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Docket: CI 14-01-90666 & CI 15-01-93171
Indexed as: Delcor Enterprises Limited
v. The Economical Insurance Group
Cited as: 2015 MBQB 49
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

File No. CI 14-01-90666:	)	Appearances:
	)	
DELCOR ENTERPRISES LIMITED operating as BEE-CLEAN,	)	Michael G. Finlayson for the applicant
applicant,	)	
- and –	)	Anthony C. Fletcher and Celia C. Fergusson for the respondents
THE ECONOMICAL INSURANCE GROUP and LAWN BOYS LTD.,	)	
respondents.	)	
	)	
AND BETWEEN:	)	
	)	
File No. CI 15-01-93171:	)	
	)	
ROYAL BANK OF CANADA and LOUNT CORPORATION,	)	Kathleen A. McCandless for the applicants
applicants,	)	
	)	Michael G. Finlayson for the respondents
DELCOR ENTERPRISES LIMITED operating as BEE-CLEAN and AVIVA INSURANCE COMPANY OF CANADA,	)	
respondents.	)	JUDGMENT DELIVERED: March 25, 2015

GREENBERG J.

[1] In February 2011, Joyce Castles slipped on ice and was injured when using the ATM at a branch of the Royal Bank of Canada ("RBC"). She sued RBC,

Delcor Enterprises ("Bee-Clean"), which was the company hired by RBC to do snow maintenance, and Lawn Boys Ltd., the company with which Bee-Clean subcontracted to do the snow maintenance. The issue before me is who should pay to defend the claim on behalf of RBC and Bee-Clean.

[2] RBC[1] has filed an application seeking an order that Bee-Clean and/or its insurer, Aviva Insurance Company of Canada, must defend the claim on its behalf and reimburse it for its defence costs to date. Bee-Clean has brought an application seeking an order that Lawn Boys and/or its insurer, The Economical Insurance Group, must defend the claim on its behalf and reimburse it for its defence costs to date.[2]

Background

[3] As I said, Bee-Clean was hired by RBC to provide snow maintenance services.[3] Among other things, the snow maintenance agreement specified that Bee-Clean was to clear snow within two hours of a snowfall, if it snowed between the hours of 5:30 a.m. and 7:00 p.m ("daytime hours"). If it snowed

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[1] Lount Corporation, the owner of the building where the branch is located, was also named as a defendant and joined in the application brought by RBC. But its counsel essentially conceded that there is no basis, contractual or otherwise, to impose a duty to defend Lount on Bee-Clean or Aviva. In any event, although Lount is named as a defendant in Ms Castles' claim, it was not an "occupier" of the property and under its lease with RBC, RBC is responsible for the maintenance of the premises. So there does not appear to be a basis on which to impose liability on Lount for Ms Castles' injuries. (See ***The Occupiers' Liability Act***, C.C.S.M., c. O8, s. 6)

[2] The notices of application of RBC and Bee-Clean also seek an order that the various respondents indemnify them should they be found liable to Ms Castles. However, at the hearing, counsel for RBC and counsel for Bee-Clean conceded that it would be premature to make any order regarding indemnification at this stage of the proceedings (see ***Papapetrou v. 1054422 Ontario Ltd.***, 2012 ONCA 506, at pars. 24-28). The only issue at this time is the duty to defend.

[3] It was actually CB Richard Ellis Management Services, which managed RBC's property, that entered into the snow maintenance agreement with Bee-Clean. However, insofar as the issues before me are concerned, Richard Ellis was acting as agent for RBC. For ease of reference, I will refer to RBC as the contracting party.

between 7:00 p.m. and 5:30 a.m. ("nighttime hours"), the snow clearing was to be completed by 7:30 a.m. Bee-Clean was to salt and/or sand the property as required and apply ice melter when weather conditions required. And Bee-Clean was to monitor weather conditions and forecasts and regularly inspect the property to determine if and when services were required. When Bee-Clean subcontracted with Lawn Boys, the same specifications regarding snow maintenance were included in the contract between them.

