Case Name:

Mamaca (Litigation Guardian of) v. Coseco Insurance Co.

Between
Ozcan Mamaca, by his Litigation Guardian Ahmet Mamaca,
Plaintiff, and
Coseco Insurance Company, Defendant

[2008] O.J. No. 2508

65 C.C.L.I. (4th) 1

238 O.A.C. 56

2008 CarswellOnt 3755

169 A.C.W.S. (3d) 295

Court File Nos. 259/08 and 01-CV-215026CM3

Ontario Superior Court of Justice
Divisional Court

R.W.M. Pitt J.

Heard: May 27, 2008.
Judgment: June 24, 2008.

(32 paras.)

Civil litigation -- Civil procedure -- Discovery -- Production and inspection of documents -- Privileged documents -- Documents prepared in contemplation of litigation -- Appeals -- Leave to appeal -- Jurisdiction -- Ontario -- Application by the defendant insurance company for leave to appeal a decision that upheld a Master's order that required it to produce certain documents over which it claimed litigation privilege, dismissed -- There was no basis to grant leave -- Defendant did not provide a good reason to doubt the correctness of the order -- Its interpretation of the relevant case law did not cast doubt on the principles of litigation privilege as applied by the appeal judge -- The case law that the defendant relied upon did not stand for the proposition that all documents created, once the insurer reasonably contemplated litigation, were protected by

litigation privilege.

Civil litigation -- Civil evidence -- Documentary evidence -- Privilege -- Jurisdiction -- Ontario -- Application by the defendant insurance company for leave to appeal a decision that upheld a Master's order that required it to produce certain documents over which it claimed litigation privilege, dismissed -- There was no basis to grant leave -- Defendant did not provide a good reason to doubt the correctness of the order -- Its interpretation of the relevant case law did not cast doubt on the principles of litigation privilege as applied by the appeal judge -- The case law that the defendant relied upon did not stand for the proposition that all documents created, once the insurer reasonably contemplated litigation, were protected by litigation privilege.

Insurance law -- Actions -- Jurisdiction -- Ontario -- Practice and procedure -- Discovery -- Production and inspection of documents -- Appeals and judicial review -- Of interim or interlocutory orders -- Application by the defendant insurance company for leave to appeal a decision that upheld a Master's order that required it to produce certain documents over which it claimed litigation privilege, dismissed -- There was no basis to grant leave -- Defendant did not provide a good reason to doubt the correctness of the order -- Its interpretation of the relevant case law did not cast doubt on the principles of litigation privilege as applied by the appeal judge -- The case law that the defendant relied upon did not stand for the proposition that all documents created, once the insurer reasonably contemplated litigation, were protected by litigation privilege.

Application by the respondent Coseco Insurance Company, the defendant in this action, for leave to appeal an order that upheld a Master's order that required it to produce certain documents listed in Schedule "B" to its Supplementary Affidavit of Documents. Coseco had claimed litigation privilege over the documents. The appeal judge identified this case as one in which, of the many issues between the parties there was only one issue that was the subject of a reasonable apprehension of litigation, namely the insured's entitlement to IRB. The judge also decided that Coseco had the onus of proving that the documents, with respect to which it asserted privilege, related to the IRB claim which was in litigation and met the dominant purpose test. He found that this onus was not met. The judge also indicated that there was some authority for the proposition that documents created after litigation was reasonably contemplated could not be protected depending on whether the dominant purpose test had been met regarding their contents.

HELD: Application dismissed. There was no reason to grant leave in respect of the judge's characterization of the dominant purpose test. Coseco was not able to point to conflicting authorities on the questions of law. It also could not demonstrate an error in the judge's reasons. There was ample authority for the application of a dominant purpose test which was not solely concerned with the date on which litigation was first reasonably contemplated. Even if there was only one dispute between the parties it was not in every case fair to presume that all subsequently prepared documents were covered by the assertion of litigation privilege. The case law that Coseco relied upon did not stand for the proposition that all documents created, once the insurer reasonably

contemplated litigation, were protected by litigation privilege. There was no basis in law, or on the facts of this case, to grant leave to appeal. Coseco did not provide a good reason to doubt the correctness of the order. Its interpretation of the relevant case law did not cast doubt on the basic principles of litigation privilege as applied by the judge.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 62.02(4)(a), Rule 62.02(4)(b)

Counsel:

George Karahotzitis, for the Plaintiff.

