# COURT OF APPEAL FOR ONTARIO

CITATION: Sanofi Pasteur Limited v. UPS SCS, Inc., 2015 ONCA 88
DATE: 20150209
DOCKET: C58868

Hoy A.C.J.O., Simmons and Tulloch JJ.A.

BETWEEN

Sanofi Pasteur Limited

Appellant

and

UPS SCS, Inc., Honeywell Limited, Honeywell International Inc., Automation Components Inc., Industrial Technical Services (ITS) Inc., Airon HVAC Service Ltd., Airon HVAC and Control Ltd. and Enercorp Instruments Ltd.

Respondents

and

United Parcel Service of America, Inc., UPS Supply Chain Solutions, Inc., UPS Supply Chain Solutions General Services, Inc., Maple Reinders Constructors Ltd., Maple Reinders Construction Ltd., Maple Reinders Group Ltd. and Heraeus Sensor Technology, USA

Third Parties

Shawn K. Faguy and Vincent Doré, for the appellant

Kathryn Podrebarac and Alan Melamud, for UPS SCS Inc.

David Hillel, for Automation Components Inc.

Linda Matthews and Dustin Milligan, for Industrial Technical Services (ITS) Inc.

David S. Young and Kevin R. Bridel, for Airon HVAC Service Ltd. and Airon HVAC and Control Ltd.

Megan Shortreed and Emily Lawrence, for Honeywell Limited and Honeywell International Inc.

Brittany Benning, for Maple Reinders Constructors Ltd. and Maple Reinders Construction Ltd.

Patrick Duffy, for Heraeus Sensor Technology, USA

Heard: December 17, 2014

On appeal from the judgment of Justice Edward M. Morgan of the Superior Court of Justice, dated April 30, 2014.

**Hoy A.C.J.O.:**

**OVERVIEW**

[1] The respondent, UPS SCS, Inc. ("UPS"), stored the vaccines of the appellant, Sanofi Pasteur Limited, in a dedicated, temperature-controlled warehouse. As required by the storage contract between them, the appellant insured its vaccines under an all-risks policy. The warehouse cooling system malfunctioned. After a weekend at below the contractually-stipulated temperatures, the vaccines were unsaleable. The appellant was fully indemnified by its insurer.

[2] The appellant's insurer subrogated itself to the appellant and commenced an action against UPS and a number of other defendants, including Honeywell Limited and Honeywell International Inc. ("Honeywell"), Automation Components

Inc. ("Automation"), Airon HVAC Service Ltd. and Airon HVAC and Control Ltd. ("Airon"), and Industrial Technical Services Inc. ("ITS") (collectively, the "Other Defendants").[1] On summary judgment motions brought by most of the defendants,[2] the motion judge dismissed the action in its entirety and awarded costs to UPS and the Other Defendants. He also ordered the appellant to pay one-half of the costs sought by the third parties to the action.

[3] At issue on this appeal is whether the motion judge erred in concluding that: (1) the effect of the covenant (the "Insurance Covenant") in the storage contract between the appellant and UPS that required the appellant to maintain all-risk property insurance for its personal property could be determined on a summary judgment motion; (2) the Insurance Covenant signified that the appellant had assumed *all* risk of damage to the vaccines and barred the appellant's claim against UPS; and (3) the Other Defendants were third-party beneficiaries of the Insurance Covenant and similarly insulated from suit. The appellant also takes issue with the costs of the action awarded to the defendants and the third parties, and thus seeks leave to appeal the motion judge's costs awards.

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[1] Although Enercorp Instruments Ltd. ("Enercorp") appears in the title of proceedings, Himel J. dismissed the claim and all cross-claims against it in an order dated May 4, 2011. Enercorp's motion to dismiss was made on consent, except for UPS which did not oppose the motion.

[2] Automation did not bring a motion for summary judgment.

[4] While I agree with the motion judge that the effect of the Insurance Covenant can be determined on a summary judgment motion, I conclude the appellant assumed all risk of damage to its vaccines *except for* damages of up to $100,000 solely due to the negligence of the defendants. The motion judge erred to the extent that he concluded otherwise. I also conclude that the Other Defendants are third-party beneficiaries of this limitation of liability.

[5] As I detail below, UPS previously tendered payment of $100,000 plus pre-judgment interest to the appellant as an estimate of its maximum liability to the appellant. Although UPS indicated that the payment was non-refundable and did not depend on the outcome of the summary judgment motion, the appellant returned the payment. Because of the willingness of UPS to make such payment, there is no genuine issue requiring a trial. Provided UPS pays to the appellant within 10 days the $100,000 plus pre-judgment interest that was refunded to it, together with pre-judgment interest thereon from the date of refund to the date of such payment, I would uphold the motion judge's costs awards and dismiss this appeal.

[6] If such payment is not made within 10 days, I would allow this appeal and direct a trial of the issue of whether the vaccines were damaged solely as a result of the negligence of the defendants. In such event, I would also necessarily set aside the costs of the action awarded by the trial judge and return the issue of

the costs of the summary judgment motions to the motion judge, if the parties are unable to agree on those costs.

[7] I first provide some background to this appeal and then address the issues raised by the appellant.

**BACKGROUND**

[8] The appellant is an international pharmaceutical company. UPS – the main respondent – is among other things a warehousing company, specializing in the storage of pharmaceutical products. The Other Defendants include: the manufacturer of the building automation system that controlled the temperature in UPS's warehouse (Honeywell); the party which installed the system and performed limited ongoing preventative maintenance on it (Airon); the supplier of the temperature and humidity sensors used in the warehouse (Automation); and the contractor who calibrated and tested those sensors (ITS).

[9] On April 8, 2009, the appellant and UPS entered into a Master Services Agreement (the "MSA"). The MSA incorporated various schedules ("Service Schedules") that specified the services that UPS was to provide to the appellant. The Service Schedules in turn attached statements of work ("SOWs") and exhibits. The MSA, and the Service Schedules, SOWs and exhibits (the "Incorporated Documents") are defined as the Agreement between the parties. For ease of reference, the relevant provisions of the Agreement are set out in

Schedule A to these reasons. The Agreement specifies that in the event of a conflict between the terms of the MSA and the terms of any Incorporated Document, the terms of the Incorporated Document shall control.

