CITATION: Amello v. Bluewave Energy Limited Partnership, 2014 ONSC 4040
COURT FILE NO.: CV-11-421309
DATE: 20140708

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
JOSEY AMELLO and FRANKIE AMELLO Plaintiffs	)	*Hugh M. MacKenzie*, for the Plaintiffs Josey Amello and Frankie Amello
- and -	)	
BLUEWAVE ENERGY LIMITED PARTNERSHIP, PARKLAND INCOME FUND and DANIEL CHARLES TRANSPORT LTD. Defendants	)	*Eric J. Adams*, for the Defendants Bluewave Energy Limited Partnership and Parkland Income Fund *David Zarek* and *Oneal Banerjee*, for the Defendant Daniel Charles Transport Ltd.
	)	**HEARD**: June 12, 2014

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] There was an oil spill in the basement of Josey and Frankie Amellos' home. Oil seeped from a leak in a tank that was maintained by Bluewave Energy Limited Partnership ("Bluewave"), a division of Parkland Income Fund ("Parkland"). Bluewave was also the oil supplier.

[2] The Amellos sued Parkland, Bluewave, and Daniel Charles Transport Ltd., the transportation company that delivered the oil. The Defendants asserted crossclaims one against the other.

[3] There was a Trucking Services Agreement between Bluewave and Daniel Charles Transport that obligated the transportation company, among other things, to hold harmless and indemnify Bluewave for costs and legal fees that arose from an oil spill. Further, under the Trucking Services Agreement, Daniel Charles Transport was obliged to take out liability insurance naming Bluewave as an additional insured.

[4] Daniel Charles Transport says that it did not understand the scope of the indemnity and the hold harmless provisions in the Trucking Services Agreement.

[5] Daniel Charles Transport did take out liability insurance - for itself - with State Farm Fire and Casualty Company - but it omitted to add Bluewave as a co-insured.

[6] Bluewave does have its own liability insurance with Liberty Mutual Insurance Company, which is paying for the cost of Bluewave's and Parkland's defence to the Amellos' action. However, Bluewave, (or more likely, its insurer) wants the costs of the defence paid by Daniel Charles Transport, and so Bluewave brings a motion for a partial summary judgment seeking an Order obliging Daniel Charles Transport to pay for it's defence, which has cost $34,484.81, so far.

[7] Daniel Charles Transport (or more likely its insurer) refuses to pay for Bluewave's defence, and raising numerous arguments, it resists the motion for summary judgment.

[8] Moreover, Daniel Charles Transport brings a motion to withdraw admissions made in a Response to a Request to Admit. And, relying on a Pierringer Settlement Agreement it negotiated with the Amellos, it brings a cross-motion (similar to a bar order) for a judgment dismissing Bluewave's Crossclaim.

[9] Daniel Charles Transport argues that the admissions should be withdrawn because its lawyer did not review the Response to the Request to Admit with Daniel Watts, the principal of Daniel Charles Transport, who did not give instructions to release the Response with its admissions.

[10] Although it did not press the argument during the hearing of the motions, Daniel Charles Transport submitted that the Trucking Services Agreement was not an enforceable agreement because of *non est factum* or because the Agreement was induced by misrepresentation or because Bluewave did not explain the indemnity provisions to its transportation contractor.[1]

[11] Daniel Charles Transport did, however, press the argument that if the Trucking Services Agreement is an enforceable agreement, then, properly interpreted, it does not require Daniel Charles Transport to pay for a defence or to indemnify Bluewave for its own negligence or mistakes, including its failure to maintain the Amellos' oil tank.

[12] Further, and in the alternative, Daniel Charles Transport submits that if it is liable to pay for a defence, then its liability to Bluewave should be reduced for two reasons: first, Bluewave's defence costs are being shared by Parkland; and second, Bluewave's claim for defence costs is subject to the principles regarding equitable contribution between insurers covering the same risk.

[13] For the reasons that follow, I come to the following conclusions:

- First, I do not grant Daniel Charles Transport leave to withdraw its admissions. Its motion for leave to withdraw the admissions is dismissed.
- Second, Bluewave should have a partial summary judgment for 50% of the costs of its defence of the Amellos' action to date and a declaration that Daniel Charles Transport is liable to pay 50% of the costs of Bluewave's defence in the future.

[1] See *Tilden Rent-A-Car v. Clendenning* (1978), 18 O.R. (2d) 601 (H.C.J.).

- Third, the motion to dismiss Bluewave's Crossclaim should be dismissed.

B. OVERVIEW

[14] By way of overview, the reasons for the above conclusions can be summarized as follows.

[15] First, with respect to its motion to withdraw admissions, Daniel Charles Transport has not satisfied the criteria for leave to withdraw its Response to the Request to Admit.

[16] Second, with respect to Bluewave's motion for payment of defence costs, Daniel Charles Transport contracted to obtain insurance for Bluewave but failed to do so. The missing insurance coverage would have provided Bluewave with an indemnity for the costs of defending the Amellos' claim if the allegations in the Amellos' Statement of Claim would have engaged coverage. The allegations in the Amellos' Amended Statement of Claim do engage coverage for a defence for Bluewave, and therefore, there is no genuine issue requiring a trial, and Bluewave has proven a claim for damages against Daniel Charles Transport for payment of the defence costs.