Theodore P. Charney, for the Defendant.

REASONS FOR JUDGMENT

1 R.W.M. PITT J.:-- This is a motion by the respondent for leave to appeal the order of J. MacDonald J. upholding the Master's decision requiring the respondent insurance company to produce certain documents listed in Schedule "B" to the respondent's Supplementary Affidavit of Documents. The respondent asserted litigation privilege to these documents.

2 The motion is grounded on rule 62.02(4)(a) and (b) which restricts the availability of leave to appeal:

> *Grounds on Which Leave May be Granted*
>
> (4) Leave to appeal shall not be granted unless,
>
> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

3 It is important in the appeal process, and especially in dealing with interim orders, to recognize

that appeals are taken against decisions rather than reasons, although wrong reasons often give rise to wrong decisions. In fact, this is just such a case as the appeal judge agreed with the result that the Master arrived at, although he disagreed with some of the Master's reasons.

The Issue

4 The appellant (defendant on the action) submits that the appeal judge made three reversible errors of law, which individually or cumulatively meet the test for granting leave. These errors are:

(1) He erred in finding that there are two alternative approaches to determining whether a document is protected by litigation privilege and that a master of judge deciding the motion has the discretion to follow either approach, depending on the circumstances of the case.
(2) He erred in finding that the insurer continues to bear the onus to establish privilege for documents created after the date when the insurer reasonably contemplated litigation.
(3) He erred in finding that the insurer failed to meet its onus, while not giving any weight to the evidence found in the supplementary affidavit of documents and while not inspecting the Schedule B documents.

It is necessary to determine what the appeal judge decided and his reasons for so deciding.

5 The crux of the appeal judge's decision can be found in paragraphs 21, 22, part of 23, and part of paragraph 34, of his decision:

> [21] The Master or Judge who decides a litigation privilege claim has the discretion to follow either a one step or a two step procedure, depending on the circumstances of the case. This follows from Carthy J.A.'s analysis in *Chrusz* [1999] O.J. No. 3291, [*supra*]. In some cases, it will be appropriate to infer, from the evidence in the case, that litigation privilege applies to documents prepared after litigation was reasonably anticipated. For example, there may be only one issue in dispute between litigants and, after litigation of that one issue was reasonably anticipated, there may have been no other subject addressed by the party asserting litigation privilege in its documents relating to the adverse party. In determining whether litigation privilege applies in this circumstance, it would be reasonable to require the party asserting litigation privilege to establish when litigation was reasonably anticipated, and then to infer that all documents prepared after that in relation to the one issue are subject to litigation privilege. That is the one step process.
>
> [22] In other circumstances, there may be numerous issues between parties with only one of those issues being the subject of a reasonable apprehension that it

> will be litigated. This case is an example. The appellant is the respondent's accident benefits insurer and also the insurer responsible for defending his tort claim. In respect of accident benefits claims, the appellant has accepted and is paying a number of different types of ongoing claims, while rejecting and defending against only part of the respondent's claim that he is entitled to IRB's. In its documents relating to the respondent, the appellant has addressed many more issues than just IRB's for the time in dispute. The appellant's documents relating to the respondent which were prepared after it apprehended litigation may relate to the IRB claim which is in litigation, or to other claims which are not in litigation because it is paying those claims. In this circumstance, it is a reasonable exercise of discretion to use a two step process for the determination of litigation privilege, putting the burden of proof in each step on the person asserting litigation privilege.
>
> [23] The appellant accepts that the person asserting litigation privilege bears the burden of leading evidence to establish when litigation was anticipated. It objects to the two step process, and also to bearing the burden of establishing in the second step that each document was prepared for the dominant purpose of the anticipated litigation. In my opinion, if the two step procedure is followed as it was here, the party asserting litigation privilege properly bears the burden of proof in each step ...