[4] Under the snow maintenance agreement, Bee-Clean was required to indemnify RBC for any claim against it with respect to personal injury "arising out any act, error, omission or default, whether willful or negligent by the Contractor [Bee-Clean] or any of its employees, subcontractors, or agents in performance of this Agreement." The agreement also required Bee-Clean to maintain comprehensive general liability insurance and to add RBC as an additional insured party. At the time of Ms Castles' accident, Bee-Clean was covered by a contract of insurance with Aviva which named RBC as an additional insured but RBC's coverage was "limited to the operations performed by the named insured [Bee-Clean] on behalf of the additional insured [RBC]."

[5] The contract between Bee-Clean and Lawn Boys had similar indemnity and insurance clauses. That is to say, Lawn Boys was required to indemnify Bee-Clean for any claims against it arising out of the acts or omissions of Lawn Boys "in the performance of this agreement." Lawn Boys was required to maintain general liability insurance which named Bee-Clean and its clients,

specifically RBC, as additional insureds. At the time of Ms Castles' accident, Lawn Boys was covered by an insurance policy with Economical and Bee-Clean was named as an additional insured but "only with respect to liability arising out of the operations of the Named insured [Lawn Boys]." RBC was not named as an insured in the policy.

The Allegations in the Statement of Claim

[6] Ms Castles' statement of claim alleges that her fall and consequent injuries were a result of the negligence of the various defendants by allowing ice to build up around the entrance to the ATM. The claim does not distinguish between the various defendants in the particulars of negligence that are alleged, which include:

- failing to take reasonable measures for removal of the ice which had accumulated as a result of freezing rain which had occurred at approximately 11:00 p.m. on February 3, 2011 and again at 1:00 a.m. on February 4, 2011;
- failing to place traction sand or ice melting products in and around the entrance to the premises and in and around the ATM machine in a timely fashion, particularly having regard to the fact that the ATM machine was available for use by customers on a 24 hour basis;
- failing to perform reasonable and appropriate inspection and/or to require that one or more of the contractors provided reasonable and appropriate inspection having regard to the fact that the premises were open for use by customers 24 hours per day.

The Positions of the Parties

[7] RBC says that the allegations of negligence in the claim relate to the acts or omissions of the snow maintenance contractor. Under RBC's agreement with Bee-Clean, snow clearing was Bee-Clean's responsibility and it must indemnify

RBC if RBC is held liable for any injury caused by Bee-Clean in executing its obligations under the agreement. RBC is a named insured in Bee-Clean's policy with Aviva. Therefore, RBC says, Bee-Clean or Aviva must defend the claim on its behalf.

[8] Bee-Clean and Aviva say that Bee-Clean's obligations under the snow maintenance agreement were assumed by Lawn Boys and, by virtue of the contract between Bee-Clean and Lawn Boys, the obligation to defend both it and RBC "flows through" to Lawn Boys or its insurer, Economical.

[9] Economical acknowledges that it has a duty to defend Bee-Clean against Ms Castles' claim to the extent that her injuries were caused by the acts or omissions of Lawn Boys in the performance of the snow maintenance agreement. However, Economical says that the claim makes allegations that, if proven, may result in liability on the part of Bee-Clean that are not related to the performance of the contract by Lawn Boys. With respect to those aspects of the claim, there is no duty to indemnify Bee-Clean and, therefore, no duty to defend it.

[10] Insofar as RBC is concerned, Economical says that as Lawn Boys failed to name RBC as an insured in the policy, Economical has no duty to defend it.

The Issue

[11] It is common ground that an insurer is required to defend a claim on behalf of an insured where the facts alleged in the pleadings, if proven true, would require the insurer to indemnify the insured. For the purpose of

determining whether there is a duty to defend, the strength of the allegations is irrelevant. A mere possibility that they can be proven is enough to trigger the duty to defend. The issue in this case is the scope of the duty to defend where some of the allegations in the claim relate to acts that fall within the defendant's insurance coverage but some of the allegations relate to acts that are not covered.

