157 O.A.C. 334

2002 CarswellOnt 767

Abick v. Continental Insurance Co. of Canada Inc.

Harold Abick, Scott Abick and Alexander Kristian Ligate,
Plaintiffs/Appellants/Respondents on Cross-Appeal and Continental Insurance
Company of Canada Inc., Lombard General Insurance Company of Canada, Owen J.R.
Smith, Smith, Glaude & Scott, Smith, Scott & Pirie, and Smith, Byck & Grant,
Defendants/Respondents/Appellants on Cross-Appeal

Ontario Superior Court of Justice (Divisional Court)

Farley J.

Heard: January 29, 2002
Judgment: February 2, 2002
Docket: 48/01

Counsel: Craig Brown, Darcy **Merkur,** for Plaintiffs

Mark Veneziano, for Defendants, Continental and Lombard

Subject: Insurance; Civil Practice and Procedure; Evidence

Insurance --- Actions on policies -- Practice and procedure -- Discovery.

Evidence --- Documentary Evidence -- Privilege as to documents -- Solicitor and client privilege -- General.

Practice --- Discovery -- Discovery of documents -- Privileged document -- Solicitor-client privilege.

Cases considered by Farley J.:

> Canadian Triton International Ltd., Re, 1998 CarswellOnt 879, 3 C.B.R. (4th) 231 (Ont. Bktcy.) -- referred to
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> Chersinoff v. Allstate Insurance Co. (1968), 65 W.W.R. 449, [1969] I.L.R. 1-217, 69 D.L.R. (2d) 653, 1968 CarswellBC 132 (B.C. S.C.) -- referred to
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> Chersinoff v. Allstate Insurance Co., 67 W.W.R. 750, [1969] I.L.R. 1-285, 3 D.L.R. (3d) 560, 1969 CarswellBC 34 (B.C. C.A.) -- considered

Crocker, Re, [1936] 2 All E.R. 899 (Eng. Ch. Div.) -- referred to

General Accident Assurance Co. v. Chrusz, 1999 CarswellOnt 2898, 45 O.R. (3d) 321, 124 O.A.C. 356, 180 D.L.R. (4th) 241, 38 C.P.C. (4th) 203 (Ont. C.A.) -- considered

Groom v. Crocker, [1938] 2 All E.R. 394, [1939] 1 K.B. 194, 108 L.J.K.B. 296 (Eng. C.A.) -- referred to

MacDonald Estate v. Martin (1990), [1991] 1 W.W.R. 705, 77 D.L.R. (4th) 249, 121 N.R. 1, (sub nom. Martin v. Gray) [1990] 3 S.C.R. 1235, 48 C.P.C. (2d) 113, 70 Man. R. (2d) 241, 1990 CarswellMan 384 (S.C.C.) -- considered

McMurachy v. Red River Valley Mutual Insurance Co. (August 26, 1992), Doc. CI-92-01-61872 (Man. Master) -- considered

Skye Properties Ltd. v. Wu, 2001 CarswellOnt 4523, 57 O.R. (3d) 46 (Ont. S.C.J. [Commercial List]) -- referred to

Tatone v. Tatone, 16 C.P.C. 285, 1980 CarswellOnt 382 (Ont. S.C.) -- referred to

TSB Bank plc v. Robert Irving & Burns (a firm) (1998), [2000] 2 All E.R. 826 (Eng. C.A.) -- considered

APPEAL by insureds from order that only part of documents existing between solicitor and insurance company be produced; CROSS-APEAL by insurance company.

***Farley J.*:**

1 The plaintiffs appealed from an Order of Master Polika dated January 8, 2001, asking that the Order be varied to require the documents not ordered by the Master to be produced be produced by Barry Percival, Q.C. (and his law firm) ("Percival") and by the insurance companies Continental Insurance Company of Canada Inc. and its successor corporation Lombard General Insurance Company of Canada (jointly "Insuranco"). In turn Insuranco appealed the same Order asking that the Order be varied to reflect that a separate retainer existed between Percival and Insuranco prior to the release of reasons by the Court of Appeal on April 12, 1996 and that all documentation exchanged or created between them prior to then is privileged as against the plaintiffs Harold and Scott Abick (jointly "Abicks"). Neither Percival nor Owen J.R. Smith (and his law firm) ("Smith") attended.