6 In dealing with documents themselves, the appeal judge had this to say in paragraph 34:

> [34] ... I do not accept the appellant's argument that the Master must have overlooked the evidence in the affidavit of documents because he made no mention of it. The appellant did not file an affidavit from one of its employees with knowledge of its actions. The evidence which it relied upon consisted primarily of an affidavit from a law clerk in the employ of its counsel. It also relied on the transcripts of the examinations for discovery. In my view, the appellant relied on relatively thin evidence and there is no error in the Master's conclusion that it simply failed to meet the burden in respect of the documents which are in issue in this appeal.

Analysis

7 The appeal judge identified this case as one of those in which, of the many issues between the parties, there was only one issue that was the subject of a reasonable apprehension of litigation, namely the respondent's entitlement to IRB. The appeal judge also agreed with the appellant and disagreed with the Master that the appellant's right to assert litigation privilege existed from August 2, 1999, rather than September 5, 2001 as the Master had found.

8 The appeal judge decided that even after the date of August 2, 1999 the appellant had the onus of proving that the documents with respect to which the appellant asserted litigation privilege related to the IRB claim which is in litigation and met the dominant purpose test. He found that the onus was not met. In determining that the appellant had not met the onus, he made the observations he did about the quality of the evidence found in paragraph 34 referred to above.

9 The appeal judge identified the un-privileged Schedule B documents as follows:

> (1) Loss advice report of Kathy Metzgher re: handling of disputed items and settling of reserves dated December 30, 1999
> (2) Memorandum from Kathy Metzgher to Rob Landrio re: handling of disputed items and reserves dated January 11, 2000
> (3) Status report of Patricia Riopelle re: handling of disputed items and setting of reserves dated November 29, 2000
> (4) Adjuster notepad entries from November 14, 1998 to date.

10 The date on which litigation was first reasonably contemplated is relevant in terms of whether these documents were in fact covered by litigation privilege that has been asserted. However, as the appeal judge indicated in his reasons, there is some authority for the proposition that documents created after litigation was reasonably contemplated may nevertheless not be protected depending on whether the dominant purpose test has been met in regard to their contents.

Arguments of the Defendant (Applicant for Leave)

11 The defendant's arguments are based, in part, on the affidavit of Vickie Snider and other documentary evidence, which in its view demonstrates that August 3, 1999 was the date on which the defendant insurer first denied the plaintiff's claim for IRBs. This date, it argues, is the date on which litigation was first contemplated, and therefore, the date from which all documents became privileged.

12 It is the defendant's position that the approach to determining whether litigation privilege applies to a given set of documents is well settled in the law. On their analysis, the law does not recognize the discretion of the motions judge or Master to adopt either a one-step, or two-step approach. There is only one approach and it emphasizes the date on which litigation was first contemplated as the primary arbiter of the document's "dominant purpose". If a document was produced before litigation was contemplated, its dominant purpose is not related to litigation, if it was produced after litigation was contemplated its dominant purpose is related to litigation. It cites the following excerpt from the reasons of Carthy J.A. in *General Accident Assurance Company et al. v. Chrusz et al.* (1999), 180 D.L.R. (4th) 241, 45 O.R. (3d) 321, as one of the leading authorities for this interpretation:

> [50] In my view, an insurance company investigating a policy holder's fire is not, or should not be considered to be, in a state of anticipation of litigation. It may be

> that negotiations and even litigation will follow as to the extent of the loss but until something arises to give reality to litigation, the company should be seen as conducting itself in good faith in the service of the insured. The reality of anticipation of litigation arose in this case when arson was suspected and Eryou was retained. Chrusz was presumably a suspect if this was a case of arson and litigation privilege attached to communications between Bourret and Eryou or from Bourret through General Accident to Eryou so long as such litigation was contemplated. The dominant purpose test is satisfied.

13 The defendant's position is that, on this interpretation, it has fully complied with its disclosure obligations because it has provided all documents prepared up to the date it first contemplated litigation (August 3, 1999).