[12] There does not appear to be any dispute between the parties that in both the Economical policy and the Aviva policy, coverage for the additional insureds is limited to liability arising out of the operations of the primary named insured. The dispute between the parties is generated by a difference in the approach taken by two lines of cases. One line of authorities, cases such as ***RioCan Real Estate Investment Trust v. Lombard General Insurance Co.*** (2008), 91 O.R. (3d) 63 (S.C.J.), holds that where the allegations in the claim create multiple bases for liability, only one of which is covered by the insurance policy, if the covered part of the claim embodies the true nature of the claim, the insurer must defend the entire claim. The second line of cases, cases such as ***Atlific Hotels and Resorts Ltd. v. Aviva Insurance Co. of Canada*** (2009), 97 O.R. (3d) 233 (S.C.J.), holds that where a claim includes both covered and non-covered claims, the insurer is obliged to defend only those parts of the claim that fall within policy coverage.

The Scope of the Duty to Defend

[13] The facts in ***RioCan*** are similar to those in the case at bar. The plaintiffs in the underlying action had slipped on ice in the parking lot of a mall operated by RioCan. RioCan had a snow removal contract with Palmer Paving who was insured by Lombard General Insurance. In accordance with the contract between RioCan and Palmer, RioCan was a named insured in the Lombard policy but only with respect to operations performed by Palmer. Lombard agreed to defend Palmer but refused to defend RioCan. Lombard argued that requiring it to defend RioCan would put it in a position of conflict since, in its defence of Palmer, it would be arguing that liability should be based on RioCan's obligations as an occupier that fell outside the scope of work of Palmer as contractor. The court concluded that the fact that there were conflicting claims did not negate the duty to defend. Hennessy J. held:

> 38 I am of the view that in most situations where there is a duty on an insurer to defend some, or only one, of the claims made against an insured and that claim embodies the true nature of the claim, a duty to defend the entire claim arises. This is so even where the pleadings include claims that may be outside the policy coverage. Conflict issues can be addressed in a number of ways. Counsel did not request me to deal with this issue.

[14] In ***Atlific***, the plaintiff in the underlying action fell on an icy pathway outside a resort hotel. The court agreed with the proposition that if, after examining the entire pleading, it found that a particular claim that was covered by the policy captured "the essence of the entire action" (par. 14), then the insurer would be obliged to defend the entire action. However, it distinguished ***RioCan*** on the facts and held that the insurer was only obliged to defend the

hotel with respect to the allegations related to snow removal operations. Belobaba J. explained:

> 17 This is not a case where I am able to find, as did Justice Hennessy in *RioCan*, that one particular claim or category of claims captures the true essence of the action. The snow and ice claims appear, at first glance, to be predominant but the claims alleging negligence in hotel operations and management are formidable and can stand on their own. There are, as I have already stated, three categories of liability, and only one, the claims relating to the snow and ice removal, falls within coverage. The insurer, Aviva, is therefore obliged to provide the applicants with a defence to these claims only. The Deerhurst [the hotel owner] defendants are obliged to provide their own defence to the other two categories of claims.

[15] In my view, to the extent that there is a dispute between ***RioCan*** and ***Atlific***, it has been resolved by the decision of the Ontario Court of Appeal in ***Papapetrou v. 1054422 Ontario Ltd.***, 2012 ONCA 506, 111 O.R. (3d) 532, a case which also involved liability for injuries caused by a "slip and fall" on ice on a commercial property - stairs in a mall. In that case, the motion judge, relying on ***RioCan***, held the snow removal company's insurer had a duty to defend the occupier of the property because any liability of the occupier was linked to the "essential negligence" alleged – the failure to maintain an ice-free stairway. That decision was overturned by the Court of Appeal which held that the insurer's duty to defend the occupier was limited to claims that arose from the contractor's performance or non-performance of the snow removal contract. In arriving at its decision, the Court implicitly overruled ***RioCan***. Simmons J.A. said:

