NOVA SCOTIA COURT OF APPEAL

Citation: *Intact Insurance Company v. Malloy*, 2019 NSCA 85

Date: 20191010
Docket: CA 488619
Registry: Halifax

Between:

Intact Insurance Company/Intact Compagnie d'Assurance

Appellant

v.

Shauna Vraielene Malloy

Respondent

Judge:	Van den Eynden, J.A.
Motion Heard:	October 10, 2019, in Halifax, Nova Scotia in Chambers
Written Decision:	November 8, 2019
Held:	Motion dismissed
Counsel:	J. Scott Barnett, for the appellant Ansley Simpson, for the respondent

Decision:

Introduction

[1] The appellant insurance company applied for a stay of an interlocutory order pending appeal. I heard and dismissed the motion with costs to the respondent. My written reasons were to follow. These are my reasons.

Legal principles

[2] *Civil Procedure Rule* 90.41(1) dictates that the filing of a Notice of Appeal does not stay the execution or enforcement of the judgment appealed from. Rather, *Rule* 90.41(2) confirms that the authority to grant a stay of execution is discretionary.

[3] The exercise of this discretion is guided by the principles set out in *Purdy v. Fulton Insurance Agency Ltd.* (1990), 100 N.S.R. (2d) 341 (N.S.C.A.). These principles establish that to succeed on a stay application, the appellant must prove on a balance of probabilities that:

> (1) there is an arguable issue raised on appeal;
>
> (2) if the stay is not granted and assuming the appeal is ultimately successful, the appellant will have suffered irreparable harm such that it cannot be compensated for monetarily; and
>
> (3) the appellant would incur greater harm than the respondent if the stay is not granted (the so-called balance of convenience test).

[4] This three-part test is referred to as the primary test. However, if the appellant cannot meet all the criteria for the primary test, a stay may still be granted if the appellant can establish there are exceptional circumstances that render a stay fit and just. This is referred to as the secondary test. In the motion before me, the appellant relied mainly on the primary test.

[5] The following is a summary of the relevant background to which these principles were applied.

Background

[6] The respondent (Ms. Malloy) was injured in a motor vehicle accident. She made a claim for accident benefits under her automobile insurance policy issued by the appellant. The claim related to medical, rehabilitation and loss of income benefits under Section B of her policy.

[7] Ms. Malloy's claim was not fully resolved. She filed a Notice of Action in the Supreme Court of Nova Scotia under *Rule* 57. She claimed her insurer (the appellant Intact Insurance) had an obligation to act in good faith in assessing/responding to her claim and her insurer breached the terms of their contract and acted in bad faith. She further claimed this caused her to suffer mental distress and financial loss.

[8] In her Statement of Claim (para. 8), Ms. Malloy enumerates specific allegations of bad faith and breach of duty on the part of her insurer. Several relate to the assessment and/or investigation of her compensation claim. She seeks an order from the lower court compensating her for the alleged losses.

[9] Trial dates are set for October 2020. Counsel advise that seven or eight days are scheduled. The parties have not completed the discovery phase of their litigation. Matters stalled over the production of documents requested by Ms. Malloy.

[10] Ms. Malloy asked her insurer to disclose its policies, procedures, guidelines, internal documents, and other documentation outlining how her accident benefit claims were to be handled and resolved. The appellant insurer adopted the position that the documents requested were not relevant to the claim primarily because Ms. Malloy's Statement of Claim itself made no specific reference to the materials sought. The appellant refused to produce. This led to the hearing of a contested production motion before the Honourable Justice Jamie S. Campbell.

[11] In his decision (2019 NSSC 131), Justice Campbell set out his reasons for ordering the appellant to produce the documents requested. For context in the motion before me, I refer to these paragraphs:

> [14] Ms. Malloy's Statement of Claim asserts that Intact has an obligation to act in good faith and has breached that duty. Paragraph 8 of the Statement of Claim sets out the particulars. It says that Intact failed to conduct reasonable assessments or investigations of Ms. Malloy's claims and failed to conduct a fair and thorough adjudication of those claims. The Statement of Claim says that Intact denied the claim "in an arbitrary manner without consideration of all medical evidence or a fair and equitable application of the Policy." It says that Intact allowed "a lay person(s) to interpret medical evidence while

> adjudicating the claim, Intact relied on the lay person(s) analysis of medical documentation and information in wrongly denying the claim." The Statement of Claim says that Intact "ignored reports from Ms. Malloy's treating physicians which demonstrated that Ms. Malloy required medical/rehabilitation expenses as defined by the Policy."
>
> [15] The claim by Ms. Malloy is neither "bald" nor "boiler-plate". It is not a simple allegation of bad faith.
>
> …
>
> [18] The information sought is relevant to the proceeding and should be disclosed.

[12] The order flowing from Justice Campbell's decision provided:

> 1. The Defendant Intact Insurance, will produce all Intact policies, procedures, guidelines, internal documents or other documentation (electronic or otherwise), outlining how accident benefit claims were handled or resolved during the adjudication of the Plaintiff's claim.

[13] It is this interlocutory order that is the subject of appeal and which the appellant seeks to stay. As an aside, I note that pursuant to *Rule* 14.01(2), any determination of relevancy made by the motion judge is not binding at trial.

[14] The appeal is scheduled to be heard on November 22, 2019. The stay motion was filed on September 11, 2019. Both parties filed an affidavit and brief in support of their respective positions. The deponents were not cross-examined. I heard and dismissed the motion on October 10, 2019, and as noted, with reasons to follow.

[15] I will supplement additional background as needed in my analysis.