[10] Federal legislation requires that vaccines be stored in temperature-controlled warehouses that accord with Good Manufacturing Practices ("GMP"). Under the Agreement, UPS agreed to store the appellant's vaccines in a GMP-compliant cooler, at between 2 to 8 degrees Celsius, and to monitor the temperature in the cooler (see ss. 6 and 9.3 of Exhibit A to Service Schedule 1). It also agreed to adhere to federal regulations regarding the storage of vaccines. In exchange, the appellant agreed to pay UPS monthly storage fees. For the month at issue on this appeal, the storage fees amounted to $8,920.

[11] The Insurance Covenant – s. 10.2(c) of the MSA – required the appellant to maintain "all-risk property… insurance for the Goods and the personal property of [the appellant] … in an amount not less than the full replacement cost thereof, whether such Goods or property are in [UPS's] facilities or in transit and shall include [UPS] as an additional insured."

[12] Another provision of the MSA – s. 10.1 – required UPS to maintain commercial general liability insurance, "including … warehouseman's liability and contractual liability covering [UPS's] obligations hereunder for bodily injury and property damage".

[13] Clause 4.2.1.1 of Service Schedule 1 provided that UPS would be liable for damaged vaccines "solely due to its negligent acts or omissions with up to a maximum of one hundred thousand dollars ($100,000) per year."

[14] On June 1, 2009, UPS discovered that the warehouse cooling system had malfunctioned. The vaccines had spent the weekend at a temperature of minus 4.2 degrees Celsius. They were unsaleable. The incident seems to have been caused by compounding errors: not only did the cooler malfunction, but the alarm system intended to notify UPS of temperature fluctuations had been suppressed before the MSA was signed due to the actions of an employee of a U.S.-based affiliate of UPS and remained suppressed until sometime after the incident occurred.

[15] The appellant sued UPS and the Other Defendants for damages in the amount of $8,259,934.48 for "breach of contract, negligence, gross negligence, recklessness, wilful misconduct and/or fundamental breach of contract." Among other things, it alleged that it had entered into the Agreement based on various representations made by UPS regarding its cooling and monitoring system.

[16] A number of third parties (the "Third Parties") were added to the action: United Parcel Service of America, Inc., UPS Supply Chain Solutions, Inc., UPS Supply Chain Solutions General Services, Inc., Maple Reinders Constructors

Ltd., Maple Reinders Construction Ltd., Maple Reinders Group Ltd. and Heraeus Sensor Technology, USA.

[17] UPS delivered a cheque to the appellant for $100,000, plus pre-judgment interest, stating that, "[i]t is [UPS's] position that its *maximum* liability to [the appellant] under the [Agreement] is $100,000" (emphasis added). And in a subsequent letter it confirmed that it would not seek to recover this amount, regardless of the outcome of the proceeding. Several months after delivery of its cheque, UPS brought its motion for summary judgment, based on the Insurance Covenant. The appellant chose to return the $100,000 plus pre-judgment interest that UPS paid to it before the summary judgment motions were heard.

[18] The motion judge concluded that the Insurance Covenant signified the appellant's assumption of risk "of the very damage for which it sues" and was therefore a complete answer to the appellant's action. He wrote, at para. 3:

> The Ontario Court of Appeal has stated in an unqualified way that, "[a] contractual undertaking by the one party to secure property insurance operates in effect as an assumption by that party of the risk of loss or damage caused by the peril to be insured against": *Madison Developments Ltd. v. Plan Electric Co.* (1997), 36 O.R. (3d) 80, at para. 9. And since the [appellant's] insurer in this subrogated action can be in no better position than the [appellant] itself, *Amexon Realty Inc. v. Comcheq Services Ltd.* (1998), 37 OR (3d) 573 (Ont CA), this combined proposition of contract and insurance law entirely refutes the claim.

[19] Applying *Fraser River Pile & Dredge Ltd. v. Can-Drive Services Ltd*, [1999] 3 S.C.R 108, he also concluded, at para. 34, that the parties intended to extend the benefit of the Insurance Covenant to the Other Defendants: "...the activities of the co-Defendants – all of whom are sued because they are alleged to have played a role in the failure of the required temperature control mechanism – are the very activities at which the [Insurance Covenant] aims."

[20] The motion judge accordingly dismissed the appellant's action against all of the defendants. Because UPS and the Other Defendants enjoyed immunity by virtue of the Insurance Covenant, and therefore sustained no loss for which they could claim contribution or indemnity, the motion judge also dismissed the defendants' claims against the Third Parties.

[21] Finally, the motion judge awarded costs of the action in favour of the defendants and the Third Parties. (The parties had agreed on the costs of the summary judgment motions.)

**Issue 1: Was this action appropriate for summary judgment disposition?**

[22] The decision of a motion judge that an action is appropriate for summary disposition attracts deference: see *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 81-84.

[23] While I conclude that the motion judge erred in his interpretation of the Agreement, I am not persuaded that ascertaining the effect of the Insurance

Covenant could not be undertaken on a summary judgment motion, and therefore cannot be undertaken by this court on appeal. The task before the motion judge was to determine whether – or to what extent – the appellant had contractually assumed all risks of damage to its vaccines and, to the extent the appellant had assumed the risk, whether the parties intended to extend the benefit of the Insurance Covenant to all of the defendants.

[24] The appellant argues that because the parties advance competing interpretations of the Agreement, the motion judge needed to engage in an exercise of contractual interpretation (which – as discussed below – it argues he failed to do) and a complete factual matrix relating to the incident and its cause are necessary before this task can be undertaken. The appellant argues that the complete factual matrix can only be determined after it has an opportunity to examine the individual who allegedly suppressed the alarm in the warehouse. Therefore, it submits, a trial of the action was (and is) required.

[25] In its factum, the appellant also argued that the motion judge erred in concluding that the cause of the loss at issue was fortuitous. It did not pursue this issue in its oral submissions. I address this argument here, because it appears to me to relate to the appellant's submission that this matter is not appropriate for summary disposition.