> 46 In this regard, it is important to bear in mind that a pleading may contain both covered and uncovered claims. As Doherty J.A. stated in obiter in *Unger (Litigation Guardian of) v. Unger* (2003), 68 O.R. (3d) 257, [2003] O.J. No. 4587 (C.A.), at para. 10: "If there is a possibility

> that any of the claims are captured by [an insurer's] coverage, [that insurer] has a duty to defend *those* claims" (emphasis added). See also *Atlific Hotels and Resorts Ltd. v. Aviva Insurance Co. of Canada* (2009), 97 O.R. (3d) 233, [2009] O.J. No. 2005 (S.C.J.).
>
> 47 However, assessing the true nature of a particular claim is not an exercise to be undertaken in the abstract. Rather, it should be approached with a view to the specific limitations of the insurance coverage at issue.
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> 48 In this case, the coverage would be limited to the matters relating to Collingwood's [the contractor] performance or non-performance of the contract.
>
> 49 With a view to the limits of coverage, the "true nature" of the claims in the action are best classified as allegations concerning: (i) negligent maintenance due to Collingwood's performance or non-performance of the service contract (which may include claims under the Occupiers' Liability Act with regard to obligations which have been delegated to Collingwood); (ii) negligent conduct on the part of The Cora Group [the property manager] extending beyond Collingwood's obligations under the contract; as well as (iii) a statutory cause of action under the Occupiers' Liability Act extending beyond those obligations delegated to Collingwood under the contract. The duty to defend only extends to allegations that can be classified as falling under the first category of claims.
>
> 50 To the extent that this conclusion may differ from *Riocan*, I disagree with that decision.
>
> [emphasis added]

[16] The approach in ***Papapetrou*** is supported by dicta in ***American Home Assurance Co. et al. v. Nichols***, [1990] 1 S.C.R. 801, a decision on which Simmons J.A. relied. In ***Nichols***, the Court held that a lawyer who was sued for fraud was not entitled to have his defence paid by his insurer because fraud was excluded from coverage under the policy. McLachlin J. (as she then was) explained the duty to defend, at pp. 811-12:

> Other Canadian authority overwhelmingly supports the view that normally the duty to defend arises only with respect to claims which, if proven, would fall within the scope of coverage provided by the policy: see *Dobish v. Garies* (1985), 15 C.C.L.I. 69 (Alta. Q.B.); *Thames Steel*

> *Construction Ltd. v. Northern Assurance Co.*, [1989] I.L.R. 1-2399 (Ont. C.A.); *Vancouver General Hospital v. Scottish & York Insurance Co.* (1987), 15 B.C.L.R. (2d) 178 (B.C.S.C.)
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> The same view generally prevails in the United States: see *Couch on Insurance* (2nd ed. 1982), vol. 14, para. 51:45, and authorities cited therein. Only *Conner v. Transamerica Insurance Co.*, 496 P.2d 770 (Okla. 1972), was cited to contrary effect. ...
>
> ... [T]he adoption of the course chosen in *Conner* would give rise to practical difficulties. The insurer would always be obliged to defend regardless of how far outside the scope of the policy the claims might be, subject only to the possibility of recovery back in the event the claim ultimately succeeded only on grounds outside the scope of the policy. This raises policy questions of whether others in the insurance pool should be taxed with providing defences for matters outside the purview of the policy. Moreover, conflicts of interest may result. The insurer's interest in defending a claim is related to the possibility that it may ultimately be called upon to indemnify the insured under the policy. It is in the insurer's interest that if liability is found, it be on a basis other than one falling under the policy. Requiring the insurer to defend claims which cannot fall within the policy puts the insurer in the position of having to defend claims which it is in its interest should succeed. The respondent suggested that this potential conflict could be avoided if the insured was able to retain his own lawyer, with the cost to be borne by the insurer. However, this would not end the difficulty. An insurer would be understandably reluctant to sign a "blank cheque", and cover whatever costs are borne by whatever lawyer is retained, no matter how expensive. Yet the insurer could not challenge any of these expenses without raising precisely the same conflict. For this reason, the practice is for the insurer to defend only those claims which potentially fall under the policy, while calling upon the insured to obtain independent counsel with respect to those which clearly fall outside its terms.
>
> I conclude that considerations related to insurance law and practice, as well as the authorities, overwhelmingly support the view that the duty to defend should, unless the contract of insurance indicates otherwise, be confined to the defence of claims which may be argued to fall under the policy. That said, the widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy.