14 The defendant suggests that the appeals judge wrongly interpreted a subsequent passage from *Chrusz, supra*, as indicating that even though documents prepared after the date on which litigation was first considered are presumptively privileged, they may nevertheless be excluded from privilege if their dominant purpose was not directed to the litigation at bar:

> [55] On May 23, 1995, a metamorphosis occurred. The revelations of Pilotte immediately brought new litigation into contemplation-the eventual claim by General Accident of fraud and misrepresentation by Chrusz following the fire. However, it was Pilotte's evidence that he was acting because his conscience bothered him. The lack of any assertion that he contemplated litigation prior to receiving the counterclaim, requires a separate analysis of whether documents in his hands must be produced, notwithstanding protection in the hands of Eryou by reason of the fresh litigation privilege.
>
> [56] Dealing first with Eryou, any communications or reports from Bourret after May 23, 1995, whose dominant purpose was directed to the litigation now before us, are protected by litigation privilege, subject to the rules as to discovery of evidence and witnesses. Similarly, any contacts with third parties reported on by Bourret would be protected.

15 The defendant also relies on Hill J.'s decision in Davies v. American Home Assurance Co., [2001] O.J. No. 3050, I.L.R. I-4017, and Sanderson J.'s decision in Scopis Restaurants v. Prudential Assurance Co. of England Property and Casualty Company (Canada), [1999] O.J. No. 1319, 11 C.C.L.I. (3d) 101. It argues that these decisions demonstrate that there is only one approach to litigation privilege and it is one that is focused on the idea that documents are privileged if they relate to the investigation and were prepared after the date on which litigation was first contemplated.

16 In the alternative, the defendant argues that if there are two approaches, the one-step approach

ought to have been applied here because there was only a single issue between the parties. On this theory, any document produced after the date on which litigation was first contemplated, would automatically be privileged because it could only possibly relate to the litigation at bar.

17 The defendant also makes the argument that the appeal judge erred in finding that it bore the onus with respect to asserting litigation privilege. The position advanced here is that the documents are *prima facie* privileged and that the plaintiff/respondent bears the burden of rebutting this presumption.

18 Finally, the defendant argues that the appeals judge committed reversible error in finding that Coseco did not meet its onus with respect to asserting litigation privilege, not having inspected the Schedule B documents or referring to the Affidavit of Documents.

Arguments of the Plaintiff (Respondent on the Application)

19 The plaintiff's position is that the two-step approach applied in the appeal was the correct and proper approach.

20 The plaintiff's primary argument is that the dominant purpose test is not solely a question of when litigation was first contemplated. The plaintiff interprets *Chrusz, supra* differently from the defendant in this regard, and the plaintiff also cites a number of other authorities which have stated, in different ways, that there is more to determining the dominant purpose than simply establishing the date on which litigation was first reasonably contemplated. These Ontario Superior Court decisions, among others, were cited for this proposition: *Gabany v. Sobeys Capital Inc.*, [2002] O.J. No. 3151, 27 C.P.C. (5th) 297 at paras. 5, 10 per Hoy J. (S.C.J.); *Augustine v. Inco Ltd.*, [2006] O.J. No. 3070 at para. 10 per Henderson J. (S.C.J.); *First Choice Foods Ltd. v. Royal Insurance*, [1999] O.J. No. 2260 at paras. 5-6 per Stinson J. (S.C.J.).

21 This position is bolstered, says the plaintiff, by the fact that the concept of litigation privilege is meant to be a limited exception to the general principle of full disclosure. A mechanistic approach to the application of litigation privilege would, in the plaintiff's view, lead to inconsistent results. The determination of the dominant purpose of documents within a given case is fact specific and resistant to generalizations. The plaintiff makes the argument that merely because litigation is contemplated in respect of one aspect of an insured's file, not every subsequent document prepared by the insurer automatically relates to the anticipated litigation.

22 The plaintiff argues that the appeal judge did not commit reversible error in finding that Coseco did not meet its onus with respect to asserting litigation privilege, without having inspected the Schedule B documents or referring to Affidavit of Documents. In the plaintiff's view the affidavit evidence was thin to begin with, and further, did not deal adequately with the issue of whether Coseco had met its burden in establishing litigation privilege.