[17] The measure of Bluewave's damages is equal to the amount of money that would put it in the position it would have been had Daniel Charles Transport performed its promise to obtain insurance including coverage for the costs of defence.

[18] In this regard, had Daniel Charles Transport obtained insurance for Bluewave that included a duty to defend as required, then because Bluewave has some insurance of its own that includes a duty to defend, the principle of equitable contribution would have been engaged; that is to say, the missing other insurer of Bluewave would have been responsible for 50% of the indemnity for the risks that were to be insured for Bluewave by that other insurer. Thus, using money to put Bluewave in the position it would have been in had the contract been performed, Daniel Charles Transport is liable for 50% of the defence costs incurred to date ($17,242.41) and 50% of the defence costs on an ongoing basis.

[19] To be clear, the above analysis does not answer - and I do not answer the question of whether Daniel Charles Transport must indemnify Bluewave for its own negligence or mistakes, including its failure to maintain the Amellos' oil tank.

[20] The duty to defend and the obligation to indemnify are separate obligations, and the duty to defend is determined prospectively based on the pleaded allegations, while the duty to indemnify is triggered later if the allegations are actually proven.

[21] In the case at bar, whether there are damages commensurate with the duty to indemnify will depend upon interpreting the scope of Daniel Charles Transport's obligations under the Trucking Services Agreement and upon the findings of fact at a summary judgment motion or at a trial about who was liable for the spill at the Amellos' home. Bluewave's present motion for summary judgment, however, involves only its claim for damages for the costs of defending the Amellos' action. For the purposes of the motions before the Court, I need only determine whether a duty to defend has been triggered.

[22] Turning to the effect of the Pierringer Agreement between the Amellos and Daniel Charles Transport, under this Agreement, the Amellos have agreed to be responsible for the costs of Bluewave's defence, and the Amellos have agreed to confine their remaining claims against

Bluewave to the individual or several liability of Bluewave. Daniel Charles Transport, therefore, argues that because of the Pierringer Agreement, it is appropriate to dismiss Bluewave's Crossclaim.

[23] This argument based on the Pierringer Agreement, however, is fallacious, because it ignores that Bluewave's Crossclaim is premised on Daniel Charles Transport being liable to indemnify Bluewave for is several; i.e. its own discrete liability. Thus, the Pierringer Agreement does not make the Crossclaim meaningless, and it should not be dismissed at this juncture of the proceedings.

C. DANIEL CHARLES TRANSPORT'S MOTION TO WITHDRAW ADMISSIONS

[24] Before describing the factual background for the competing motions, it is necessary to address Daniel Charles Transport's motion for an Order withdrawing its admissions.

[25] On June 25, 2013, Daniel Charles Transport's lawyer of record delivered a Response to the Request to Admit.

[26] Daniel Watts, the President of Daniel Charles Transport, deposed that its lawyer did not review the Request to Admit with him and that he did not give instructions to deliver the Response. Mr. Watts deposed that he would not have admitted the truth of any of the facts admitted in the Response, nor would he have authenticated any of the documents contained in the Response, without first reviewing the Request to Admit and the Response with Daniel Charles Transport's lawyer in person.

[27] It is to be noted that Mr. Watts does not deny the truth of the admissions; rather, he coyly says that he would not have made the admissions without reviewing the Request to Admit in person. There is no suggestion that the lawyer made a mistake in making the admissions, and there is no explanation as to why the admissions should be withdrawn apart from the absence of prior review with a lawyer. There is no suggestion that the lawyer had not been adequately instructed about the background facts before drafting the Response to the Request to Admit and misunderstood those instructions.

[28] A lawyer whose retainer is established in a particular proceeding may bind the client in those proceedings unless the client has limited the lawyer's authority and the opposing side has knowledge of the limitation.[2]

[29] Under rule 51.05, an admission made in response to a request to admit may be withdrawn on consent or with leave of the court. Bluewave does not consent, and thus the issue is whether the Court should grant leave to withdraw the Response to the Request to Admit.

[30] The case law establishes that before the Court will grant leave for an admission to be withdrawn, the person seeking the withdrawal must: (1) raise a triable issue; (2) provide a reasonable explanation for the admission and for its withdrawal; and (3) establish that the withdrawal will not result in non-compensable prejudice.[3]

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[2] *Scherer v. Paletta*, [1966] 2 O.R. 524 (C.A.).

[3] *Antipas v. Coroneos*, [1988] O.J. No. 137 (H.C.J.); *BNP Paribas (Canada) v. Donald S. Bartlett Investments Ltd.*, 2012 ONSC 5315 (S.C.J.); *Szelazek Investments Ltd. v. Orzech*, [1996] O.J. No. 336 (C.A.); *147619 Canada Inc. v. Chartrand*, [2006] O.J. No. 1877 (C.A.).

