# COURT OF APPEAL FOR ONTARIO

CITATION: 1162740 Ontario Limited v. Pingue, 2017 ONCA 52
DATE: 20170124
DOCKET: M46799 (C59933)



Feldman, Lauwers and Miller JJA.

BETWEEN

1162740 Ontario Limited, Joseph Pingue, and Sabatino Pingue Jr.

Plaintiffs (Respondents)

and

Venanzio Pingue, 2077626 Ontario Inc. and 912618 Ontario Limited

Defendants (Appellants)

Ryan Wozniak, for the appellants

Hari Nesathurai and Glen M. Perinot, for respondents

Heard in writing: November 18, 2016

**Lauwers J.A.:**

[1] This procedural appeal from the decision of a chambers judge addresses the optimal way to construct the trial record. On the appeal proper, the appellants wish to challenge the trial judge's decision to exclude certain expert evidence they assert was necessary to establish their defence to the respondents' claim for misappropriation of funds. When they attempted to file an appeal book that contained the excluded expert evidence, the respondents moved before a single

judge of this court, sitting in chambers, to excise those materials. The chambers judge ordered:

> The expert reports that were not admitted before the trial judge are to be removed from the appeal book and compendium. Counsel may bring a motion in writing to the panel to admit further evidence if so advised.



The appellants now move before this panel under s. 7(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to set aside the decision of the chambers judge.

[2] I would set aside the chambers order largely on the basis that the excised material should properly have been in the trial record. It is necessary for the panel to consider on the appeal.

## A. THE FACTUAL AND PROCEDURAL CONTEXT

[3] The appellant, Venanzio Pingue, was involved with his brother, Sabatino Pingue, and his first cousin, Joseph Pingue, in the operation of an apartment building in St. Catharines, Ontario owned by the respondent, 1162740 Ontario Limited ("116").

[4] In a nutshell, the respondents sued the appellants for misappropriation of funds generated by the operation of the apartment building. The trial judge gave judgment in favour of the respondents, and her lengthy reasons are reported at 2014 ONSC 7418. The trial took 40 days.

[5] In assessing whether funds were misappropriated, and in what amount, the trial judge relied, at para. 195, on the evidence of Robert Forsyth, whom she "qualified as an expert in the area of forensic accounting and statistics." Mr. Forsyth prepared two reports, one completed in June 2011, and the other in September 2011. His September 2011 report was provided to the appellants well before the trial started. A number of the schedules from Mr. Forsyth's September report were made exhibits at trial, but the whole report was not.

[6] The trial judge gave great weight to Mr. Forsyth's evidence, noting at para. 250:

> Mr. Forsyth testified that he had in excess of 15,000 documents to review and consider. Without his assistance, I cannot imagine how the court would be able to digest, analyze, review or compile 10 years of financial statements of 116 and the defendants' related companies. I have found Mr. Forsyth's evidence to be invaluable in this regard.

## B. THE TRIAL JUDGE'S RULING

[7] Towards the very end of the case for the defence and of the trial, the appellants moved under rr. 53.03 and 53.08 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for an order: (1) abridging the time for service of the report of a forensic accounting expert, Charlotte Urquhart; (2) granting leave to admit her report; and (3) permitting her to give evidence at the trial. I note that the appellants did not tender a copy of Ms. Urquhart's report as part of the motion material.

[8] The trial judge explained the development of the expert evidence in the case, at paras. 245-246:

> After a judicial pretrial in 2010, it was recommended that the parties obtain an expert report to assist the court in quantifying the monies the plaintiffs allege Venanzio misappropriated.
>
> In September 2010, the plaintiffs' solicitor retained Robert Forsyth, a forensic accountant, to prepare such a report. The defendants retained Darren Chapelle, but in time, Mr. Chapelle questioned his independence and the defendants took no further steps to retain another expert until well after the commencement of trial. In a written ruling released May 1, 2014, the court refused to permit the late filing of this report.



