

Dance of the Insurers

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A fire occurs and the dance begins. In a commercial situation, the landlord, the tenant and the third parties are usually all insured. The court action arising out of a fire is generally maneuvering between insurance companies to determine whose bottom line is to be affected. In a recent case before the British Columbia Court of Appeal there were some interesting steps by the insurers.

The landlord had installed a facility in the mall of an enclosed shopping centre for the coming holiday season. A fire broke out which appeared to have started in the facility which spread, and caused severe damage, to several tenant stores and tenant property.

The lease form in this centre contained an obligation on the part of the tenant to insure in the name of the landlord and the tenant loss or damage to the tenant's property in the store up to full replacement value and to obtain a waiver of subrogation rights against the landlord, which results in neither the tenant or its insurers being able to sue the landlord.

Casting about, one of the tenants commenced an action against the manufacturer and designer of the mall facility, the designer of the sprinkler system, the security company and, for good measure, the City, none of whom were protected by the lease.

This group of defendants then commenced an action by bringing third party proceedings against the landlord's employees whose negligence, it was alleged (not proven) started the fire, and against the landlord on the basis that it is responsible for the actions of its employees.

Several issues arise out of the facts and the proceedings but for the purposes of these comments only two need be addressed--the liability of the landlord, the liability of the landlord's employees.

The Court upheld the trial judge's decision that if the landlord is not liable to the tenant directly, it is not liable to contribute with the defendants to the tenant's losses ie. if you are not liable directly you are also not liable indirectly.

Employees can shelter under the landlord's protection if two conditions are met. Firstly, the landlord's limitation of liability under the lease, either expressly or impliedly, must extend to its employees. Secondly, the employees must have been acting in the course of their employment and performing the services required of the landlord under the lease.

It was clear in this case that the employees were acting as employees and performing the services on behalf of the landlord. It was also clear that the lease did not explicitly protect the employees. It was therefore necessary for the Court to determine if the protection was implied.

In determining implied protection, intention is critical. Intention can be determined from identity of interest between employer and employee (there was--landlord obligated to provide services and employees primarily responsible for performing those services), and if the tenant would

normally expect the service to be performed by the landlord's employees (it would).

The Court then stated:

"In these circumstances, there was, in my view, an implied mutual intention on behalf of the tenants and the landlord that the landlord's employees would have the benefit of any contractual protection afforded by the leases. It would make no commercial sense to infer otherwise, as the insuring clauses clearly show how the parties intended the risk of loss should be borne. If the employees could be sued for their negligence in performing services provided for under the contract, the tenant (or their insurers) would be able to avoid the clear meaning of the leases. Employees, who would then bear the risk, would have had no opportunity to protect themselves either by contract with the tenants or by insuring themselves against those risks which the contracting parties had already agree would be borne by the tenants."

For some insurers the dance ended.