[31] In my opinion, it would not be appropriate to grant Daniel Charles Transport leave to withdraw its admissions. The first criterion for leave may have been satisfied, but the other criteria remain unsatisfied.

[32] With respect to the first criterion, I note that it would seem that the major admission that Daniel Charles Transport wishes to withdraw is about the validity of the Trucking Services Agreement. It wishes to withdraw this admission in order to advance allegations of *non est factum* and misrepresentation. When I remarked during argument that typically these are very difficult defences to succeed by a corporation and often do not raise genuine issues for trial, Daniel Charles Transport conceded that it would not press this argument, but rather it would focus on the issues associated with the interpretation of the Trucking Services Agreement.

[33] Thus, the withdrawal of the admissions seems purposeless, but in any event, I do not grant Daniel Charles Transport leave to withdraw its admissions. It did not provide a reasonable explanation or justification for withdrawing the admissions and did not establish that the withdrawal would not result in non-compensable prejudice.

D. FACTUAL BACKGROUND

Introduction

[34] The factual background to the remaining two motions before the Court have four major components; namely: first, the Trucking Services Agreement between Bluewave and Daniel Charles Transport, which obligated Daniel Charles Transport to obtain liability insurance for itself and for Bluewave; second, Bluewave had insurance of its own with Liberty Mutual; third, there was an oil spill at the Amellos' home and the Amellos sued Parkland, Bluewave, and Daniel Charles Transport, which made crossclaims respectively; and fourth, pursuant to a Pierringer Agreement, the Amellos have settled their claims against Daniel Charles Transport.

[35] The details of this factual background follow.

1. The Trucking Services Agreement

[36] Pursuant to a Trucking Services Agreement dated October 31, 2008, Daniel Charles Transport agreed to deliver petroleum products to Bluewave's customers. Under the Agreement, Daniel Charles Transport promised to have and maintain the necessary equipment to provide for the containment and clean-up of oil spills. Daniel Charles Transport was responsible for the safety performance and training of drivers, including "Environment and Products Handling", as well as "spill containment" and "emergency response".

[37] The following provisions from the Trucking Services Agreement are pertinent to Bluewave's motion for payment of its defence costs.

> **9. INDEMNITY**
>
> Except if specifically otherwise provided herein, Bluewave has no right to control or direct the conduct or management of Contractor's business or operations. In performing its obligations hereunder Contractor shall act as an independent contractor, in its own name and not in the name of, or as an agent of Bluewave. Contractor will indemnify Bluewave against any and all claims and liability for injury to or death of persons (including, without restriction, Contractor's employees) or damage to property (including, without restriction, Contractor's property) caused

by or happening in connection with Contractor's business or operations or any act or omission of Contractor or Contractor's employees, including those performed in execution of this Agreement.

16. SPILLS

Contractor must notify Bluewave immediately and make a report of any spills, product, contamination, property damage or accidents, including those causing injuries to or death of any person(s) and relating to or resulting from the transportation, handling and delivery of products under this Agreement (an "Incident"). The Contractor will bear the costs related to any damages such an Incident might cause. …

In such foregoing event, Contractor shall be liable for any defect any and all acts or actions necessary with respect to such Incident and the response, at its sole cost and risk, and Contractor hereby specifically

> (a) indemnifies and holds harmless Bluewave, its directors and officers, agents, contractors and employees from and against all losses, damages, injuries, liabilities (including, without limitation, strict and absolute liability), claims, demands, costs, fines, penalties, actions, suits and other proceedings and expenses in connection therewith (including counsel fees and expenses) by whomever brought or presented, including Contract.
>
> (b) agrees that it is liable to Bluewave, its officers and agents, contractors, and employees for all losses, costs, damages and expenses whatsoever which Bluewave, its officers and directors, agents, contractors or employees may suffer, sustain, pay or incur as a result of or in connection with the acts or omissions of any kind of Bluewave, its agents, contractors or employees in performing, purporting to perform, or failing to perform the response to the Incident and whether or not caused by the negligence or wilful misconduct of Bluewave, its agents, contractors or employees. For the purposes of this paragraph, any act or omission of Bluewave, its employees or agents, shall be deemed not to be negligence or wilful misconduct if it is done at the instruction or with the concurrence of the Contractor, its employees, contractors or agents.

15. INSURANCE:

During the term hereof and any renewal, Contractor agrees to maintain to the benefit of Bluewave the following insurance policies:

> (a) Comprehensive General Liability insurance (including coverage for all non-owned automotive units) including employers', products and contractual liability, specialty and licensed vehicles, tortious liability, contractors protective liability, products and completed operations liability, and any other extensions standard to the industry, with a combined single limits of not less than two million dollars ($2,000,000.00) for each occurrence for bodily injury, death or property damage and also including sudden and accidental pollution coverage with a minimum of 72 hours discovery/reporting provision in a sublimit of not less than one million dollars ($1,000,000.00) inclusive;

35. ENTIRETY

This Agreement comprises the entire agreement between Bluewave and Contractor and there are no agreements, understandings conditions or representations, oral or written, express or implied, concerning the subject matter or in consideration hereof, that are not merged herein or superseded hereby. The parties hereby agree to the terms of all schedules and addenda attached hereto and such schedules and addenda shall form part of this Agreement.