[9] The trial judge dismissed the motion on the basis that it was too late: "Prejudice to the plaintiffs is real." She stated, at para. 18: "Permitting the filing of the report and/or the calling of Ms. Urquhart would for all intents and purposes start a second trial." To grant the motion would cause "real prejudice that cannot be compensated for by way of an adjournment, an order for costs, or any other terms."

[10] The trial judge's ruling is directly challenged on the appeal.

## C. THE PRIMARY GROUND OF APPEAL

[11] The primary ground of appeal raised by the appellants on the appeal is that the trial judge: "erred in refusing to grant them leave to call Ms. Urquhart as a witness at trial." They assert that, had she permitted Ms. Urquhart's evidence to

be led, the trial judge "would have found that Venanzio did not, in fact, misappropriate any of 116's funds."

[12] The appellants attempted to file an appeal book that contained Mr. Forsyth's September report, which had not been made an exhibit at trial in its entirety, and the proffered expert report of Ms. Urquhart. The respondents moved successfully before the chambers judge for an order excising these documents because they were not marked as exhibits by the trial judge.

[13] I would set aside the chambers order. Unless the excised documents are before the panel on the appeal, it will be difficult, if not impossible, for the appellants to argue the merits of their main ground of appeal.

## D. A PURPOSIVE APPROACH TO ASSEMBLING A TRIAL RECORD

[14] The goal of a trial judge in supervising the assembly of a trial record is completeness and accuracy, so that the panel of this court sitting on the appeal can discern without difficulty exactly what was before her at any moment in the course of the trial.

[15] With respect to document management in particular, relatively little is prescribed by the *Rules of Civil Procedure*. Trial practices have emerged to assist judges, but they are not universally or consistently followed: see generally Michelle Fuerst and Mary Anne Sanderson, *Ontario Courtroom Procedure*, 4th ed. (Markham: LexisNexis, 2016), at p. 318, 325, and 328.

[16] In these reasons, I comment on two areas of lingering difficulty that affect this appeal: expert reports and motion materials.

[17] Throughout, I draw a distinction between numbered exhibits, which are governed by r. 52.04 of the *Rules of Civil Procedure,* and lettered exhibits, which are documents "marked for identification": *Ontario Courtroom Procedure*, at p. 318, 325, and 328. The distinction is important because, subject to the trial judge's discretion, the jury has access to the numbered exhibits, but not to the lettered exhibits: see *Ontario Courtroom Procedure*, at p. 759-760.



## E. EXPERT REPORTS AND THE TRIAL RECORD

### (1) The Practice

[18] Rule 53.03 of the *Rules of Civil Procedure* sets out the requirements for expert reports. By the time the trial starts, counsel will ordinarily have had copies of the experts' reports from all parties for some time.

[19] Although expert reports are exchanged and form the basis for examination-in-chief and cross-examination at trial, the expert evidence before the trial court is usually the *viva voce* evidence of the expert, and not the report the expert provided before trial: see *Ontario Courtroom Procedure*, at p. 1004-1005. There is an exception, which relates to the reports of practitioners under the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, the *Drugless Practitioners Act*, R.S.O. 1990, c. D.18 and other similar legislation in Canada,

whose reports are governed by s. 52 of the *Evidence Act*, R.S.O. 1990, c. E.23: see *Ontario Courtroom Procedure*, at p. 1004-1005; and *Iannarella v. Corbett*, 2015 ONCA 110, 124 O.R. (3d) 523, at para. 131.

[20] In civil jury trials, when an expert witness is called to testify and after the witness has been qualified for that purpose, the party calling the witness usually provides a copy of the expert's report to the trial judge. Often chunks of expert reports are effectively read into the record by the expert or are extensively paraphrased. Having a copy as an *aide memoire* enables the trial judge to follow along with the evidence, maintain good notes, and to deal expeditiously with questions of admissibility that might arise, such as whether the witness is impermissibly straying beyond the subject of the report. Having a copy also assists the trial judge in the preparation of the jury charge, and the reasons for decision.