[17] Of course, whether and the extent to which the duty to defend is triggered in any given case will depend on the facts of that case. ***Papapetrou*** does not preclude a court from finding that a contractor's insurer must defend

the occupier of the premises with respect to the entire claim. But that duty would only arise where the claim does not disclose allegations of negligence on the part of the occupier that are distinct from the allegations against the contractor.

[18] The scope of the duty to defend will turn on an examination of the allegations in the claim. In ***Non-Marine Underwriters, Lloyd's of London v. Scalera***, 2000 SCC 24, [2000] 1 S.C.R. 551, Iacobucci J. explained the relevance of the pleadings in determining the duty to defend:

> 80 The general rule regarding the role of the pleadings is well stated by Wallace J. in *Bacon v. McBride* (1984), 6 D.L.R. (4th) 96 (B.C.S.C.), at p. 99:
>
> > The pleadings govern the duty to defend – not the insurer's view of the validity or nature of the claim or by the possible outcome of the litigation. If the claim alleges a state of facts which, if proven, would fall within the coverage of the policy the insurer is obliged to defend the suit regardless of the truth or falsity of such allegations.

[19] Two decisions of the Supreme Court provide guidance as to how to approach the task of interpreting the pleadings. In ***Monenco Ltd. v. Commonwealth Insurance Co.***, 2001 SCC 49, [2001] 2 S.C.R. 699, Iacobucci J. said:

> 31 Where pleadings are not framed with sufficient precision to determine whether the claims are covered by a policy, the insurer's obligation to defend will be triggered where, on a reasonable reading of the pleadings, a claim within coverage can be inferred. This principle is congruent with the broader tenets underlying the construction of insurance contracts, namely the *contra proferentem* rule, and the principle that coverage provisions should be construed broadly, while exclusion clauses should receive a narrow interpretation. ...
>
> [emphasis added]

[20] More recently, in ***Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada***, 2010 SCC 33, [2010] 2 S.C.R. 245, Rothstein J. commented:

> 20 In examining the pleadings to determine whether the claims fall within the scope of coverage, the parties to the insurance contract are not bound by the labels selected by the plaintiff (*Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at paras. 79 and 81). The use or absence of a particular term will not determine whether the duty to defend arises. What is determinative is the true nature or the substance of the claim (*Scalera*, at para. 79; *Monenco*, at para. 35; *Nichols*, at p. 810).

[21] While the pleadings govern the duty to defend, in determining the nature of the claim, the court can look beyond the statement of claim to some extent. Extrinsic evidence may be considered where it has been explicitly referred to in the pleadings. For example, in this case, the parties have filed the snow maintenance agreements which are referred to in the claim. However, evidence of facts that may be contentious is not admissible. As Iacobucci J. warned in ***Monenco***:

> 37 ... [W]e cannot advocate an approach that will cause the duty to defend application to become "a trial within a trial". In that connection, a court considering such an application may not look to "premature" evidence, that is, evidence which, if considered, would require findings to be made before trial that would affect the underlying litigation.

Application to Facts in this Case

[22] The statement of claim in this case does not allege the time of day when Ms Castles fell, a fact which may be significant in view of the different obligations under the snow maintenance agreements with respect to daytime and nighttime snow maintenance. However, even without the time of the fall being pleaded, it is implicit in the claim that there are distinct allegations that, if proven, may

result in liability against RBC but not against Bee-Clean or Lawn Boys. The claim alleges that the build-up of ice that caused the fall resulted from freezing rain during nighttime hours. And the claim alleges a failure to perform inspections and address ice problems "in a timely fashion, particularly having regard to the fact that the ATM was available for use by customers on a 24 hour basis." As I said, the snow maintenance agreements provided for different levels of service during daytime and nighttime hours. In my view, the allegations in the claim establish the possibility of a stand-alone basis for liability on the part of RBC for not putting into place reasonable systems for nighttime snow clearance. This will no doubt create a conflict between RBC and the snow contractors in the presentation of their respective defences. This is precisely the type of conflict to which McLachlin J. refers in ***Nichols***.