2 The plaintiff Alexander Kristian Ligate ("Ligate") suffered severe injuries in a motor vehicle accident on October 19, 1985 when he was struck by a vehicle driven by the plaintiff Scott Abick, owned by the plaintiff Harold Abick and insured by the defendant, Insuranco. Insuranco retained the defendant Smith as counsel to defend against Ligate's action on behalf of its insured, the Abicks. Litigation with respect to the allegation of bad faith and in particular the failure of Insuranco to settle the Ligate claim within the $1,000,000 policy limits prior to the decision of Austin J. was contemplated by Insuranco as early as May 7, 1991. On or about May 28, 1991, Percival was retained by Insuranco to provide a second opinion on the claim and then to work with Smith and give him advice for the benefit of both the Abicks and Insuranco but as well to provide Insuranco with confidential advice as to the incipient threat of the bad faith claim. The position of the separate retainer was not communicated to the plaintiffs until April 27, 2000. The Ligate claim proceeded to trial at Thunder Bay lasting from May 27 to June 18, 1991. Percival did not attend the trial but discussed it with Smith. On July 3, 1991 Austin J. granted Ligate judgment against the Abicks for $3,568,267.52 plus party and party costs. Insuranco had received opinions as to liability and damages from Smith from time to time, together with the recommendations regarding settlement, but at no time

prior to judgment did Smith recommend payment of the policy limits.

3 An appeal of the Ligate judgment was filed by Smith on July 16, 1991. On January 27, 1992, Insuranco replaced Smith with Percival for the appeal by filing a notice of change of solicitors although it appears that Percival had taken carriage of the file earlier as he advised the personal solicitors for the Abicks on October 25, 1991 that he had done so.

4 On July 21, 1993 the Abicks assigned to Ligate any rights they had against the defendants in this case and irrevocably appointed Ligate their lawful attorney in prosecuting any such claim.

5 The Court of Appeal dismissed the Appeal of the Abicks on April 12, 1996.

6 On November 8, 1996, the plaintiffs, Ligate and the Abicks, brought this action claiming bad faith and negligence on the part of Insuranco and Smith (particularly that Insuranco had the opportunity to settle but failed to do so within the policy limits but also with respect to the conduct of the defence). Smith third partied Percival.

7 The plaintiffs assert that, for them to determine whether and to what extent the defendants were acting in bad faith or otherwise liable, they require production of Percival's entire file. This request was refused on the basis that Insuranco had claimed privilege over the bulk of Percival's file. The representative of Insuranco on his examination testified that Percival had been retained to act on behalf of both Insuranco and the Abicks. In his Affidavit he advised:

> 11. It has always been the position of [Insuranco] that any documentation in the possession or under the control of Mr. Percival in connection with the opinion relating to the value of the claim and participation in the trial in May/June 1991 are relevant. As indicated above, these documents have been produced to the Plaintiffs.

8 Insuranco takes the position that discussions, advice or correspondence between Insuranco and Percival relating to the bad faith claim (or incipient threats thereof) are covered by litigation privilege and solicitor and client privilege and thus do not have to be disclosed.

9 The Master ruled (as per the Insuranco Factum):

> (a) It was not possible for Insuranco to retain Percival to act for both the insurer and the Abicks with respect to the Ligate action while maintaining a separate retainer regarding the threatened bad faith claim;
>
> (b) Percival was in a position of conflict by accepting the separate retainer concerning the material bad faith claims;
>
> (c) This conflict was created by Insuranco and therefore it could not assert privilege over documentation created during the joint retainer;
>
> (d) Insuranco had failed to communicate its separate retainer with Percival to the insureds and therefore it would be against the public interest to allow Insuranco to assert privilege over the documents created in respect of this retainer;
>
> (e) Following the release of the reasons of the Court of Appeal on April 12, 1996, a separate retainer existed between Insuranco and Percival and privilege over those related documents could be asserted. Percival's retainer vis-à-vis the Abicks ended with the release of those reasons [subject only to some

> housekeeping functions in reporting to the Abicks and similar activities].

10 Was the Master correct in his determination as to privilege? In my view, he was with respect to production of the material up to the release of the Court of Appeal reasons but that he erred with respect to his conclusion that the material developed later need not be produced.

11 A joint solicitor-client relationship existed between Percival and jointly the Abicks and Insuranco with respect to the amount of the claim and the conduct of the defence of the Ligate action -- in essence a second opinion from Percival for the benefit of the insured and the insurer, over and above the first opinion they enjoyed from Smith. This entitles either client to full access of Percival's material covering that retainer. See *Crocker, Re*, [1936] 2 All E.R. 899 (Eng. Ch. Div.) at pp. 902-3; *Groom v. Crocker*, [1938] 2 All E.R. 394 (Eng. C.A.) at p. 399; *Chersinoff v. Allstate Insurance Co.* (1968), 69 D.L.R. (2d) 653 (B.C. S.C.) at pp. 659-60, affirmed in part (1969), 3 D.L.R. (3d) 560 (B.C. C.A.); *McMurachy v. Red River Valley Mutual Insurance Co.*, [1992] M.J. No. 407 (Man. Master); "Conflicts between Insurer and Insured", *Advocates Quarterly* (November 1990), Vol. 12, No. 2, 129 at p. 152.