[21] It is common practice for an expert report tendered by counsel to be marked as a lettered exhibit by the trial judge. That way the report will form part of the trial record, but will not be available to the jury in its deliberations: see *Ontario Courtroom Procedure*, at p. 1004; and *Moore v. Getahun*, 2015 ONCA 55, 124 O.R. (3d) 321, at para. 86, leave to appeal refused, [2015] S.C.C.A. No. 119.

[22] In non-jury civil trials expert reports are sometimes made numbered exhibits on consent. The practice in the Toronto Commercial List, for example, is for such reports to be made numbered exhibits.

[23] The practice of making expert reports numbered or lettered exhibits is essential to the construction of a complete trial record for appeal purposes. There should be no reluctance on the part of counsel or trial judges to doing so.

[24] I pause to note that the judicial act of accepting any document as a numbered exhibit under r. 52.04, or of converting a lettered exhibit into a numbered exhibit, has only a limited effect. Consider the example of a document that was marked for identification as a lettered exhibit. By later converting a lettered exhibit into a numbered exhibit, the trial judge is doing no more than asserting she is satisfied that the document is relevant to a fact in issue in the proceeding and has a sufficient measure of authenticity, usually provided by a witness, to warrant its inclusion in the trial record as an exhibit.

[25] I use the expression, “a measure of authenticity,” to indicate that there are degrees of authenticity. It is important for the trial judge and counsel to clarify the extent to which the authenticity of a particular document is accepted. Taking a cue from r. 51.01 of the *Rules of Civil Procedure*, and using its definition of “authenticity”, the trial judge and counsel must still consider the following questions:

> (a) Was a document that is said to be an original printed, written, signed or executed as it purports to have been?
>
> (b) Was a document that is said to be a copy a true copy of the original? and
>
> (c) Where the document is a copy of a letter, telegram or telecommunication, was the original sent as it purports to have been sent and received by the person to whom it is addressed?



[26] The fact that a document is accepted as sufficiently authentic in some aspect of these particulars to warrant being made an exhibit under r. 52.04 does not mean that its ultimate authenticity or reliability has been decided. Any dispute about authenticity or reliability must be resolved on independent evidence and decided by the trier of fact. Nor does merely making a document a numbered exhibit mean that its hearsay content is admitted. I am quick to add that nothing prevents the parties from making such an admission or the trial judge from determining that the hearsay content is admissible where that is disputed.

[27] These concepts apply with necessary modifications to expert reports that are made numbered exhibits.

**(2) The Record in this Case**

[28] The trial judge did not mark Mr. Forsyth's report for identification as a lettered exhibit, and did not make the report an exhibit, because opposing counsel did not consent. However, had the common practice been followed by

the trial judge in this case, the trial record would be complete and this court would not be obliged to speculate on what she had before her. Let me explain.

[29] Glen M. Perinot, counsel for the respondents on the appeal, filed an affidavit in the motion record before this panel in which he advises that Joseph Pingue told him: “neither the expert reports of Robert Forsyth nor Charlotte Urquhart were before” the trial judge. Mr. Perinot also deposes that he spoke to trial counsel, Mr. Douglas, who advised him that Mr. Forsyth’s June report and his September report “were never before” the trial judge, nor was Ms. Urquhart’s report, which was dated February 19, 2014. Mr. Perinot adds that Mr. Douglas told him: “That although copies of the expert reports of Robert Forsyth were exchanged between Mr. Douglas and Mr. Timothy Pedwell, the lawyer for the defendants at trial”, no copies of Mr. Forsyth’s expert reports were delivered to the trial judge.

[30] In the motion before the chambers judge, trial counsel Mr. Douglas provided an affidavit to the same effect.

[31] However, I am somewhat uncertain as to whether the trial judge had physical possession of a complete copy of the September 2011 report or only the schedules to it. I am similarly uncertain whether she had a copy of the June 2011 report or only the schedules to it. My uncertainty arises from the exchanges in the transcript.

**Examination-in-chief**

[32] Mr. Douglas began his examination-in-chief of Mr. Forsyth in the October 23, 2013 transcript by proposing that his September report and the schedules be made exhibits. The report consisted of 20 pages of text and about 44 pages of schedules. As noted, the trial judge refused to make it an exhibit unless on consent, which, inexplicably, was not forthcoming.