[23] RBC is a named insured in the Aviva policy. But, in my view, Aviva's duty to defend RBC extends only to the allegations related to Bee-Clean's performance or failure to perform the obligations under the snow maintenance agreement. That is the limit of Bee-Clean's duty to indemnify under the snow maintenance agreement and it is the limit stipulated by the terms of the Aviva policy. RBC cannot look to Bee-Clean or Aviva to defend it with respect to allegations related to its broader duty as occupier.

[24] Bee-Clean and Aviva argue that the defence of Bee-Clean and whatever duty they owe to defend RBC flows through to Lawn Boys (and Economical) because Lawn Boys undertook all of Bee-Clean's obligations under the snow

maintenance agreement and agreed to indemnify Bee-Clean for liability related to those obligations.

[25] Bee-Clean is a named insured in the Economical policy and Economical concedes that it has a duty to defend Bee-Clean with respect to liability based on the actions of Lawn Boys in the performance of the snow maintenance agreement. However, it argues that there are allegations in the claim that raise the possibility of liability being found on the part of Bee-Clean that are not related to the actions of Lawn Boys and are not covered by the policy. For example, Bee-Clean's contract with RBC contained the following clause:

> [T]he contractors will also respond on site within 2 hours to any request from a CBRE [the property manager] representative to provide Services.

[26] The same clause was included in the subcontract with Lawn Boys except that Bee-Clean is substituted for CBRE. Economical argues that the ice build-up may have been caused by Bee-Clean's failure to convey to Lawn Boys a request for service from CBRE. It argues that, if that was the case, there may be liability on the part of Bee-Clean but not Lawn Boys.

[27] In my view, the possibility that this fact may come out in evidence at trial does not create a stand-alone basis for liability that would limit the extent of Economical's duty to defend Bee-Clean. The duty to defend is based on allegations in the pleadings. There is nothing in the claim or crossclaims that raises this as a possible issue. Nothing in the pleadings suggests a distinct basis for liability between the snow contractor, Bee-Clean, and the snow subcontractor, Lawn Boys. As stated in ***Monenco***, whether a claim is covered

by the duty to defend should be based on a reasonable reading of the pleadings and a broad reading of the coverage provisions of the policy. A reasonable reading of the claim here suggests that insofar as Bee-Clean and Lawn Boys are concerned the essence of the claim is the same.

[28] In arguing that there is a limited duty to defend Bee-Clean, Economical relies on the endorsement of Belobaba J. in ***Tinkess v. N.M. Davis Corporation Ltd et al,*** 2007 CanLII 8644 (ONSC). In that case, the court held that there was no obligation on the insurer to defend claims related to the negligence of the operator of the parking lot where the plaintiff had slipped because the snow removal agreement allowed for the possibility that the ice build-up was not caused by the failure of the contractor to carry out the terms of the contract. But in that case, there was no subcontractor who had assumed the obligations of the contractor. The distinction between the potential liability of the parking lot operator and the contractor in ***Tinkess*** is analogous to the distinction I have made between the liability of RBC (or its property manager) and the contractor in this case.

[29] The same distinction is not apparent between the contractor and the subcontractor here. Rather, the pleadings and the snow maintenance agreements suggest that the obligations of Bee-Clean and Lawn Boys are indistinguishable. Lawn Boys assumed the obligations of Bee-Clean under the snow maintenance agreement and any liability associated with carrying out those obligations. In fact, the possibility of a subcontract is contemplated by the

agreement between RBC and Bee-Clean. And the specifications under the snow maintenance agreement between Bee-Clean and Lawn Boys are a mirror image of the agreement between RBC and Bee-Clean.

