis that it is relieved from the implied undertaking with respect to the Plaintiffs' and related companies' financial affairs within the discovery transcripts and documents found in Schedule "A" and may use them in the bankruptcy proceedings.

---

[4] Marsh June 12, 2020 Brief at para. 8

[63] If the parties are unable to agree on costs within 30 days from the decision date, I will receive written submissions from the parties as follows:

- Marsh Canada Limited - March 10, 2022;
- Grafton Connor Property Incorporated et al. - April 7, 2022;
- Marsh Canada Limited (reply, if any) - April 21, 2022.

Bodurtha, J.

SCHEDULE "A"

February 24, 2014 – Discovery (Gary Hurst)

- Net worth statements of Mr. Hurst (Undertaking 5);
- Statements of Earnings of Grafton Connor Property Inc. and related companies from March 2007 onward (Undertaking 15).

February 24, 2014 – McMullin Discovery

- Yearly budgets from March 2007 onward for each company in the Grafton Connor Group (Undertaking 6);
- Spreadsheet regarding the cost of Mr. Hurst's Pizza Pizza franchises and renovations of those restaurants (Undertaking 12).

July 11, 2018 – Discovery in Aid of Execution (Gary Hurst)

- Plaintiffs' 2017 tax returns (Undertaking 1);
- Documentation related to the transfer of Cheers Lounge, up to the end of October 2017 (Undertaking 2);
- Mr. Hurst's personal tax information from 2013 to 2017 (Undertaking 28);
- Correspondence from Plaintiffs' counsel dated October 3, 2018 responding to undertakings from the above discovery;
- Correspondence from Plaintiffs' counsel dated September 20, 2019 – Tab 2 only.

July 11, 2018 – Hurst Discovery in Aid of Execution

- Exhibit 3: Beaufort Tax Returns (2012-2016)
- Exhibit 4: Grafton Connor Tax Returns (2012-2016)

Discovery Evidence (Transcripts)

- The transcript from the discovery of Mr. McMullin that took place by agreement on August 19, 2013. Mr. McMullin was represented by former counsel for the Plaintiffs, Mr. John Merrick.
- The transcript from the discovery of Mr. Hurst that took place by agreement on August 20 and 21, 2013. Mr. Hurst was represented by former counsel for the Plaintiffs, Mr. Merrick.
- The transcript from the discovery of Mr. Hurst that took place by agreement on February 24, 2014. Mr. Hurst was represented by former counsel for the Plaintiffs, Mr. Merrick.
- The transcript from the discovery of Mr. McMullin that took place by agreement on February 24, 2014. Mr. McMullin was represented by former counsel for the Plaintiff, Mr. Merrick.
- The transcript from the discovery in aid of execution of Mr. Hurst on July 11, 2018. Mr. Hurst was represented by former counsel for the Plaintiff. Mr. George MacDonald, which was held pursuant to a discovery subpoena in aid of execution issued on June 29, 2018.
- The transcript from the discovery in aid of execution of Mr. Hurst on October 31, 2018 which took place by agreement. Mr. Hurst was represented by former counsel for the Plaintiff, Mr. MacDonald.

Other Financial Documents Produced by the Plaintiffs

- Organization chart of group of companies affiliated with the Plaintiff prepared by or on behalf of Mr. Hurst, disclosed on August 20, 2013.
- Tax Returns of the Plaintiffs (2015-2016), produced by the Plaintiffs in response to Marsh's execution efforts.
- Schedule of Expenses for Beaufort (2007-2017), produced by the Plaintiffs in response to Marsh's execution efforts.