

NOVA SCOTIA COURT OF APPEAL

Cite as Prudential of America General Insurance Co. v. Pelot, 1995 NSCA 4

BETWEEN:

PRUDENTIAL OF AMERICA GENERAL)
INSURANCE COMPANY (CANADA), a)
a body corporate)

Applicant)

- and -

RONALD PATRICK PELOT and EMILJA)
MILICA SAAGH-PELOT and MARVIN K.)
HATTER and LINDSEY MORDEN CLAIM)
SERVICES LIMITED, a body corporate)

Respondents)

F. Proudfoot
for the Applicant

George W. MacDonald and
Raymond Morse for
the Respondents

Application Heard:
June 29, 1995

Decision Delivered:
July 5, 1995

BEFORE THE HONOURABLE JUSTICE HALLETT IN CHAMBERS

HALLETT, J.A.:

This is an application for an order, staying an order of Justice Tidman for the production of documents, pending the determination of the appeal from that order.

The respondents, Ronald Patrick Pelot and Emilija Milica Saagh-Pelot had their home insured against fire loss with the appellant Prudential. Following a fire that did substantial damage to their home and contents their insurer engaged the respondent Lindsey Morden Claim Services Limited to investigate and adjust the claim. Morden determined that the fire was "of accidental origin". Prudential made some payments on the claim but subsequently Ruth Simms-Fisher, a claims examiner in Prudential's Toronto office, had serious concerns with regard to the coverage and referred the file to Jean Cormier, the manager of Prudential's special investigations unit whereupon he determined the investigation should be re-opened and further payments suspended. The concerns related to the rate of fire spread. Prudential called in the special investigations unit of Morden and Mr. Dan Little of that unit came to Halifax and took a second statement from Mrs. Saagh-Pelot. On January 23rd, 1995 Mr. Dan Little conducted a taped interview with Mrs. Saagh-Pelot which lasted some three hours. On January 25th Prudential retained counsel.

Gordon Proudfoot's affidavit in support of the application for the stay sets out that a claim of privilege was maintained by Prudential with respect to the written and recorded statement of Mrs. Saagh-Pelot on the basis that it was prepared in anticipation of litigation when payments on the claim were suspended after the decision was made to re-open the investigation.

The Pelots commenced an action on February 22nd, 1995, against Prudential, Morden and Hatter, a senior adjuster with Morden. Defences were filed. No further

payments were made to the Pelots by Prudential.

Prudential refused to provide the Pelots or their solicitor with a copy of Mrs. Saagh-Pelot's statement or audio tape of the interview by Dan Little. An application was made by the Pelots for production of these statements and related documents. It was heard by Justice Tidman who ordered that Prudential produce to the Pelots copies of Mrs. Saagh-Pelot's written statement and audio tape of the interview as well as a drawing prepared by Mrs. Saagh-Pelot dated January 23rd, 1995. He concluded that the statements were not taken for the dominant purpose of litigation. Justice Tidman further ordered that documents produced subsequent to January 23rd, 1995, were prepared in anticipation of litigation and had to be put before counsel for advice in litigation and were therefore privileged from production. Prudential, having appealed Justice Tidman's order for production of the documents, seek a stay of that order.

Both Prudential, Morden and Hatter wish to discover Mrs. Saagh-Pelot without her having the benefit of reading and hearing what she said to Mr. Little. I will grant a stay of the order because if the stay is not granted the documents will have to be produced and the appeal from the order granted by Justice Tidman would become moot. This is an exceptional circumstance that dictates that the stay be granted (**Fulton Insurance Agencies Ltd. v. Purdy** (1990), 100 N.S.R. (2d) 341, **Exco Corporation Ltd. v. Nova Scotia Savings & Loan** (1987), 79 N.S.R. (2d) 29 at p. 31). I would note that the primary test to be applied in considering an application for a stay as set out in **Fulton Insurance** was principally directed to a stay of execution of a judgment for a monetary sum.

Although I am granting the stay I will impose terms pursuant to **Civil Procedure Rule 62.10(3)**; neither Prudential, Morden or Hatter shall be entitled to discover Mrs. Saagh-

Pelot until after the determination of this appeal because if the appeal is unsuccessful Mrs. Emilija Milica Saagh-Pelot should be entitled to read her written statement and hear a tape of the recorded statement prior to being discovered.

A discovery of all other parties may proceed in the normal fashion including the discovery of Mr. Ronald Patrick Pelot. His discovery will answer the concerns of counsel for Prudential, Morden and Hatter that they be able to ascertain what are the specifics of the allegations made in the statement of claim against them respectively. The stay of the Order on condition that Mrs. Saagh-Pelot not be discovered until after the determination of the appeal will answer the concerns of counsel for the Pelots.

The parties shall bear their own costs of this application.

Hallett, J.A.