[30] Economical makes another argument as to why its duty to defend Bee-Clean is limited. It says that to the extent that the claim alleges negligence on the basis that the defendants did not employ reasonable systems for snow maintenance, there may be a basis for liability on the part of Bee-Clean (as well as RBC) but not on the part of Lawn Boys because the specifications for snow maintenance in the agreements may have been based on advice given to RBC by Bee-Clean. Again, the duty to defend must be based on the pleadings and there is nothing in the pleadings, in particular in the crossclaim of RBC against Bee-Clean, to suggest that Bee-Clean provided such advice. As I said, the duty to defend is based on the allegations on the pleadings, not on speculation as to what evidence may surface at trial.

[31] I conclude that Economical has a duty to defend Bee-Clean with respect to all aspects of the claim.

[32] Insofar as RBC is concerned, because Lawn Boys neglected to name RBC as an insured in its policy with Economical, as it was required to do under the subcontract with Bee-Clean, Economical has no duty to defend RBC. However, Lawn Boys' failure to name RBC would give Bee-Clean a right to damages against Lawn Boys for the cost to defend RBC. The quantum of damages would be the amount that Bee-Clean is required to pay towards RBC's defence of the claim.

As I have explained, Bee-Clean's obligation extends only to defending the claim with respect to the manner in which Lawn Boys performed or failed to perform the service contract (see ***Papapetrou***, at pars. 34 & 39-40).

Conclusion

[33] Bee-Clean is entitled to a declaration that Economical has a duty to defend it in the Castles' claim and must reimburse it for its defence costs to date.

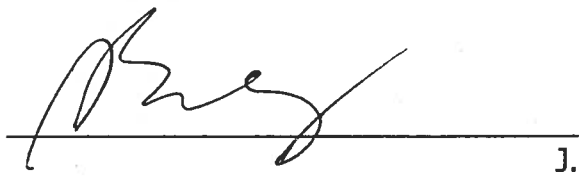
[34] I have found that Aviva has a duty to defend RBC but only insofar as that defence relates to the performance of the service contract. RBC would be responsible for its own defence with respect to other aspects of the claim. As I have said, there is a conflict between RBC's defence as it relates to the performance of that contract and its defence as it relates to its obligations as occupier. Counsel made no submissions as to how to allocate defence costs between RBC and Aviva but it makes sense that this decision be deferred until the proceedings in the underlying action are complete. In Brown, **Insurance Law in Canada** (looseleaf ed., vol. 2, at 18-21 – 18-22), the authors explain the difficulty in attempting to allocate defence costs at the outset of the proceedings where there are multiple theories of liability not all of which are covered by the insurance policy:

> ... A number of years ago, some Canadian courts did permit pre-trial allocation of defence costs in situations where multiple theories of liability were alleged. In 1996, however, the Ontario Court of Appeal declined to allocate defence costs in advance of trial where there were allegations of multiple theories of liability: *Daher v. Economical Mutual Insurance Company* [(1996), 31 O.R. (3d) 472 (Ont. C.A.)]. ...
>
> ... The court declined to allocate defence costs at this stage of the proceeding since it was not practical to split the costs of the defence, and

> since there was no evidentiary foundation to permit allocation. A number of subsequent lower court decisions have followed this approach and have declined to allocate defence costs in advance of trial where there are multiple theories of liability. Canadian courts are generally reluctant to allocate defence costs before trial or settlement in such cases.

[35] I have found that Lawn Boys would be liable to pay damages to Bee-Clean for any cost it incurs to defend RBC with respect to those parts of the claim regarding performance of the service contract. An assessment of those damages would also have to wait until the proceedings in the underlying action are complete. I note that Lawn Boys' obligation is based on the contract between Lawn Boys and Bee-Clean. However, Aviva has a duty to defend RBC that is based on the insurance policy. I heard no submissions on whether Aviva has a subrogated right to claim damages against Lawn Boys in that regard, so I make no comment on it.

[36] Costs may be spoken to if they cannot be agreed upon.



J.