CITATION: Sanofi Pasteur Limited v. UPS SCS, Inc. et al., 2014 ONSC 2695
COURT FILE NO.: CV-10-414999-000
DATE: 20140430

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Sanofi Pasteur Limited Plaintiff	*Shawn Faguy and Vincent Dore*, for the Plaintiff
– 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. Defendants	*Kathryn Podrebarac and Alan Melamud*, for the Defendant, UPS SCS, Inc. *David Young*, for the Defendants, Airon HVAC Service Ltd. and Airon HVAC and Control Ltd. *Megan Shortreed*, for the Defendants, Honeywell Limited and Honeywell International Inc. *Linda Matthews and Dustin Milligan*, for the Defendant, Industrial Technical Services (ITS) Inc.
	HEARD: December 2-3, 2013 and February 12, 2014

MORGAN J.

[1] These combined motions for summary judgment brought by the Defendants all ask the same basic question: does the Plaintiff's covenant to insure signify its assumption of risk of the very damage for which it sues, and therefore provide a complete answer to the Plaintiff's action?

[2] A substantial amount of time and resources have been devoted to this question. All four sets of Defendants seek summary judgment dismissing the Plaintiff's subrogated insurance claim as well as each other's cross-claims, a voluminous evidentiary record has been filed, and a veritable library of case law has been submitted by the various parties. While I appreciate and respect the large-scale efforts by all counsel, there is a short answer to the central question posed above: yes.

[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 OR (3d) 80, at para 9. And since the Plaintiff's insurer in this subrogated action can be in no better position than the Plaintiff 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.

I. The claim against SCS

[4] On April 8, 2009, the Plaintiff and the Defendant, UPS SCS, Inc. ("SCS"), entered into a Master Services Agreement with incorporated service schedules (the "MSA"), pursuant to which SCS agreed to store certain vaccines belonging to the Plaintiff in a temperature controlled environment. The Plaintiff paid storage fees to SCS, which for the month in issue here amounted to $8,920; in return SCS was obliged to adhere to various special requirements for storing the vaccines – specifically, that the vaccine be stored at a temperature ranging between 2° and 8° C.

[5] On June 1, 2009, SCS discovered that the cooler in which the vaccines were stored had malfunctioned, and that the temperature had dropped to -4.2° C. At the time of the incident, the alarm notification system for the cooler was suppressed due to the actions of an employee of a U.S.-based affiliate of SCS, resulting in the vaccines spending a weekend at an excessively low temperature. The Plaintiff contends that the vaccines were thereby rendered unsellable and has claimed damages of $8,259,934.48.

[6] Under the terms of the MSA, the Plaintiff agreed that it would insure its stored goods against the risk of loss. Article 10.2(c) of the MSA required the Plaintiff to insure the full replacement cost of vaccines while stored in SCS' warehouse. The covenant to insure provides:

10.2 Client Insurance

> [The Plaintiff] shall maintain in effect during the term of this Agreement and for a period of two (2) years after termination of this Agreement:
>
> ...
>
> c) all-risk property or stock-transit insurance for the [vaccines] and the personal property of [the Plaintiff] (or property for which [the Plaintiff]is legally responsible) in an amount not less than the full replacement cost thereof, whether such [vaccines] or property are in the SCS's facilities or in transit and shall include SCS as an additional insured.

[7] The Plaintiff and SCS also agreed that any consequential losses flowing from damage to or destruction of the vaccines is entirely excluded. Article 7 of the MSA provides:

> 7. Exclusions.

> Neither party shall be liable to the other party for any special, punitive, consequential or indirect damages, including but not limited to loss of profits business opportunities, or client goodwill in connection with this agreement or the services provided hereunder. SCS shall have no liability to client in connection with this agreement except as expressly set forth in this agreement.

[8] In *Madison Developments*, at para 9, the Court of Appeal analogized this type of clause to a covenant by a landlord to obtain fire insurance for the leased premises. The Court noted that, "where the landlord covenants to obtain insurance against the damage to the premises by fire, the landlord cannot sue the tenant for a loss by fire caused by the tenant's negligence... There would be no benefit to the tenant from the covenant if it did not apply to a fire caused by the tenant's negligence."

[9] Likewise, in the present case, where the Plaintiff covenanted to obtain all-risk property insurance against damage to the stored goods, the Plaintiff cannot sue SCS for a loss of those goods caused by SCS's negligence. If this action were to go to trial, even if it were found beyond the shadow of a doubt that the damage to the vaccines was caused by an agent of SCS, the trial findings would not impact on the legal effect of the covenant to insure. As in *Madison Developments*, there would be no benefit to SCS from the covenant if it did not apply to damage or loss caused by SCS's negligence or by that of an agent for whom it is responsible.