[26] I disagree that a trial is required to determine whether – or to what extent – the appellant contractually assumed the risk of damage to its vaccines and, to the extent the appellant had assumed the risk, whether the parties intended to extend the benefit of the Insurance Covenant to all of the defendants.

[27] To be covered by an all-risk policy, the damage must be due to some fortuitous circumstance or casualty. The insured is not required to prove the exact nature of the accident or casualty: see *Goderich Elevators Ltd. v. Royal Insurance Co.* (1999), 42 O.R. (3d) 577 (C.A.), at para. 15.

[28] As the motion judge wrote at para. 10 of his reasons:

> The [appellant's] obligation under the MSA is to maintain "all-risk" coverage. The requisite insurance is not limited to a specific type of peril or damage; rather it covers all situations in which the cause of the damage is "fortuitous". The courts have made it clear that with this type of coverage obligation, there is no need to "prove the exact nature of the accident or casualty which, in fact, occasioned [the] loss": *British & Foreign Marine Insurance Co. v. Gaunt*, [1921] 2 AC 41, at 47 (HL).

[29] It was not necessary to determine the cause of the damage in order to interpret the Agreement. Further, the factual matrix includes those facts surrounding the genesis of the contract that are known or reasonably ought to have been within the knowledge of both parties at or before the date of contracting: see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, 373 D.L.R. (4th) 393, at para. 58. The facts surrounding the alleged loss were not known by both parties at the time the MSA was executed. Accordingly, these

facts are not part of the factual matrix and were not relevant to the interpretation of the Agreement.

[30] I find it odd that the appellant argued the issue of fortuity on the summary judgment motion, and again on appeal. It is an issue that I would have expected the appellant to raise to avoid an obligation to indemnify its insured, and not to bolster a subrogated claim made *after* it has indemnified its insured. This may explain why the appellant did not pursue this issue in oral submissions.

[31] In any event, if the motion judge was required to address the issue of fortuity, he did so. He referred to this court's decision in *Goderich* and reasoned that as the loss in that instance was covered under an all-risk policy, the loss in this case was similarly covered.

[32] In *Goderich*, grain stored by the insured became "heated", resulting in a down-grading of the grain shipment. The insurer sought to avoid indemnifying the insured. Goudge J.A., for the court, wrote at para. 15:

> In my opinion, although the cause remains unknown, the fact that the grain became "heated" grain while in the care and control of Goderich is exactly the kind of "fortuituous event" that triggers the coverage of this all-risks policy. Something happened which resulted in the damage to the grain.

[33] As the motion judge wrote at para. 11,"[i]t stands to reason that if a covenant to insure prevents a warehouse from being held liable for overheated

products, a similar covenant prevents a warehouse from being held liable for overcooled products."

[34] Moreover, there was no evidence that UPS intentionally damaged the appellant's vaccines or that damage to the appellant's vaccines was inevitable. I see no error in the motion judge's reasoning in concluding that the loss was fortuitous. And as previously stated, I agree with the motion judge that the effect of the Insurance Covenant could properly be determined on a summary judgment motion.

**Issue 2: Does the Insurance Covenant bar the appellant's claim?**

[35] The appellant argues that the motion judge simply determined that the Insurance Covenant barred the appellant's claim as a matter of contract law, without engaging in the requisite exercise of contractual interpretation. It submits that this amounted to an error of law. Further, the appellant says that had the motion judge engaged in a full and complete analysis of the Agreement, he would, or at least should, have concluded that the Insurance Covenant does not bar the appellant's action.

[36] While, as the appellant points out, the motion judge cited numerous cases in his analysis, I am satisfied that the motion judge engaged in an exercise of contractual interpretation in concluding that the Insurance Covenant barred the appellant's action. This is demonstrated in paras. 13-22 of his reasons, where he

addresses the appellant's arguments that s. 10.1 of the MSA and clause 4.2.1.1 of Service Schedule 1 – reproduced below and in Schedule A to these reasons – make clear that the Insurance Covenant was not intended to bar its claim.

[37] However, as I explain below, in interpreting the inter-play of clause 4.2.1.1 of Service Schedule 1 and the Insurance Covenant, the motion judge failed to consider a material provision of the Agreement: s. 1 of the MSA, entitled "Structure of the Agreement" (reproduced in Schedule A to these reasons). Section 1 of the MSA mandates that in the event of any conflict between a provision in the MSA (such as the Insurance Covenant) and a provision in Service Schedule 1, the terms of Service Schedule 1 control. As a result, his conclusion is not entitled to the deference this court would otherwise accord it: see *Sattva*, at paras. 50-55.

[38] Clause 4.2.1.1 of Service Schedule 1 provides that UPS is liable for damage to the vaccines as result of its negligence, to a maximum of $100,000. Giving effect to the structure of the Agreement mandated by s. 1 of the MSA, I conclude that pursuant to the Insurance Covenant the appellant assumed all risk of damage to the vaccines, *except for* up to $100,000 caused solely due to the defendants' negligent acts or omissions. But for this adjustment, I agree with the motion judge that the Insurance Covenant bars the appellant's claim.

[39] The appellant advances three arguments to show why the Insurance Covenant does not bar its action. I address each argument in turn.

[40] The appellant's first, and principal, argument arises out of s. 10.1 of the MSA. That section sets out UPS's insurance obligations:

> 10.1 [UPS] Insurance
>
> > [UPS] shall maintain the following insurance: (a) commercial general liability insurance including premises operations, broad form property damage, independent contractors, warehouseman's liability and contractual liability covering [UPS's] obligations hereunder for bodily injury and property damage, with a combined single limit of not less than $5,000,000 USD each occurrence…

[41] At para. 19 of his reasons, the motion judge concluded that, "[t]his clause requires [UPS] to carry liability insurance, which is aimed at damage and injury to third parties. It is not aimed at damage or injury to the [appellant's] property."

[42] The appellant argues that the motion judge erred in so concluding. It submits that the Agreement requires each of the appellant and UPS to insure the vaccines. While the Insurance Covenant requires the appellant to maintain all-risk property insurance, s. 10.1 requires UPS to maintain warehouseman's liability insurance for property damage. And, it argues, s.10.1 is more specific than the general "all-risk" Insurance Covenant and therefore takes precedence over it.