[38] By way of Response to the Request to Admit dated June 25, 2013, Daniel Charles Transport admitted that it breached its covenant to insure Bluewave. It admitted that it entered into the Trucking Services Agreement and that under the Agreement it was permitted to transport by tank truck petroleum products to Bluewave's customers. It admitted that under s. 15 of the Agreement, it was obliged to maintain Commercial General Liability insurance, including sudden and accidental pollution coverage, with limits of $2 million dollars and that it was required to name Bluewave as an additional insured under the policy.

[39] Daniel Charles Transport admitted that it obtained Commercial General Liability Insurance with State Farm Fire and Casualty Company under a policy bearing policy number 90-E7-5987-7 but that it did not name Bluewave as an additional insured under the policy.

[40] The State Farm Fire and Casualty Company policy has an "Other Insurance" clause which states as follows:

> **6. Other Insurance**
> b. Section II
>
> (1) the insurance provided under coverage L-Business Liability is excess insurance over any other insurance not written by us which would apply if this policy had not been written.
>
> (2) the total insurance provided under coverage L-Business Liability and any other policy written by us will not exceed the largest limit of insurance applicable under any one of these policies written by us.
>
> (3) items b. (1) and b. (2) above do not apply to insurance written specifically as excess to cover over the Limits of Insurance applicable to Section II of this policy.
>
> (4) the insurance provided under coverage L-Business Liability is excess over any property insurance (including any deductible portion) available to the insured that insures for direct physical loss or damage to property in the care, custody or control of the insured including, but not limited to, Fire, Extended Coverage, Builders Risk, Installation Risk or similar coverage.
>
> (5) when this insurance is excess, we will have no duty under coverage L-Business Liability to defend any claim or suit that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

2. Bluewave's Own Insurance Coverage

[41] Bluewave did have its own insurance. As noted in the introduction, it was insured by Liberty Mutual. The Liberty Mutual policy provides coverage to Bluewave in the amount of $20,000,000 during the policy period of September 29, 2008 to September 29, 2009. This policy is responding to the claims against Bluewave in the Amello litigation.

[42] The Liberty Mutual policy contains an "Other Insurance" clause, as follows:

> **Other Insurance**
>
> Where other insurance may be available for "loss" covered under this policy, you shall promptly provide us with copies of such policies.
>
> If other valid and collectable insurance is available to the "insured" for "loss" we cover under this policy, our obligations are limited as follows:

Primary Insurance

This insurance is primary and our obligations are not affected unless any of the other insurance is also primary. In that case we will share with all such other insurance by the method described in Method of Sharing described below.

Method of Sharing

If all of the other insurance permits contribution of equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the "loss" remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method each insurer's share is based on the ratio of its applicable limits of insurance to the total applicable limits of insurance of all insurers.

Excess Insurance

This insurance is Excess where:

> (a) you are an "insured" on an insurance policy that applies to "professional services" or "covered operations" performed at a specific job site and the insurance policy applies to a specific job site, or
>
> (b) valid and collectible insurance provided to you by any person or organization working under contract for you, or under which you are included as an insured.

When the insurance is excess over other insurance, we will pay only our share of the amount of the "loss", if any, that exceeds the sum of the total amount that all other such insurance would pay for the "loss" in the absence of this insurance, and of all deductible and self-insured amounts under all that other insurance. We will share the remaining "loss" if any, with any other insurance that is not described in this Excess Insurance Provision and was not purchased specifically to apply in excess of the limits of insurance shown in the Declarations of this Insurance.

3. The Oil Spill and the Amellos' Action

[43] In December 2001, the Amellos contracted with Thermoshell Inc. for the supply of furnace oil to their property. The Oil Delivery Contract was in effect from year-to-year until terminated. The Amellos also entered into a Parts and Service Plan Agreement with Thermoshell.

[44] Subparagraph 1(b) of the Service Agreement required Thermoshell to inspect the condition of the Amellos' oil tank; it stated:

> 1(b) Thermoshell shall provide annual conditioning and visual inspection of the tank and associated connections during scheduled working hours as required, including cleaning and inspection of the furnace, flue pipe and oil burner, and adjustment of the oil burner to ensure safe, proper performance.

[45] In November 2006, Bluewave, which is a division of Parkland, purchased Thermoshell. Bluewave was assigned the obligations owed to the Amellos under the Service Agreement and the Oil Delivery Contract.

[46] On September 17, 2009, Daniel Charles Transport delivered oil to the Amellos' home. Later that day, there was a leak from an oil tank in the Amellos' home causing extensive damage. The Amellos allege that the oil leak occurred after the delivery by an employee of Daniel Charles Transport.

[47] On March 2, 2011, the Amellos issued a Statement of Claim against Bluewave and Parkland. Subsequently, Daniel Charles Transport was added as a Defendant.