[10] The Plaintiff'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).

[11] The Court of Appeal has applied a covenant to insure clause to a situation where grain was ruined in storage due to overeating. In *Goderich Elevators Ltd. v. Royal Insurance Co.* (1999), 42 OR (3d) 577, at para 15, the Court indicated that, "the fact that grain became 'heated' grain while in the care and control of Goderich is exactly the kind of 'fortuitous event' that triggers the coverage of this all-risks policy". It 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.

[12] The covenant in issue required, among other things, that the Plaintiff name SCS as an "additional insured". In *Kruger Products Ltd. v First Choice Logistics Inc.*, [2013] 3 WWR 45, the British Columbia Court of Appeal indicated that this type of arrangement reinforces what it called, at para 34, the "tort immunity" flowing from a covenant to insure. As the B.C. court stated, at para 38, "it would make no business sense for each subcontractor to pay premiums to duplicate the comprehensive fire coverage to be obtained by the contractor and there would be no purpose for a covenant on the latter's part to obtain such insurance if it were not to protect the subcontractors from claims caused by their own negligence."

[13] The Plaintiff points out that the MSA contains a limitation of liability clause, pursuant to which SCS' liability is capped at $100,000. Plaintiff's counsel goes on to submit that the existence of this clause must be indicative of the fact that SCS is indeed liable for the damages caused by its own negligence. However, this argument misstates the preclusive effect of a covenant to insure.

[14] A covenant such as the one at issue here displaces the risk that would otherwise be on SCS, and which is in any case capped under the MSA. Just because SCS is responsible for a limited amount of the Plaintiff's loss does not mean that the allocation of risk for the overwhelming majority of the Plaintiff's losses is to be ignored.

[15] Analogizing SCS's position to that of a tenant in a case where a landlord covenants to insure against fire and the tenant has an obligation to repair, the limited obligation of SCS "does not impose upon the tenant [or, here, upon SCS] any greater liability for fire caused by its negligence than exists in the absence of such a provision": *Economical Mutual Insurance Co. v 1072871 Ontario Ltd.*, 1998 CarswellOnt 4041, at para 12 (SCJ), aff'd (1999), 122 OAC 94 (Ont CA). Rather, "the landlord's covenant to insure is a covenant that runs to the benefit of the tenant, lifting from it the risk of liability for fire arising from its negligence and bringing that risk under insurance coverage": *Smith v T. Eaton Co.*, [1978] 2 SCR 749, at 754.

[16] In any case, the record makes it clear that SCS has already forwarded to the Plaintiff a payment of $100,000 (plus pre-judgment interest). SCS' counsel advises that this 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, and that the Plaintiff is free to keep those funds regardless of this court's finding with respect to liability.

[17] The limitation of liability clause is analogous to a tenant's covenant to repair contained in a lease in which a landlord has covenanted to insure. Chief Justice Laskin observed in *T. Eaton*, at 755, that "the effect of this insurance obligation was to entitle the tenant to protection against the risk of loss by fire caused by its negligence, and this *notwithstanding the repairing covenants*..." [emphasis added]

[18] The Plaintiff further submits that under the MSA the insurance obligations of the parties are mutual. In making this point, counsel for the Plaintiff points to article 10.1 of the MSA, which provides:

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

[19] This clause requires SCS to carry liability insurance, which is aimed at damage and injury to third parties. It is not aimed at damage or injury to the Plaintiff's property.

[20] The Plaintiff's position in respect of art. 10.1 is similar to that taken by the landlord in *Alberta Importers and Distributors (1993) Inc. v Phoenix Marble Ltd.* (2006), 410 AR 78 (Alta QB), aff'd 432 AR 173 (Alta CA), who tried to present the tenant's obligation to obtain commercial liability insurance as a counterweight to its own covenant to insure its property. The Court observed, at para 15, that this position "misapprehends the nature and purpose of general liability insurance as opposed to property insurance. The former covers claims by third parties and benefits the landlord. If the tenant's negligence injures a third party, the tenant's liability insurance indemnifies the landlord against such claims which the property insurance would not cover."