[43] I disagree. While my reasoning is slightly different than that of the motion judge, I agree with him that s. 10.1 does not alter the appellant's assumption of risk pursuant to s. 10.2. First, it is evident from the requirement in the Insurance Covenant that the appellant insure its property "in an amount not less than the full replacement cost thereof" that the Insurance Covenant is to take precedence over s. 10.1. The Insurance Covenant is more specific as to the quantum of the coverage to be obtained. It provides *comprehensive coverage* for the appellant's vaccines. Second, this interpretation gives meaning to both sections. If s. 10.1 contemplates insurance that would cover damage to the appellant's property, that insurance would cover UPS in respect of its limited liability (i.e. $100,000) flowing from damage to the appellant's property occasioned solely as a result of UPS's negligence. The commercial general liability policy UPS was required to maintain would primarily cover claims by persons not party to the Agreement.

[44] The appellant's second argument is that the motion judge erred in concluding that clause 4.2.1.1 of Service Schedule 1 did not apply and that UPS is liable for its own negligence or its own negligence to a maximum of $100,000. Clause 4.2.1.1 provides as follows:

> 4.2.1.1 [UPS] shall be liable for Lost Goods or Damaged Goods in excess of the Shrinkage Allowance while the Goods are in its care, custody and control solely due to its negligent acts or omissions with up to a maximum of one hundred thousand dollars ($100,000) per year.

[45] Indeed, the appellant argues, the motion judge failed to consider evidence that UPS thought it was liable for the incident, but that its liability was limited to $100,000 as set forth in clause 4.2.1.1. It points to the following answer to an undertaking arising out of the discovery of UPS's representative:

> It is [UPS's] position that section 4.2.1.1 of [Service Schedule 1] applies to the Incident and [UPS's] sole liability to [the appellant] is $100,000 maximum specified therein.

[46] At paras. 13 through 17 of his reasons, the motion judge considered the appellant's argument that clause 4.2.1.1 must be indicative of the fact that UPS is liable for damages caused by its own negligence and the evidence that UPS had forwarded a payment of $100,000 to the appellant.

[47] Citing *Economical Mutual Insurance Co. v. 1072871 Ontario Ltd.* (1998), 20 R.P.R. (3d) 154 (Ont. C.J.), at para. 12, aff'd (1999), 122 O.A.C. 94 (C.A.)[3] and *Smith v. T. Eaton Co.*, [1978] 2 S.C.R 749, at p. 754, the motion judge concluded that a covenant to insure such as the Insurance Covenant is of "preclusive effect": it displaces the risk that would otherwise be on UPS as a

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[3] In *Economical Mutual Insurance Co.*, the lease contained both a covenant on the part of the landlord to maintain fire insurance and a covenant on the part of the tenant to indemnify the landlord with respect to damage to the premises caused by the tenant's negligence. The premises were damaged as a result of a fire. The motion judge rejected the landlord's insurer's argument that the tenant's specific obligation to indemnify in respect of damage occasioned by its negligence demonstrated an intention that the tenant was not to be protected from fires caused by its own negligence. At para. 13, he wrote, "...even in the absence of a specific provision requiring the tenant to indemnify for damage caused by its negligence, there is no doubt as to the liability of the tenant for fire caused by its negligence. I therefore cannot see how the presence of a provision such as [the tenant's indemnification obligation] changes the effect of the landlord's obligation to insure."

result of its negligence. At para. 16 of his reasons, the motion judge accepted UPS's counsel's representation that the $100,000 payment was "made out of an abundance of caution, and not as an admission of liability or as an advance payment made to obtain a release of liability".

[48] Each contract containing a covenant to insure must be interpreted based upon its own wording. Decided cases can be helpful, when the wording considered is similar to that in the agreement at issue. However, differences in the wording between each case can be determinative. Such is the case here.

[49] Each of the MSA and Service Schedule 1 specifically provides that in the event of any conflict between the terms of the MSA and the terms of Service Schedule 1, the terms of the Service Schedule are to control. The agreements in the cases considered by the motion judge did not include a similar provision. In concluding that the Insurance Covenant was of "preclusive effect", the motion judge did not consider these specific paramountcy provisions or whether the Insurance Covenant and clause 4.2.1.1 conflict. His failure to do so warrants appellate intervention.

[50] In my view, the terms of the Insurance Covenant in the MSA and clause 4.2.1.1 of Service Schedule 1 conflict. The Insurance Clause effectively provides that UPS has no liability for fortuitous losses, howsoever arising. Clause 4.2.1.1, on the other hand, provides that UPS is liable up to $100,000 for damage to the

vaccines while they are in its control, solely due to its negligent acts or omissions. Clause 4.2.1.1 therefore controls, to the extent of the conflict. As a result, pursuant to the Insurance Covenant, the appellant assumed all risk of damage to the vaccines, except for up to $100,000 caused solely due to UPS's negligent acts or omissions.[4] I come to this conclusion without consideration of the position taken by UPS – pointed to by the appellant – in answer to an undertaking arising out of the discovery. I do not accept that the effect of clause 4.2.1.1 is that the Insurance Covenant does not insure against *any* loss arising from negligence.

[51] The appellant's final argument is that because the Insurance Covenant is in the MSA it cannot supersede UPS's specific obligations in the Service Schedule with respect to the storage of the vaccines, such as maintaining the vaccines at specified temperatures. It submits that giving effect to the Insurance Covenant would render these specific obligations meaningless and the Agreement provides that the provisions of the Service Schedule are to control.

[52] I reject this argument. As discussed above, the Agreement specifies that in the event of a *conflict* between the terms of the MSA and the terms of a Service Schedule or other Incorporated Document, the terms of the Incorporated

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[4] As I explain below, the proviso contained in clause 4.2.1.1 of Service Schedule 1 also applies to the Other Defendants.

Document shall control. There is no conflict between the provisions of the Service Schedule that the appellant refers to and the Insurance Covenant.

[53] I now turn to whether the Other Defendants are third party beneficiaries of the Insurance Covenant, as qualified by clause 4.2.1.1 of Service Schedule 1.