12 Where parties share a solicitor communications between either of them and the solicitor, and the solicitor's joint capacity, are not privileged by one of the parties against the other. See *Chersinoff* (B.C. C.A.) *supra* at p. 564; *Tatone v. Tatone* (1980), 16 C.P.C. 285 (Ont. S.C.) at p. 286; *McMurachy**supra* at p. 3; *Phipson on Evidence* (14th ed., 1990; Sweet & Maxwell, London); Ronald D. Manes and Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (1992; Butterworths, Toronto).

13 It is important to note that *Chersinoff**supra* was a case in which the insured represented that he was not driving the vehicle, but rather the deceased plaintiff in the motor vehicle action and the plaintiff and insurer had entered into a non-waiver agreement. It was on that basis that McFarlane J.A. speaking for the British Columbia Court of Appeal stated at p. 564:

> The insurer may not assert, as against its insured, privilege in respect of the documents which are relevant to the conduct of the defence or to the compromise of the action *Ostrikoff v. Chersinoff*, even though such documents may also be relevant to the determination of the insured's obligation to indemnify him against the claims made in that action. Documents in the second category which are relevant to the later obligation, i.e., the insurer's obligation and which are not relevant to the defence or compromise of the Ostrikoff action are privileged.

14 However in this case, the amount of the Ligate claim and whether it could be compromised for the amount not exceeding the policy limits was not only the subject of the joint retainer but it was also the crux of the issue as to the separate retainer. It would be an impossible task for Percival, skilled counsel though he may be, to scrub clean his mind of everything that he gained as a result of the joint retainer on the subject and somehow independently (which in my view at a minimum he would have to, but which it is not asserted that he did) gain information as to which he could separately advise Insuranco that it appeared to him that Insuranco was on side by the view that it was holding concerning the amount of the Ligate claim and whether it would be appropriate to compromise it for the policy limits.

15 Insuranco cites *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.) for the principle that, for an insurer to assert privilege over documentation, it must demonstrate that it intended to keep that information confidential from its client (per Doherty J.A. at p. 350). However it must be appreciated that the insurer's lawyer in Chrusz was not a joint lawyer for the insured. With respect to *TSB Bank plc v. Robert Irving & Burns (a firm)* (1998), [2000] 2 All E.R. 826 (Eng. C.A.), it is important to keep in mind that the court there was dealing with a situation where joint counsel, without warning, effectively cross-examined the unsuspecting insured on behalf of the insurer which was still considering repudiating liability and, as a result of the "cross-examination", did so repudiate. As a result of the insurer's bad faith (keeping in mind that in insurance matters, the insurer and the

insured owe each other the duty of the utmost good faith) the court was concerned not to disadvantage the insured.

16 In the question of public policy and related concerns I would note that the courts (and the legal profession) have become increasingly concerned about the question of conflict of interest and its impact upon clients of solicitors. What may have been tolerated a generation ago may be now seen as improper or at the least inappropriate. With respect, I cannot reconcile the views of the Supreme Court of Canada in *MacDonald Estate v. Martin* (1990), 77 D.L.R. (4th) 249 (S.C.C.) and the Rules of the Law Society of Upper Canada concerning conflict of interest (Rule 5 in place at the time) with the retaining of Percival by Insuranco, a sophisticated "professional" litigant, as to the separate retainer. As I rhetorically raised at the hearing of the appeal, what would Insuranco have said if the joint counsel that it had retained for the benefit of the Abicks and itself, had been secretly retained by the Abicks in May 1991 to deal with or assist them as to their bad faith claim against Insuranco? Rather the Abicks appropriately relied upon their independent solicitor (and exactly the course of action recommended by Aikins J. in *Chersinoff* (B.C.S.C.) *supra*). See also my views in *Canadian Triton International Ltd., Re* (1998), 3 C.B.R. (4th) 231 (Ont. Bktcy.) and *Skye Properties Ltd. v. Wu* [(2001), 57 O.R. (3d) 46 (Ont. S.C.J. [Commercial List])] (Court File No. 98-CL-2504) released December 8, 2001. However, I think it important to note that there likely should be an adjustment where the joint client wishing to maintain privilege is not one who would be familiar with the public policy concerns of *MacDonald Estate* and the Rules of the Law Society.

17 In my view, all the documents in question are to be produced including the material referred to in the letter of January 11, 1999 from Percival to Mr. Veneziano (of the new counsel for Insuranco concerning the bad faith claim). This documentation is to remain sealed pending an appeal, if any, of my decision. Counsel who co-operatively and fairly dealt with this appeal were agreed that the successful party should receive $2,500 in costs. Insuranco is to pay the plaintiffs that forthwith.

18 This sealed material not to be sent to Thunder Bay but kept in Toronto pending appeal, if any.

Appeal allowed in part.

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