[21] The answer to the Plaintiff's art. 10.1 argument is provided by the Ontario Court of Appeal in *1044589 Ontario Inc. (c.o.b. Nantucket Business Centre) v A.B. Autorama Ltd.* (2009), 98 OR (3d) 263. The Court addressed the argument with respect to this kind of mutual insurance obligation with yet another analogy to the commercial landlord-tenant situation in which one party has covenanted to insure the property and the other has covenanted to maintain liability insurance. At para 30, Laskin JA reasoned in a way that is on all fours with the present case and that dismisses as irrelevant the contractual obligation of SCS to insure:

> The motion judge held that the clause in Schedule A of the Offer to Lease requiring the Tenant to maintain commercial liability (including fire and premises) insurance 'lends weight to the landlord's position'. I do not agree with that holding. This clause obligates the Tenant to obtain third party liability insurance. So, if a third party sustains damage - including damage from fire - because of the Tenant's negligence, the Tenant bears the risk of that loss. *This has nothing to do with the issue on appeal: who bears the risk of first party property damage.* [emphasis added]

[22] The same covenant to insure that relieves SCS of liability for damage to the Plaintiff's vaccines, would also relieve SCS for all further liability that is claimed to have resulted from therefrom.

[23] As it was stated in *Laing Property Corp. v All Seasons Display Inc.* (2000), 79 BCLR (3d) 199, at para 40, the "waiver of a right to claim for property damage extends to the indirect or consequential losses associated with that property damage." This bar to liability that arises by operation of law is, of course, in addition to the fact that the MSA expressly bars any claim for lost profits and consequential damage. There is, accordingly, no legal footing on which the Plaintiff can maintain its claim in the face of the MSA.

[24] Plaintiff's counsel submits that whatever the meaning of the MSA, it cannot be enforced because it is an unconscionable contract. With respect, this strikes me as an argument born of despair rather than of reason. As counsel for SCS points out in her factum, the Plaintiff has not referred to a single case in which a covenant to insure has been held unconscionable. The reason for this is self-evident – a covenant to insure operates for the benefit of both parties to the contract, ensuring that the promisee is relieved of liability for the loss and that the promisor will be indemnified for the loss. Given that this is a subrogated action, the Plaintiff has indeed been

indemnified; the other half of the covenant's bargain – relieving SCS of liability – must also be enforced.

[25] Moreover, there was no inequality of bargaining power on which the Plaintiff can rely in pressing its unconscionability point. This would be a necessary ingredient for any argument seeking to invalidate a specifically bargained covenant between contracting parties: See *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, [2010] 1 SCR 69, at paras 121-123.

[26] The Plaintiff identifies itself in its own pleading as an international pharmaceutical company. It is axiomatic that, "[t]o render the contract or the limitation clause invalid there must be evidence that the aggrieved party was in the control or power of the other party to the extent that their will is overborne": *Roy v 1216393 Ontario Inc.*, 2012 CarswellBC 3660, at para 138 (BC SC). No evidence has been led, or even hinted at, that would suggest that a large corporate party such as the Plaintiff suffered such an unconscionable inequality with the warehouse in which it stored its goods that the contract that it entered is somehow not a product of its freely bargained will.

[27] One can therefore do no better than to reiterate the observation by the B.C. Court of Appeal that it is by now "well established that a covenant to obtain fire insurance will relieve the beneficiary of the covenant from any liability for the fire losses that may be suffered by the covenantor": *Laing Property*, at para 22. As a matter of contract law, the Plaintiff cannot sustain its claim against SCS.

II. The claim against the other Defendants

[28] The same covenant to insure that precludes the Plaintiff from maintaining an action against SCS also acts as a bar to the Plaintiff's claims against the other Defendants. These Defendants include the manufacturer of the temperature control and coolant system used in the SCS warehouse (Honeywell Limited and Honeywell International Inc.), the supplier and installer of the temperature control system (Airon HVAC Service Ltd. and Airon HVAC and Control Ltd.), and the contractor who calibrated and tested the temperature control system in the SCS warehouse (Industrial Technical Services (ITS) Inc.).

[29] The Plaintiff's claims against these Defendants are derivative of the same incident and the same damage as the claim against SCS. Each of these Defendants is alleged to have played a part, along with SCS, in the failure of the cooling and monitoring system, and it is apparent that the goods and services provided by these parties are "the very activities coming within the scope of the Main Contract": *Castonguay Construction v Commonwealth Plywood Co.*, 2012 ONSC 3487, at para 63. They therefore each have an "identity of interest" with SCS insofar as the covenant to insure is concerned: *Tony and Jim's Holdings Ltd.* v Silva (1999), 43 OR (3d) 633, at para 29.

[30] To again analogize the present case to that of a landlord who has covenanted to insure against fire, the Supreme Court of Canada stated in *Agnew-Surpass v Cummer-Young*, [1976] 2 SCR 221, at 229-230, 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.*" [emphasis added] Accordingly, the covenant to insure acts as a bar to liability of the Defendants who were contracted by SCS to service the goods covered by the Plaintiff's all-risk insurance.