23 The plaintiff takes the position that the appeal judge rightly placed the burden of establishing

litigation privilege on the defendant. The plaintiff accepts the appeal judge's statement that in some cases it may be proper to infer that litigation privilege applies to documents on the basis that they were prepared after the date on which litigation is first contemplated. However, the plaintiff also emphasizes that aspect of his decision which noted that this is not one of those cases.

CONCLUSION

24 There is no reason to grant leave to appeal in respect of the appeal judge's characterization of the dominant purpose test on the basis of rr. 62.02(4)(a) and (b). The plaintiff's characterization of the general trend of the law in Ontario is more persuasive, as is the plaintiff's analysis of the significance of the ratio in *Chrusz, supra*. The defendant has not been able to point to conflicting authorities on the questions of law, nor has the defendant demonstrated an error in the appeal judge's reasons.

25 There is ample authority, represented in the cases that the plaintiff relies on, for the application of a dominant purpose test that is not solely concerned with the date on which litigation was first reasonably contemplated. Even where there is only one dispute between the parties it is not in every case fair to presume that all subsequently prepared documents are covered by the assertion of litigation privilege. As Stinson J. stated in *First Choice Foods, supra*, "[e]ven where it has been established that a defendant has met the test of establishing that there was a reasonable prospect of litigation, that does not end the matter".

26 Furthermore, the key passage from *Chrusz, supra* that the defendant relies on, when read within the full context of that case, does not stand for the proposition that, "all documents created once the insurer reasonably contemplated litigation are protected by litigation privilege" (Defendant's Factum, para. 29). Justice Carthy's assessment of the dominant purpose of communications between a lawyer, retained by the insurer for advice on the very claim that became the subject of litigation, and an independent claims adjuster investigating that same claim, hinged on the timing issue due to the particular facts of that case. The communications between Eryou, the lawyer, and Bourret, the claims adjuster were clearly connected to the question of the bona fides of the insurance claim. The primary issue in that case was when, "[t]he reality of litigation arose". As the passage cited by the defendants says, "Chrusz was presumably a suspect if this was a case of arson".

27 Here the issues are different. The parties essentially agree with the appeal judge's interpretation of when litigation was first reasonably contemplated. The dispute arises over the purpose for which these documents were prepared. *Chrusz, supra* is distinguishable from the case at bar. One cannot infer from the emphasis placed on the timing issue in the *Chrusz* case that the date on which litigation was first reasonably contemplated is determinative, or that this establishment of this date gives rise to a rebuttable presumption and a shifting of the onus in respect of every document prepared afterward.

28 The burden of showing that these documents were connected to the anticipated litigation

properly lies on the party asserting privilege. There is an abundance of case law supporting this interpretation and no conflicting authorities have been cited by the defendant to justify granting leave to appeal under r. 62.02(4)(a). Even in *Chrusz*, *supra*, Doherty J.A. stated that, "[l]itigation privilege claims should be determined by first asking whether the material meets the dominant purpose test ... I would put the onus on the party claiming the privilege at the first stage of the inquiry".

29 Finally, there was no obligation on the appeals judge to review the Schedule B documents, nor to place a certain amount of weight on the Affidavit of Documents, or to refer to either in a particular way in his reasons. I agree with the defendant that, "[t]here does not appear to be any Ontario jurisprudence which provides a specific test to determine the circumstances when the Court should review the Schedule B documents". Further, the Master did inspect these documents, and there is no evidence that the appeals judge did not.

30 There is no basis in law, or on the facts of this case, to grant leave to appeal. The defendant has not provided a good reason to doubt the correctness of the order, nor has the defendant's interpretation of the relevant case law cast doubt on the basic principles of litigation privilege as applied by the appeals judge.

31 The motion is dismissed.

COSTS

32 Subject to any agreement between the parties, brief written submissions on costs are to be made within 20 days of the release of these reasons.

R.W.M. PITT J.

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