[48] In their Amended Statement of Claim, the Amellos allege, among other things, that Bluewave's subcontractor; i.e., Daniel Charles Transport failed to contact the Amellos in advance of the delivery of oil, trespassed onto the Amello property, jumped a six-foot metal fence and failed to deliver the oil in a good and workmanlike manner. They allege that the Defendants failed to comply with conditions or inspection standards in the Fuel Oil Code and Canadian Oil Heating Association Publications and they had the last clear chance to condition, inspect, replace or red tag the oil tank but failed to do so. The Amellos allege that Bluewave and / or Daniel Charles Transport failed to consider fuel oil consumption records before depositing a substantial quantity of oil. The Amellos allege that Bluewave and Daniel Charles Transport failed to ensure that the oil tank was fit.

[49] Bluewave argues, and I agree with the argument, that the allegations in the Amended Statement of Claim would constitute circumstances that: (a) an incident was caused by or happened in connection with Daniel Charles Transport's business or operations; (b) the oil spill resulted from the transportation, handling and delivery of product under the Trucking Services Agreement; and (c) the incident would have been covered by a commercial general liability, including sudden and accident pollution coverage.

[50] On November 1, 2011, Bluewave and Parkland delivered a Statement of Defence and Crossclaim. They deny liability and place the blame on Daniel Charles Transport. Bluewave alleges that Daniel Charles Transport was an independent contractor acting beyond any actual or ostensible agency for Bluewave.

[51] In the Crossclaim, Bluewave claims contribution and indemnity. It relies on the indemnity provision in the Trucking Services Agreement. Paragraphs 17 to 20 of the Crossclaim state:

> 17. Bluewave states that pursuant to the Trucking Agreement, as identified in Bluewave's Statement of Defence, herein, Daniel Charles agreed but has refused to defend, hold harmless and indemnify Bluewave in relation to the allegations such as those contained in the Amended Statement of Claim and in the circumstances that give rise to this claim.
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> 18. Bluewave states and the fact is that Daniel Charles is obliged under the Trucking Agreement, but have refused to obtain and maintain, throughout the term of the Trucking Agreement insurance for the operation of Daniel Charles, including, *inter alia*, in relation to the allegations in the Amended Statement of Claim and in the circumstances that give rise to this claim.
>
> 19. As a result of these past and ongoing breaches of the terms of the Trucking Agreement, Bluewave will suffer damages to the extent of all losses, damages, liabilities, obligations, costs, expenses, judgments, orders, fines, penalties, amounts paid in settlement, legal fees, adjusters' fees, court costs and all and any expenses arising directly or indirectly out of, or in connection with adjusting the Plaintiff's claim, defending the main action and prosecuting the Crossclaim.

> 20. Further, Bluewave has suffered and continues to suffer damages in the amount of all legal fees, adjusters' fees, court costs and all related expenses incurred to defend the allegations in the Amended Statement of Claim.

[52] On March 9, 2012, Daniel Charles Transport delivered a Statement of Defence denying negligence. Daniel Charles Transport delivered a Crossclaim against Parkland and Bluewave for contribution and indemnity. In its pleading, Daniel Charles Transport does not challenge the enforcement of the Trucking Services Agreement.

[53] It is now known that the leak came from a pinhole in the Amellos' oil tank. Bluewave admits that Daniel Charles Transport was not responsible for inspecting and maintaining the oil tank.

4. The Pierringer Agreement

[54] On March 17, 2014, the Amellos agreed to settle their claim against Daniel Charles Transport pursuant to a Pierringer Agreement.

[55] Under the Pierringer Agreement, Daniel Charles Transport is let out of the Amellos' action, but it agrees to co-operate with the Amellos by making its relevant documents and witnesses available for the purposes of the action as against Bluewave.

[56] The Pierringer Agreement fully and finally releases Daniel Charles Transport from any and all claims made by the Amellos.

[57] Under the Pierringer Agreement, if Daniel Charles Transport is found liable to pay Bluewave's costs of any crossclaims, those costs are payable by the Amellos.

[58] Under the Pierringer Agreement, the Amellos will only claim against Parkland and Bluewave for their several liability that is independent of the liability of Daniel Charles Transport.

[59] Paragraphs 7 and 10 of the Pierringer Agreement state:

> 7. The Plaintiffs and the Settling Defendant [Daniel Charles], acknowledge that the Settling Defendant may be found liable to pay the Non-Settling Defendants [Bluewave] its' costs of any crossclaims. The liability, if any, for those costs will be borne solely by the Plaintiffs.
>
> 10. The Plaintiffs shall hold the Settling Defendant [Daniel Charles] harmless in respect of the Non-Settling Defendants [Bluewave] for any crossclaims. As a result, the Non-Settling Defendants are not exposed to joint and several liability but only to several liability.

[60] Bluewave was advised of the details of the Pierringer Agreement omitting the monetary sums.

E. DISCUSSION AND ANALYSIS

1. Liability to Pay Defence Costs

[61] Bluewave brings a motion for summary judgment with respect to Daniel Charles Transport's failure to obtain insurance for Bluewave, including coverage for the cost of defending the Amellos' action.