Analysis/application of legal principles

Primary test: Has an arguable issue been raised on appeal?

[16] In its Application for Leave to Appeal and Notice of Appeal (Interlocutory) the appellant raises two grounds of appeal. It alleges the motion judge erred in his interpretation and/or application of various *Rules* related to the production and disclosure of documents.

[17] For the purpose of the stay motion only, Ms. Malloy conceded there was an arguable issue on appeal. As the first step (arguable issue) in my primary *Purdy v.*

Fulton analysis was conceded by the respondent, I will say nothing more about my views of the strength of the grounds of appeal. It will be for the panel to decide their ultimate merit.

Will the appellant suffer irreparable harm if the stay is not granted?

[18] The appellant asserts irreparable harm on two main fronts: (1) once produced the production cannot be undone, and (2) if successful on appeal any victory will be hollow as the appeal will be moot.

[19] It is true that once produced (for the purpose of discovery in this case) production cannot be "undone". However, here there is no suggestion that the documents ordered to be produced are sensitive in nature, contain personal information or that their mere disclosure would otherwise harm the appellant. In fact, the appellant said (through its affiant) that it is willing and able to produce the balance of the outstanding production at an appropriate time once relevance has been determined on appeal. Furthermore, as the respondent pointed out, the implied undertaking in *Rule* 14.03 protects against the use of documents for a purpose outside the purpose of this action.

[20] As noted earlier, the appellant's submission on relevancy was not that the Statement of Claim is just a bold assertion of bad faith lacking particulars—rather, the sought-after materials are not relevant because of the more technical point that the internal policies and procedures etc. were not specifically mentioned as part Ms. Malloy's claim. In his assessment of this argument below the motion judge said at para. 16, *"… Without knowing what those procedures or protocols were, or if they even existed, Ms. Malloy would not know whether they had been followed."*

[21] I asked counsel for the appellant insurer: if the pleadings had/were to reference the various documents requested, would there be a challenge to relevance? His response was to the effect – likely not.

[22] In support of its stay motion the appellant's central complaint is with the anticipated time and effort it would take to compile the disclosure—which would be wasted if leave and the appeal were granted. The appellant did not provide a time or cost estimate other than to say "it would be extremely time intensive."

[23] In response to the appellant's claim of irreparable harm, Ms. Malloy contends that its concern over hollow victory or mootness is overstated because the outcome of the appeal has broader application. It could possibly be of precedential

value to other insurers and would nonetheless be important to the appellant in bad faith claims even if documents were disclosed pending appeal. Further, if ultimately successful on appeal, a cost award could adequately compensate the appellant for lost effort. These responses have merit.

[24] It is also important to remember that the risk of a moot appeal does not automatically constitute irreparable harm (see *Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45 at para. 51). Other than stating that it would suffer serious prejudice and irreparable harm if a stay were not granted, nothing of substance was offered by the appellant. In the specific context of this case, I see no irreparable harm to the appellant.

Balance of convenience test—who would incur greater harm if the stay is not granted?

[25] Given my finding that the appellant has not established irreparable harm, the stay motion falters under step two of the primary test. Even if I had found otherwise, I would weigh the balance of convenience in favour of the respondent, Ms. Malloy.

[26] The appellant argued that, on balance, it would suffer greater harm if a stay were not granted. It claimed any harm to Ms. Malloy created by the delay of production would not be substantive.

[27] A key dispute between the parties relates to the funding of medical expenses/treatment for Ms. Malloy. She argues that a stay, which can foreseeably impact her trial dates, causes her irreparable harm and would not be in keeping with *Rule* 1 (just and speedy proceeding) or *Rule* 57 (simplified procedures for actions under $100,000.)

[28] Ms. Malloy is concerned that trial dates will be in jeopardy should a stay be granted. Although the trial is to begin in about 11 months, she explained that there are several important pre-trial steps that need to be completed along the way. For example, discoveries are not complete. Intact's key witness has not been discovered. That cannot happen without the production of the outstanding documents. Plaintiff expert reports are due mid-January 2020. Whether Ms. Malloy will retain an expert respecting her bad faith claim will in part depend upon the disclosure and outstanding discovery testimony.

[29] The appellant says any jeopardy of trial dates is mere speculation. I do not accept this contention. In my view, this submission minimizes the scope of harm to the respondent should a stay be granted.

[30] Although no time estimate has been provided, the appellant repeatedly emphasized that a "great deal of time" is required to comply with the production order. Although the panel will no doubt render a timely decision, given these overall circumstances, it is not unrealistic to forecast that any delay in production could have a negative cascading effect and conceivably risk (push out) trial dates.

[31] To conclude, the appellant has failed to establish the necessary elements under the primary test.

Secondary test: Do exceptional circumstances exist?

[32] Under this secondary test a stay can still be granted to avoid an injustice in circumstances which fail the primary test. As mentioned, the appellant's stay motion was principally advanced under the primary test. The appellant did not seriously argue exceptional circumstances. In my view, this was for good reason.

[33] There is no comprehensive definition of what constitutes "exceptional circumstances". To get relief under this branch the appellant must show that it is unjust to permit the immediate enforcement of an order obtained after trial (see *Landry v. Benjamin*, 2019 NSCA 73 and cases cited therein).

[34] Given the circumstances of this case, any relief sought under this branch can be dispensed with summarily. There is nothing in the motion before me that suggests any exceptional circumstances whatsoever.

Conclusion and Costs

[35] The motion is dismissed with costs of $750 (inclusive of disbursements) payable by the appellant to the respondent.

Van den Eynden, J.A.