[33] Mr. Forsyth was examined in chief on the September report, and his attention was drawn to specific parts of it. He had the report in his hands during his examination-in-chief. As the transcript shows, from time to time the trial judge interjected in an informed manner, in an effort to keep on track. The witness went through the schedules to the September report, and it is quite plain from the discussion that the trial judge had a copy of at least the schedules to the report. Following the examination-in-chief, the schedules collectively were made Exhibit 12, as noted at p. 110 of the transcript.

**Cross-examination**

[34] Mr. Forsyth's cross-examination began on October 24, 2013, and continued on December 9, 10, 11, 17 and 18, 2013. The cross-examination focussed initially on the schedules to the September report, but there are occasional references to the text of the report. In the course of resumed cross-examination on December 9, 2013, Mr. Pedwell wished to draw Mr. Forsyth's

attention to his June report, which he had not brought to court. The exchange shows that the trial judge had physical possession of both reports, although perhaps she only had the schedules. There was a search for the June report. The trial judge first turned up a copy of the September report, and then a copy of the June report, which she offered to share with the witness.



**Observations**

[35] With respect, it should not be necessary for an appeal court to pick through the pages of a transcript in order to ferret out precisely what the trial judge had before her in documentary form at any particular moment in time. This is why marking expert reports as numbered or as lettered exhibits for identification is the preferred practice.

[36] In my view, every document or thing put to a witness or to the trial judge as a piece of evidence should be made a numbered or lettered exhibit. I would also add this: although trial judges have discretion in whether to mark as exhibits, out-of -court statements that are used solely to impeach the credibility of a witness, for the same reasons the best practice is to mark such statements as lettered exhibits for identification, if not as numbered exhibits: *Ontario Courtroom Procedure,* at p. 945-946; and *R. v. Betker*, [1997] O.J. No. 1578, 115 CCC (3d) 421 at 430 (C.A.).

**(3) Trial Motion Materials**

[37] I focus here on formal motions that are brought at trial with motion records, affidavits, and exhibits. In this case, I understand that the formal motion material was put to the trial judge on the motion seeking leave to have Ms. Urquhart provide expert evidence. I also understand that counsel had with him a copy of Ms. Urquhart's report, which had been provided to opposing counsel, but he did not tender it to the trial judge as part of the motion material.

[38] In my view, the motion material ought to have formed part of the trial record. Further, it was incumbent on the trial judge to request a copy of the proffered expert's report to be marked as a lettered exhibit for identification, so that this court would have access to it in the event the trial judge's ruling was challenged on appeal.

[39] Finally, I make an observation, in passing, on document briefs, since similar themes arise with respect to them. It is common practice for the parties in civil actions to agree upon and tender a tabbed and organized document brief at the beginning of trial. This practice is convenient and allows for a reasonably orderly development of the evidence. *Ontario Courtroom Procedure* notes, at p. 333: "For most documents there are no real evidentiary issues. They should be filed on consent."

[40] However, it is necessary for counsel to clarify to the court and to each other the extent to which the authenticity of each document in the proffered document brief is accepted, as noted at para. 25 of this decision. If, as is too often the case, counsel has not done so, it is the trial judge's responsibility to get the requisite clarity when the documents are made exhibits, especially concerning a document's hearsay content. This court is in no position to resolve such issues on appeal: see *Kiskadee Ventures Limited v. 2164017 Ontario Ltd.*, 2016 ONCA 955, at para. 19.

[41] By following these general practices, confusion about the record at trial and on appeal can be avoided.

## F. DISPOSITION

[42] I would set aside the order of the chambers judge and give leave to the appellant to file an appeal book that includes the material the chambers judge ordered to be excised. The material must be clearly marked. I would reserve the costs of this motion to be determined by the panel hearing the appeal.

"P. Lauwers J.A."
"I agree K. Feldman J.A."
"I agree B.W. Miller J.A."

Released: January 24, 2017
"K.F."