[62] There is no genuine issue requiring a trial that Daniel Charles Transport was obliged to obtain insurance coverage for Bluewave, including coverage for the costs of defending claims against Bluewave.

[63] Under s. 15 of the Trucking Service Agreement, Daniel Charles Transport promised to maintain for the benefit of Bluewave a Comprehensive General Liability insurance policy including coverage products and contractual liability, tortious liability, and any other extensions standard to the industry, with a combined single limits of not less than two million dollars for each occurrence of property damage and also including sudden and accidental pollution coverage with a minimum of 72 hours discovery/reporting provision in a sublimit of not less than one million dollars inclusive.

[64] Under s. 16(a) of the Trucking Service Agreement, Daniel Charles Transport agreed to bear the costs related to damages of any spills, property damage, or accidents, relating to or resulting from the transportation, handling and delivery of products under the Agreement. Daniel Charles Transport agreed to be liable and to indemnify and hold Bluewave harmless from all losses, damages, claims, demands, and costs, including counsel fees and expenses.

[65] Further, under s. 16(b) of the Trucking Service Agreement, Daniel Charles Transport agreed that it is liable to Bluewave for all losses, costs, damages and expenses that Bluewave may suffer as a result of or in connection with the acts or omissions of any kind of Bluewave employees in performing, purporting to perform, or failing to perform the response to the transportation, handling, and delivery of products under this Agreement.

[66] Thus, Daniel Charles Transport promised to obtain insurance or promised to hold Bluewave harmless for any liability related to any damages of any spills, property damage, or accidents relating to the delivery of products under the Agreement. There is no genuine issue requiring a trial that Daniel Charles Transport breached its contract to obtain insurance for Bluewave.

[67] Bluewave's motion for summary judgment focuses only on the damages consequent upon Daniel Charles Transport's failure to obtain insurance that would provide coverage for the costs of defending an oil spill claim.

[68] When a party has breached a covenant to insure, that party is liable to the party it promised to insure for an award of damages reflecting what would have been payable under the policy of insurance, had the insurance been obtained.[4] This award will include the defence costs that would have been recoverable under such a liability policy.

[69] A leading case is *Papapetrou v. 1054422 Ontario Ltd.*,[5] where the defendant Collingwood Landscape failed to have The Cora Group named as an additional insurer to its comprehensive general insurance policy. In this case, Ms. Papapetrou, who was injured in a slip and fall on ice, sued The Cora Group. The motions judge held that based on Ms. Papapetrou's pleading, there was a duty to defend and a duty to indemnify. On appeal, it was conceded that an order to indemnify was premature but the Court of Appeal agreed that there was a duty to defend. Justice Simmons stated for the Court:

> 31. I agree that the motion judge erred in ordering Collingwood to assume The Cora Group's defence.

[4] *Papapetrou v. 1054422 Ontario Ltd*., 2012 ONCA 506 at paras. 31 to 40.
[5] 2012 ONCA 506.

> 32. In my view, however, Collingwood is liable in damages to The Cora Group for the cost of The Cora Group's defence of the Papapetrou action, save for any costs incurred exclusively to defend claims that do not arise from Collingwood's performance or non-performance of the service contract.
>
> 33. On appeal, The Cora Group did not argue that Collingwood's obligation to defend arises out of the indemnification provision in the service contract. Rather, it relied on Collingwood's failure to satisfy its contractual obligation to have The Cora Group named as an additional insured in its comprehensive general insurance policy.
>
> 34. However, Collingwood's breach of this contractual obligation does not create a duty to defend; rather, it gives rise to a remedy in damages.
>
> 35. The fact that The Cora Group did not object to the form of insurance Collingwood obtained is irrelevant. Collingwood's contractual obligation remained. Collingwood is liable to The Cora Group in damages for failing to satisfy its duty to have The Cora Group named as an additional insured.
>
> 36. The quantum of such damages is the amount The Cora Group will be required to pay for a defence of the claims Collingwood's insurer would have been obliged to defend on The Cora Group's behalf had Collingwood fulfilled its contractual obligations.

[70] In the immediate case, the question becomes assuming Daniel Charles Transport had performed its promise to obtain insurance for Bluewave, would the insurance coverage for defence costs cover the Amellos' pleaded claims against Bluewave. This issue arises because Bluewave only suffers a loss if the Amellos' action would have triggered a duty to defend under the insurance policy that Daniel Charles Transport ought to have obtained.

[71] In other words, although the remedy being sought by Bluewave is an award of damages, it is necessary to do what is known as a duty to defend analysis to determine whether any damages are payable.