**Issue 3: Were the Other Defendants third party beneficiaries of the Insurance Covenant?**

[54] Although my reasoning is somewhat different than that of the motion judge, I agree with him that the defendants which were not parties to the Agreement are entitled to rely on the Insurance Covenant to limit the appellant's claim against them.

[55] The Supreme Court has adopted a principled approach to when the doctrine of privity of contract – under which a contract cannot confer rights or impose obligations arising under it on anyone other than the parties to the contract – should be relaxed. In *Fraser River*, the Court articulated the following two-part test to be applied in determining if a third-party should be permitted to enforce the benefit of a contractual provision to defend against an action by one of the contracting parties:

> 1. did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision; and
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> 2. are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in

> general, or the provision in particular, again as determined by reference to the intentions of the parties?

[56] The intention to extend the benefit in question may be express or implied in all of the circumstances: see *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, at p. 449.

[57] I address each of the *Fraser River* requirements in turn.

*Did the parties to the Agreement intend to extend the benefit in question to the Other Defendants?*

[58] In all of the circumstances, it can be implied that the parties to the Agreement intended to extend the benefit of the Insurance Covenant (as qualified by clause 4.2.1.1) to the Other Defendants. It is necessary to do so to give business efficacy to the transaction.

[59] As noted above, the Insurance Covenant required the appellant to maintain "all-risk property… insurance for the Goods and the personal property of [the appellant]… in an amount not less than the full replacement cost thereof, whether such Goods or property are in [UPS's] facilities or in transit and shall include [UPS] as an additional insured." In its ordinary sense, this all-risk clause insures the Goods against loss or damage arising from the negligence of any

person, whether or not a party to the contract.[5] And here, the ordinary sense of the provision prevails: the motion judge rejected – and I would reject – the appellant's arguments that the effect of other provisions in the Agreement is that the Insurance Covenant does not insure against any loss arising from negligence. (Clause 4.2.1.1 only provides that the appellant is not at risk for the first $100,000 of damages for negligence.) Given this, and absent a provision indicating that persons whose negligence is alleged to have caused the loss are intended to be excluded from the benefit of the Insurance Covenant,[6] it can and should be implied that the parties intended to extend the benefit of the Insurance Covenant (as qualified by clause 4.2.1.1) to them – provided that they were involved in the very activity contemplated by the Agreement. As I explain below, to do otherwise would subvert the allocation of risk established by the parties.

[60] The fact that the Insurance Covenant specifies that insurance is to be maintained in an amount "not less than the full replacement cost thereof" also indicates that the parties intended all persons who were involved in the very activities contemplated by the Agreement and whose negligence is alleged to

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[5] See *Cummer-Yonge Investments Ltd. v. Agnew-Surpass Shoe Stores Ltd.*, [1976] 2 S.C.R. 221, at p. 229-230, referred to by the motion judge at para. 30 of his reasons. In *Agnew-Surpass*, the landlord covenanted to insure the building against all risk of loss or damage from fire and other specified perils. The Supreme Court stated that "[t]he "ordinary concept" of fire insurance does embrace fires caused by negligence and the fact is that the policy taken out by the lessor did insure against negligence, whether that of the lessee or others."

[6] In *Williams-Sonoma Inc. v. Oxford Properties Group Inc.*, 2013 ONCA 441, 307 O.A.C. 314, the relevant clause was limited to the contracting parties and those for whom it was "in law responsible". There is no similar limitation in the Insurance Covenant in this case.

have caused the fortuitous loss to have the benefit of the Insurance Covenant (as qualified by clause 4.2.1.1). Having allocated this risk to itself (and away from UPS), it cannot at the same time have intended to allocate the risk to the persons who permitted UPS to provide the storage services contracted for.

[61] Extending the benefit of the Insurance Covenant (as qualified by clause 4.2.1.1) to the Other Defendants also accords with commercial reality. The appellant – a sophisticated international pharmaceutical company – was in the best position to quantify the financial consequences of loss of or damage to its costly vaccines. The fees UPS paid the Other Defendants pale in comparison to the $8,259,934.48 in damages the appellant claims. For example, ITS – a small company with approximately 17 employees – earned mere hundreds of dollars for its annual testing and calibration of the temperature and humidity sensors at the warehouse.

[62] Moreover, not extending the benefit of the Insurance Covenant to the Other Defendants would either nullify the protection the Insurance Covenant[7] was intended to provide to UPS or risk an injustice to the Other Defendants. The Other Defendants differ as to which of the foregoing results would prevail and this is not the case to decide the issue. Both possibilities militate in favour of

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[7] This concern mirrors that expressed by Charron J.A. in *Tony and Jim's Holdings Ltd. v. Silva* (1999), 43 O.R. (3d) 633 (C.A.). In *Silva*, Charron J.A., as she then was, extended the benefit of a contractual provision to a third party, reasoning, in part, that "a strict application of the doctrine of privity in the circumstances would have the effect of allowing the customer to circumvent the limitation of liability clause to which it had expressly consented": p. 643

extending the benefit of the Insurance Covenant to the Other Defendants. The defendant Honeywell describes the first possibility in its factum:

> It would be nonsensical for [UPS] to agree to this bargain, without extending the benefit to other parties who assisted [UPS] to provide a temperature-controlled warehouse. Doing so would expose [UPS] to claims for contribution and indemnity by its equipment suppliers and subcontractors, and render the protection afforded by the covenant to insure meaningless.

[63] Automation and Airon explain the second. They say that not extending the benefit of the Insurance Covenant to the Other Defendants would result in an injustice: under s. 2 of the *Negligence Act,* R.S.O. 1990, c. N. 1 and *Dominion Chain Co. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346,[8] the Other Defendants would not be able to claim contribution and indemnity from UPS because, as a result of the operation of the Insurance Covenant, UPS has no liability to the appellant. Section 2 of the *Negligence Act* provides as follows:

> **Recovery as between tortfeasors**
>
> 2. A tortfeasor may recover contribution or indemnity from any other tortfeasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tortfeasor, in which event the tortfeasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the

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[8] *Dominion Chain* was applied by the Supreme Court in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding (Bermuda) Ltd.*, [1997] 3 S.C.R. 1210, at para. 123.