[31] The Court of Appeal has specifically held that the contractual allocation of risk embodied in a covenant to insure extends to all claims related to the manifestation of that risk. This includes SCS' co-Defendants, even though they are not parties to the agreement in which the covenant to insure is contained: *Williams-Sonoma Inc. v Oxford Properties Group Inc.*, 2013 ONCA 2980.

[32] Contrary to the submissions by Plaintiff's counsel, the ordinary doctrine of privity of contract does not apply in the situation of a covenant to insure. In the first place, the privity rule runs the risk of ignoring, or undermining, the commercial realities of the relationship at issue: *London Drugs Ltd. v Kuehne & Nagel International Ltd.*, [1992] 3 SCR 299, at para 212.

[33] Here, SCS warehoused the Plaintiff's goods for a limited fee; likewise, there is no evidence to suggest that the manufacturer, supplier and installer, and monitoring company for the temperature control system, earned anything but the ordinary fees for their supplies and services. It "stretches commercial credulity", as the Supreme Court said in *London Drugs*, to suggest that the warehouse and its contractors, rather than the owner of the high value vaccines, would under the carefully bargained MSA be responsible for their loss.

[34] Furthermore, whether a party is within or without the third party beneficiary rule turns on the intentions of the contracting parties – i.e. "whether the parties intended to extend the benefit in question to a class of third-party beneficiaries": *Fraser River Pile & Dredge Ltd. v Can-Drive Services Ltd.*, [1999] 3 SCR 108, para 32. Here, this intention can be measured by the fact that the acts of SCS' co-Defendants are the very activities at which the covenant to insure is aimed. The MSA contains, among other things, detailed provisions relating to temperature control for the vaccines, which confirms that 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 covenant aims.

[35] Just as the Plaintiff cannot maintain its claim against SCS, it cannot maintain its claim against SCS's co-Defendants who take the benefit of the covenant to insure. That covenant, as indicated, protects SCS and, by extension, its co-Defendants, by placing on the Plaintiff the risk of the very losses at issue. SCS was "in law responsible" for the acts of the contractors it retained to fulfill the temperature control requirements of the MSA, which brings those parties within the benefit for which SCS contracted: *Williams-Sonoma*, at para 25.

[36] Likewise, since SCS has protected itself against any claim by the Plaintiff or its insurer, it "does not lie in the mouth of the other [Defendants] to claim contribution in such a case": *Giffels Associates Ltd. v Eastern Construction Co.*, [1978] 2 SCR 1346, at 1355. SCS cannot be exposed through the back door by virtue of contribution and indemnity claims by its co-Defendants when it has protected itself against liability through the front door by means of its contract with the Plaintiff.

[37] In any case, the cross-claims of the other Defendants against SCS and each other have become irrelevant. Since SCS enjoys "tort immunity" as a result of the covenant to insure, and since the other Defendants can take the benefit of that bar to liability, there is no loss for which to claim any contribution or indemnity.

III. Disposition

[38] Counsel for the Plaintiff submits that the case is too large and complex for summary judgment. He points out that of the more than 60 paragraphs in the Statement of Claim, 40 are denied by the Defendants; he adds that SCS' Statement of Defense, which presents a "radically different view" of the facts, is "a whopping 146 paragraphs".

[39] With all due respect, pleading size does not matter. It is the scope of contentious issues that is germane to the analysis under Rule 20 of the *Rules of Civil Procedure*. The appellate courts have spoken loud and clear about the legal effect of a covenant to insure, and so under the circumstances allowing this matter to proceed to a full trial would be "disproportionate to the nature of the dispute and the interests involved": *Hryniak v Mauldin*, 2014 SCC 7, at para 29.

[40] The Plaintiff's claim cannot succeed given its covenant to insure and the state of the law on such covenants. Accordingly, there is no genuine issue requiring a trial. Rule 20.04(2)(a) requires that summary judgment be granted to all of the Defendants.

[41] The action is dismissed in its entirety, as are all of the Defendants' cross-claims.

[42] Counsel for each party may provide me with written submissions with respect to costs. I would ask that these include a Costs Outline together with written argument of no more than 3 pages in length.

[43] Counsel for the Defendants should provide me with their costs submissions within two weeks of today, and counsel for the Plaintiff should provide me with his costs submissions within two weeks thereafter.

Morgan J.

Released: April 30, 2014

CITATION: Sanofi Pasteur Limited v. UPS SCS, Inc. et al., 2014 ONSC 2695
COURT FILE NO.: CV-10-414999-000
DATE: 20140430

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Sanofi Pasteur Limited

Plaintiff

– 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.

Defendants

REASONS FOR JUDGMENT

E.M. Morgan J.

Released: April 30, 2014