[72] The duty to defend is much broader than the duty to indemnify. An insurer is obligated to provide a defence if the plaintiff's pleadings allege facts which, if true, would require the insurer to indemnify the insured for the claim. For a duty to defend to be triggered, it is not necessary to prove that the obligation to indemnify will in fact arise. The mere possibility that the claim is within the insurance policy's coverage is sufficient to trigger the duty to defend. An insurer's obligation to defend is triggered when, on a reasonable reading of the pleadings, a claim within coverage can be inferred. The Court must accept the allegations contained in the pleadings as true if the claim alleges a state of facts that, if proven, would fall within the coverage of the policy, and the insurer is obliged to defend the suit regardless of the truth or falsity of such allegations.[6]

[73] An insurer's obligation to defend is to defend claims that if proven true would fall within coverage under the policy that was obtained or that ought to have been obtained pursuant to the promise to obtain insurance.[7] In the case at bar, the Trucking Services Agreement places responsibility on Daniel Charles Transport for all spills that arise from oil delivered pursuant to

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[6] *Nichols v. American Home Assurance Co*., [1990] 1 S.C.R. 801; *Monenco Ltd. v. Commonwealth Insurance Co*., [2001] 2 S.C.R. 699; *Non-Marine Underwriters, Lloyd's of London v. Scalera,* 2002 SCC 24; *Halifax Insurance Co. of Canada v. Innopex Ltd*., [2004] O.J. No. 4178 (C.A.); *Liardi v. Riotrin Properties (Kingston) Inc*., 2013 ONSC 7544; *2091533 Ontario Ltd. v. Vertigo Investments Ltd*., 2013 ONSC 2731.

[7] *Papapetrou v. 1054422 Ontario Ltd*., 2012 ONCA 506 at para. 41.

the terms of the Agreement. From the pleadings, it appears that a spill arose from oil delivered pursuant to the terms of the Trucking Services Agreement.

[74] In the case at bar, Daniel Charles Transport relies on evidence that the cause of the oil spill at the Amellos' was not its responsibility and rather was the responsibility of Bluewave, which was charged with the job of maintaining the oil tank that leaked. This evidence may be relevant later to the issue of whether Daniel Charles Transport is liable under its promises to indemnify or to hold Bluewave harmless, but this evidence is not relevant to whether there was a claim for damages for a breach of the duty to defend. The duty to defend is analyzed based on the pleaded allegations not proven ones.

[75] Subject to what will be discussed below about quantifying the damages for the breach of the duty to defend and about the principles of equitable contribution, in the case at bar, Bluewave has suffered damages from Daniel Charles Transport's failure to obtain insurance. Had insurance been obtained, then given the nature of the allegations pleaded by the Amellos, the insurer would have had a duty to defend.

[76] To repeat what I said at the outset of these Reasons for Decision, it remains to be determined whether Bluewave suffered other damages arising from Daniel Charles Transport's failure to obtain insurance or whether Daniel Charles Transport has an obligation to indemnify Bluewave under the Trucking Services Agreement.

[77] Whether Bluewave suffered other damages or has a claim for indemnification depends upon interpreting the full scope of Daniel Charles Transport's obligations under the Trucking Services Agreement. There are genuine issues requiring a trial about that interpretative exercise. However, there are no genuine issues for trial about the matter of whether Daniel Charles Transport should pay for the costs of Bluewave defending the Amellos' oil spill action.

[78] As was the case in *Papapetrou v. 1054422 Ontario Ltd., supra*, before an order can be made determining liability on the promise to indemnify, the Court will have to determine whether as a proven fact, the obligation to indemnify has been triggered, which remains to be determined. It, however, can be said now that liability for a duty to defend has been triggered by the allegations pleaded in the Amellos' Amended Statement of Claim.

2. Quantifying the Damages for the Breach of the Duty to Defend

[79] I have concluded from the above analysis that Daniel CharlesTransport did breach its contractual obligation to obtain insurance for Bluewave, which claims damages for the breach of the duty to defend.

[80] The quantum of damages payable for breaching an obligation to insure defence costs is an award equivalent to the defence costs that would have been paid by an insurer.

[81] An insurer or a party who fails to procure the insurance it promised is only required to defend allegations within the scope of the insurance policy, covenant to insure, or hold harmless agreement. The party does not have to pay the costs of any uncovered claims unless the same costs are incurred in defending both the covered and uncovered claims.

[82] In *Hanis v. Teevan*,[8] Justice Doherty stated for the Court of Appeal:

> I see no unfairness to the insurer in holding it responsible for all reasonable costs related to the defence of covered claims if that is what is provided for by the language of the policy. If the insurer has contracted to cover all defence costs relating to a claim, those costs do not increase because they also assist the insured in the defence of an uncovered claim. The insurer's exposure for liability for defence costs is not increased. Similarly, the insured receives nothing more than what it bargained for — payment of all defence costs related to a covered claim.

[83] In *Papapetrou v. 1054422 Ontario Ltd.*,[9] the Court stated:

> [W]here an action includes both covered and uncovered claims, an insurer may nonetheless be obliged by the terms of the policy to pay all costs of defending the action save for those costs incurred exclusively to defend uncovered claims.

[84] In the case at bar, the costs incurred to defend Bluewave have included both covered and uncovered claims, if any. Subject to the principle of equitable contribution, discussed next, I would not apportion the damages awarded on account of any uncovered claims because, if any, they appear to overlap with the covered claims. There does not appear to be any discrete uncovered claims that would require a separate defence.