> court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled.

And *Dominion Chain* established "it is a precondition of the right to resort to contribution that there be liability to the plaintiff": p. 1354. Thus, they say, because any tortfeasor found to have negligently caused or contributed to the injury is fully liable for it, even if it were only 1% at fault, either of them could be called upon to satisfy the entire judgment, without contribution from UPS, a public company and the world's largest package delivery company. Not extending the benefit of the Insurance Covenant to the Other Defendants would have the effect of imposing liabilities on them which they would not otherwise have.

[64] Contrary to the appellant's submissions, neither the restrictions in the Agreement on subcontracting without consent[9] nor the restriction on the transfer or assignment of rights and obligations under the Agreement in s. 17.1 of the MSA, entitled "Assignment; Third Party Beneficiaries", indicate that the parties did not intend to extend the benefit of the Insurance Covenant to the Other Defendants.

[65] UPS engaged the Other Defendants to supply products or services that permitted it to provide the warehouse services – something presumably within the parties' reasonable expectations. Section 4.1 of the MSA, which provides that

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[9] See s. 12 of the MSA, clause 6.1 of Service Schedule 1 and clause 4.1 of Service Schedule 2.

each party would indemnify the other and (among others) its "subcontractors, licensors and suppliers" evidences this. Indeed, the appellant knew that UPS would use Honeywell's system to control and monitor the warehouse's climate.

[66] While s. 17.1 of the MSA is entitled "Assignment; Third Party Beneficiaries", the text of that provision is simply a standard restriction of assignment. An assignment and the extension of the benefit of a provision to a third party are different. In the case of an assignment, a party effectively relinquishes a benefit. Party A assigns the benefit of a provision to third party X. As between X and party A, X enjoys the benefit of the provision. X and A do not both enjoy the benefit of the assigned provision. Where a third party beneficiary of a provision is recognized, party A and the third party beneficiary *both* enjoy the benefit of the provision. Section 17.1 does not provide that no third party shall be permitted to enforce the benefit of any provision of the Agreement.

[67] Nor does the fact that ITS and Airon were required by their contracts with UPS to carry $1,000,000 of Comprehensive General Liability Insurance indicate that the appellant and UPS did not intend to extend the benefit of the Insurance Covenant to them. The amount of insurance UPS required was much less than the replacement value of the vaccines. It could not have been expected to insulate against the full extent of claims by the appellant.

[68] Before turning to the second prong of the *Fraser River* test, I wish to clarify that the Insurance Covenant does not insulate the Other Defendants from the first $100,000 of damages for their own negligence. As I have indicated, the Insurance Covenant is qualified by clause 4.2.1.1 of Service Schedule 1. While clause 4.2.1.1 speaks to UPS being liable for damage to the vaccines "solely due its negligent acts or omissions" (emphasis added), this proviso must apply equally to the Other Defendants. Otherwise, the Third Parties would benefit from the Insurance Covenant to a greater degree than UPS.

*Are the activities performed by the defendants the very activities contemplated as coming within the scope of the Agreement?*

[69] At para. 39 of *Fraser River*, Iacobucci J. phrases this second part of the test as "whether the purported third-party beneficiary is involved in the very activity contemplated by the contract containing the provision upon which he or she seeks to rely." The Other Defendants were clearly involved in the very activity contemplated by the Agreement.

[70] Both federal legislation and the Agreement required the vaccines to be stored in a GMP-compliant cooler. GMP-compliance requires a continuous temperature monitoring system and an ability to obtain audit trails of events. This type of system is part of a building automation system (a "BAS"). Honeywell's BAS is well-known in the industry as one of the few GMP-compliant building automation systems. It is run by software manufactured by Honeywell, which was

installed by the defendant Airon and operated by UPS. The appellant knew that the warehouse was controlled, monitored and alarmed by a Honeywell BAS.

[71] After the installation, Airon continued to be involved, performing limited ongoing preventative maintenance. Automation supplied the temperature and humidity sensors used at the warehouse and ITS tested them annually as well as in response to specific requests to do so.

[72] All of the Other Defendants were "involved" in the storage of the appellant's vaccines and monitoring the temperatures in the cooler. They were persons who provided the products and services necessary to permit UPS to provide the temperature-controlled storage services under the Agreement.

**Issue 4: Costs of the action**

[73] "A court should set aside a costs award on appeal only if the [motion] judge has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27. While I would grant the appellant leave to appeal the costs awards, I am not persuaded that the motion judge made an error in principle or that his costs awards are plainly wrong. I would not disturb the costs that he awarded (provided, as indicated above, UPS pays the $100,000 plus pre-judgment interest that the appellant refunded to it, together with pre-judgment interest thereon from the date of the refund to the date of such payment, within 10 days).

[74] In his costs endorsement, the motion judge awarded costs of the summary judgment motion in amounts agreed upon by the parties. Over objections from the appellant, he also fixed the costs of the action, since its inception, of the defendants who had brought summary judgment motions. He rejected the appellant's argument that costs had been inflated due to the defendants' delay in bringing their summary judgment motions. He concluded that the defendants could not be faulted for the timing of the summary judgment motions in this complex and multi-party action. The defendants were justified in investigating the technological aspects of the claim, including retaining experts. However, the motion judge reduced each of these defendants' cost requests by 25% "to bring them in line with what I think the [appellant's] reasonable expectations might have been": *Sanofi Pasteur Ltd. v. UPS SCS, Inc.*, 2014 ONSC 3558, 33 C.C.L.I. (5th) 90, at para. 14. The amounts he awarded were inclusive of HST and disbursements.

[75] In a supplementary costs endorsement, the motion judge awarded partial indemnity costs to Automation – a defendant who had not brought a summary judgment motion – and costs in favour of the Third Parties.

[76] The motion judge concluded that the costs sought by Automation were "a reasonable request within the range of expectations of the [appellant] for an action of this magnitude": *Sanofi Pasteur Limited v. UPS SCS, Inc.*, 2014 ONSC 5402, 33 C.C.L.I. (5th) 96, at para. 4.