[85] Similarly, I see no reason to discount the damages award on account of the fact that Parkland is also being defended by Bluewave's defence. The costs of defending Bluewave have not been increased by the joint defence and the costs of defending Bluewave have not been increased by defending any claims, if any, outside the duty to defend.

[86] To date, Bluewave has incurred defence costs of $34,484.81. The defence costs have been paid by Bluewave's own insurer, Liberty Mutual, and thus the next issue is whether the principle of equitable contribution applies in the circumstances.

[87] As explained by Justice Bastarache in *Family Insurance Corp. v. Lombard Canada Ltd.*,[10] it is a principle of insurance law that where an insured holds more than one policy of insurance that covers the same risk the insured is entitled to select the policy under which to claim indemnity, subject to any conditions to the contrary in the insurance contract. The selected insurer, in turn, is entitled to contribution from all other insurers who have covered the same risk and may sue in its own name to recover a portion of the loss.[11]

[88] The other insurer must pay its fair share of the defence costs in accordance with the equities of the particular case.[12]

[89] In the case at bar, if Daniel Charles Transport had kept its contractual promise, Bluewave, which was insured by Liberty Mutual, would have held a second policy of insurance covering the costs of defending a claim. Had both policies of insurance been available, then the

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[8] 2008 ONCA 678 at para. 23, leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 504.
[9] 2012 ONCA 506 at para. 51.
[10] 2002 SCC 48. See also: *CE INA Insurance v. Associated Electric & Gas Insurance Services Ltd*., 2013 ONCA 685, leave to appeal to SCC refd [2014] S.C.C.A. No. 1; *Alie v. Bertrand & Frère Construction Co.* (2002), 62 O.R. (3d) 345 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 48.
[11] *Aviva Insurance Company of Canada v. Lombard General Insurance Company of Canada*, 2013 ONCA 416
[12] *Broadhurst & Ball v. American Home Assurance Co*. (1990), 1 O.R. (3d) 225 (C.A.), leave to appeal to S.C.C. refused, [1991] S.C.C.A. No. 55; ; *Alie v. Bertrand & Frère Construction Co.* (2002), 62 O.R. (3d) 345 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 48.

principle of equitable contribution would have been triggered and the defence costs would have been shared.

[90] The purpose of a damages award for breach of contract is to use money to put the innocent party in the same financial position it would have been in had the contract been performed. Had Daniel Charles Transport honoured its promise, there would have been two insurers with a duty to defend and the principle of equitable contribution would have been available to either one of the insurers.

[91] In the circumstances of the case at bar, in my opinion, a fair proportion of sharing is an equal sharing of the defence costs. Therefore, I grant Bluewave a partial summary judgment for 50% of the defence costs incurred to date ($17,242.41), and I grant a declaration that Daniel Charles Transport shall be responsible for 50% of the future defence costs on an ongoing basis.

3. The Effect of the Pierringer Agreement

[92] Turning to the issue of the effect of the Pierringer Agreement between the Amellos and Daniel Charles Transport on Bluewave's Crossclaim, I can quickly address this issue.

[93] Under the Pierringer Agreement, the Amellos have agreed to be responsible for the costs of Bluewave's defence, and under the Pierringer Agreement, the Amellos have agreed to confine their remaining claims against Bluewave to the individual or several liability of Bluewave.

[94] Daniel Charles Transport, therefore, argues that because of these terms of the Pierringer Agreement, it is appropriate to dismiss Bluewave's Crossclaim.

[95] This argument, however, is fallacious, because it ignores that Bluewave's Crossclaim is premised on Daniel Charles Transport being liable to indemnify Bluewave for Bluewave's several liability.

[96] Thus, the Pierringer Agreement does not make the Crossclaim meaningless and it should not be dismissed at this juncture of the proceedings.

[97] The Amellos may pursue their claim against Bluewave for negligence and breach of contract arising from the oil spill, and if successful, the Amellos will be entitled to a judgment against Bluewave, which, in turn, may pursue its Crossclaim to enforce the Trucking Services Agreement.

[98] Daniel Charles Transport will have the opportunity to deny liability for the oil spill and any liability under the Trucking Services Agreement to indemnify Bluewave. These are issues to be resolved on another day.

F. CONCLUSION

[99] For the above reasons, Bluewave's motion should be allowed and Daniel Charles Transport's motions should be dismissed.

[100] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Bluewave's submissions within 20 days from the release of these

Reasons for Decision followed by Daniel Charles Transport's submissions within a further 20 days.

Perell, J.

Released: July 8, 2014

CITATION: Amello v. Bluewave Energy Limited Partnership, 2014 ONSC 4040
COURT FILE NO.: CV-11-421309
DATE: 20140708

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEY AMELLO and FRANKIE AMELLO

Plaintiffs

- and -

BLUEWAVE ENERGY LIMITED PARTNERSHIP, PARKLAND INCOME FUND and DANIEL CHARLES TRANSPORT LTD.

Defendants

REASONS FOR DECISION

PERELL J.

Released: July 8, 2014