[77] The motion judge acknowledged that generally an unsuccessful plaintiff will not be held liable for costs incurred by third parties: the plaintiff does not sue the third party, does not want it in the action and is not responsible for it being brought into the action. But there are cases where costs to third parties are warranted – particularly where "the third party proceedings followed naturally and inevitably upon the institution of the [plaintiff's] claim": para. 4, quoting *Greater Toronto Airports Authority Assn. Inc. v. Foster Wheeler Ltd.*, 2011 ONSC 3377, 2011 CarswellOnt 4126, at para. 53. However, as Newbould J. observed in *Guarantee Co. of North America v. Resource Funding Ltd.* (2009), 82 C.P.C. (6th) 258, at para. 5 (Ont. S.C.), whether an unsuccessful plaintiff should be ordered to pay a third party's costs depends on the circumstances of the particular case and the discretion to order such costs must be exercised judicially.

[78] The motion judge characterized the third party claims as not "unnecessary, but neither were they imperative": para. 8. On the other hand, "[t]he very nature of the claim and its sheer size undoubtedly suggested to the [appellant] that the Defendants would do all they could to either minimize or share their liability, and that this might take the form of third party proceedings." He exercised his discretion to award costs in favour of the Third Parties by ordering the appellant to pay roughly half of what the Third Parties requested in costs.

[79] On appeal, the appellant challenges the costs awarded to the defendants on a number of bases. The appellant argues that UPS improperly sought pre-action costs and that all the defendants improperly sought disbursements for expert fees and expenses not covered under Tariff A of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. It says the motion judge's conclusion that the defendants should not be faulted for not bringing their summary judgment motions sooner was unreasonable. Further, the motion judge failed to consider the novelty of the issues on the summary judgment motion in fixing costs. Finally, the appellant argues the motion judge erred in including HST in the costs he awarded because the entity directing the appellant's litigation is a foreign corporation and not subject to HST.

[80] The appellant argues that the motion judge had no power to award costs to Automation and the Third Parties because they were not parties to the summary judgment motion. And even if he had the power to do so, the motion judge erred in principle by awarding costs to the Third Parties in the absence of a determination that the third party proceedings followed "naturally and inevitably upon the institution of the [appellant's] action, in the sense that the defendant had no real alternative but to join the party": *Royal Bank of Canada v. Gentra Canada Investments Inc.* (2001), 147 O.A.C. 96 (C.A.), at para. 16. It says the motion judge's finding that the third party proceedings were not "unnecessary, but neither were they imperative" does not meet this test.

[81] Dealing first with the motion judge's award of costs of the action to the defendants, the motion judge was not required to address every submission made by the appellant in fixing costs. It must be remembered that the motion judge reduced the costs sought by the defendants who brought summary judgment motions by 25% – a significant reduction. Even if all of the issues raised by the appellant were sustained (and in my view, they should not be) they would readily have been addressed by this reduction.[10] The amount ordered payable by the motion judge was reasonable. It is not "clearly wrong".

[82] Turning to the motion judge's supplementary costs endorsement, the motion judge's disposition of the summary judgment motion resulted in the dismissal of the appellant's action against Automation. The motion judge appropriately fixed the costs payable by the appellant to Automation.

[83] The disposition of the summary judgment motion also resulted in the dismissal of the defendants' claims against the Third Parties. The motion judge was entitled to consider whether the appellant should be liable for the Third Parties' costs. He recognized that normally an unsuccessful plaintiff will not be held liable for costs incurred by third parties. However, he concluded that, in this particular case, an order that the appellant pay one-half of the costs sought by the Third Parties was warranted.

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[10] For example, the pre-action costs sought by UPS represented approximately 10% of the total costs it sought.

[84] What the appellant advances as the applicable test – namely that the third party proceedings must have followed "naturally and inevitably upon the institution of the [appellant's] action, in the sense that the defendant had no real alternative but to join the party" – is one of the situations identified by McLachlin J., as she then was, in *Milina v. Bartsch* (1985), 1 C.P.C. (2d) 269 (B.C. S.C.), as warranting an order requiring an unsuccessful defendant to pay a successful third party's costs. I agree with the motion judge and Newbould J. in *Resource Funding* that McLachlin J. did not set out an exhaustive list of situations where a plaintiff can be ordered to pay a third party's costs. As they state, the question depends upon the circumstances of the particular case. Here, the motion judge considered the circumstances of the case in making the order that he did, and there is no basis to interfere with the exercise of his discretion.[11]

[85] The trial judge in *Royal Bank of Canada v. Gentra Canada Investments Inc.*, [2000] O.J. No. 3028 (S.C.) alluded to the "naturally and inevitably" scenario identified in *Milina* in deciding that the successful defendant – who had a complete defence without the necessity of bringing the third party law firm into the action – and not the unsuccessful plaintiff, should be responsible for the third party's costs. This court agreed with the trial judge's decision. It did not go so far as to indicate that an unsuccessful plaintiff could only be responsible for a third

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[11] While not referred to in the motion judge's supplementary costs endorsement, the appellant had itself sought to add the U.S. UPS entities as defendants to the main action. On that basis alone, third party costs were justifiable.

party's costs if it fell within that scenario (or one of the other scenarios identified in *Milina*.)

**Costs of the appeal**

[86] The parties agreed that if the appeal were dismissed, the appellant would pay the respondents costs, inclusive of disbursements and GST, in the following amounts:

UPS: $45,000

Honeywell, Airon and ITS, collectively: $45,000

ACI and the Third Parties, collectively: $8,000

[87] I would accordingly order costs in such amounts – subject to the payment to the appellant by UPS within 10 days of the sum of $100,000, plus pre-judgment interest thereon, previously paid to the appellant and refunded by it to UPS, together with pre-judgment interest thereon from the date of the refund to the date of such payment.

dispensed w. ACSD

Released: CA

FEB 0 9 2015

I agree J.A.

I agree J.A.

## Schedule A

## Excerpts from Agreement

**Master Services Agreement**

### 1. Structure of the Agreement

[UPS] shall provide the services ("Services") specified in service schedules referencing this MSA ("Schedules"), which Schedules have been approved by both Parties or their Affiliates. Each Schedule may have attached one or more statements of work ("SOWs") and exhibits. Each such Schedule, SOW, and exhibit is an "Incorporated Document." This MSA and the Incorporated Documents are the "Agreement." In the event of a conflict between the terms of the MSA and the terms of any Incorporated Document, the terms of the Incorporated Document shall control.

### 4.1 General Indemnification

Each Party ("Indemnitor") shall indemnify, defend and hold harmless the other Party and any affiliated and controlling entities of such Party, and the directors, employees, officers, agents, subcontractors, licensors and suppliers of all of them (in each case "Indemnitee") from and against all third party liabilities, claims, suits, demands, actions, fines, damages, losses, costs and expenses (including reasonable attorney's fees) ("Claims") for injury to or death of any person or damage to or loss of improvements to real property or tangible personal property to the extent caused by or resulting from such Party's negligent acts or omissions or those of its employees or agents, except to the extent caused by the Indemnitee; *provided however*, that this Section shall not apply to any loss or destruction of, or any damage to, [Sanofi's] goods and property for which Services are provided ("Goods").

### 10.1 [UPS] Insurance

[UPS] shall maintain the following insurance: (a) commercial general liability insurance including premises or operations, broad form property damage,

independent contractors, warehouseman's liability and contractual liability covering [UPS's] obligations hereunder for bodily injury and property damage, with a combined single limit of not less than $5,000,000 USD each occurrence; and (b) workers' compensation insurance in statutory amounts covering [UPS] and its employees, and employer's liability insurance. All insurance required herein shall be carried with insurance companies licensed to do business in the province(s) where operations are maintained with A.M. Best rating of A- or above. [UPS] shall deliver to [Sanofi] upon signing of this Agreement, certificates of insurance of evidence of the required coverage. All policies shall provide that such coverage under these policies shall not be canceled or materially changed without at least thirty (30) days prior written notice to [Sanofi].

**10.2 [Sanofi] Insurance**

[Sanofi] shall maintain in effect during the term of this Agreement and for a period of two (2) years after termination of this Agreement:

a) product liability insurance in the amount of at least $5,000,000 CDN and with [UPS] named as an additional insured; and
b) general liability insurance in the amount of at least $2,000,000 CDN, which shall include contractual liability coverage for all liability assumed under this Agreement with [UPS] named as additional insured; and
c) all-risk property or stock-transit insurance for the Goods and the personal property of [Sanofi] (or property for which [Sanofi] is legally responsible) in an amount of not less than the full replacement cost thereof, whether such Goods or property are in [UPS's] facilities or in transit and shall include [UPS] as an additional insured.

**12. Subcontractors**

There are no plans to subcontract [UPS] services however [UPS] retains the right to subcontract the performance of the Services to its parent, affiliates or third party service providers provided that, except as set forth in Section 6 (Limitation of Liability), no such subcontracting shall relieve [UPS] of the obligation to perform in accordance with the terms hereof, and without limiting the foregoing any failure by any such subcontractor to protect the Confidential Information of [Sanofi] shall be deemed a material breach by [UPS] of Section 8 (Confidentiality).

### 17.1 Assignment; Third Party Beneficiaries

The rights and obligations under this Agreement may not be transferred or assigned to a third party by either Party without the prior written consent of the other Party; *provided however*, either party may transfer or assign all or party of its rights and/or obligations of this Agreement to one or more of its parent or affiliates.

## Service Schedule 1

### 1. Introduction

1.2 [UPS] will perform for [Sanofi] warehouse distribution services specified in this Schedule (the "Services"), at one or more facilities listed in Exhibit C (each a "Facility"), in accordance with the MSA, this Schedule and its Exhibits and the documents specified below, which documents and Exhibits are incorporated into this Schedule by reference. In the event of a conflict between the terms of this Service Schedule and the terms of the MSA, this Service Schedule shall control. In the event of a conflict or inconsistency between any of the documents specified below and this Schedule, the order of precedence shall be as follows: (a) Statement of Work, and (c) Exhibits B-D.

### 4. Liability for Loss or Damage to Goods Stored by [UPS]

4.2.1.1 [UPS] shall be liable for Lost Goods or Damaged Goods in excess of the Shrinkage Allowance while the Goods are in its care custody and control solely due to its negligent acts or omissions with up to a maximum of one hundred thousand dollars ($100,000) per year. [UPS] shall not be liable for any loss or damage to Goods which is (i) caused by any defects in the packaging or manufacture of such Goods, (ii) attributable to carriers (contract or otherwise) failing to deliver the full shipment of expected Goods to the Facility or otherwise caused by the acts or omissions of such carriers, (iii) attributable to concealed damage, or (iv) attributable to [Sanofi's] negligence acts or omissions or those of any of its employees, agents, or subcontractors. In no event shall [UPS], its employees, agents, subcontractors or affiliates be liable for any loss of or damage to the Goods arising out of or caused by an event of Force Majeure.

## 6. Subcontractors

6.1 [UPS] may not sub-contract the Services under this Service Schedule 1 without the prior written consent of [Sanofi].

**Exhibit A to Service Schedule 1**

## 6. Storage

All Goods will be kept and stored within the Storage Area unless otherwise agreed to by [Sanofi]. The Goods will be stored in GMP (Good Manufacturing Practices) compliant, safe and secure manner on shelves or racks, and may be floor stacked on pallets if appropriate. The Goods will be stored in a temperature-controlled cooler of 2 to 8 degrees Celsius.

## 9. Warehouse Distribution Services

The Warehouse Distribution Services to be performed pursuant to this SOW are as follows (the "Warehouse Distribution Services"):

[...]

*9.3 Storage*

- adhering to applicable food and drug, and government regulations, and in particular to GMP processes related to pharmaceutical distribution and HPFBI (Health Products and Food Branch Inspectorate) Guidelines
- storing of products in a clean, secure environment
- storing of products in cooler, 2 to 8 degrees Celsius
- storage area temperature monitoring

**Service Schedule 2**

## 4.1 Subcontracting

UPS may not subcontract any aspect of the SERVICES.