ANOTHER FIRE

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Many of you may believe and/or remember that a trilogy of cases decided by the Supreme Court of Canada in the 1970's settled, *forever*, the question of what happens when a tenant causes a fire in a building that the landlord is obliged to insure under the lease. A slightly different set of lease provisions and a loss in excess of $850,000 appears to have prompted a landlord's insurer to attempt to overcome the Supreme Court of Canada decisions.

As a general rule current leases of multi-tenant non-residential buildings contain provisions for the following:

(a) the landlord will insure the building against damage by fire and other casualty,

(b) the tenant agrees to pay its share of the landlord's cost of insuring the building, either separately or as part of operating costs,

(c) the tenant's covenant to repair is subject to an exception for damage caused by fire and other matters insured against by the landlord, and,

(d) the tenant acknowledges that it has no insurable interest under the landlord's insurance policies.

In the *Agnew-Surpass Shoe Store* case, the lease contained provisions incorporating (a) and (c) above. The Court declared the tenant was given the benefit of the fire insurance and the landlord was limited to claiming compensation from the insurer.

In the *Ross Southward Tire* case, the lease contained provisions incorporating (b) above. The Court concluded that the tenant paid for the benefit of the fire insurance and accordingly the landlord was to claim from its insurers.

The third case, *Smith v. T. Eaton*, involved a lease containing the provisions in (a) above, and the Court declared that this was sufficient to transfer the liability for the fire from the tenant to the landlord.

In the case of *Amexon Realty Inc. v. Comcheq Services Ltd.*, a recent decision of the Ontario Court of Appeal, the lease contained provisions incorporating all

of (a) to (d) above. The Court quoted and confirmed the Supreme Court of Canada's cases and held the tenant was not liable.

With respect to the tenant’s lack of insurable interest the Court had the following to say:

> “It is true that the lease provides that the tenant has no insurable interest under the landlord’s policy. While this provision would presumably preclude the tenant from asserting a claim for his own loss under the policy, it does not speak to the claim asserted by the appellant in this case. It is the bargain I have referred to rather than the Tenant having an insurable interest under the landlord’s policy that is the basis upon which this action is precluded.”

The bargain referred to in the quotation is the Court’s conclusion that the tenant was to be free of the risk of liability for damage caused by it, the conclusion being based on the lease provisions requiring the landlord to insure, the tenant contributing to the cost of insurance, and the tenant’s repair covenant having an exception for fire damage.

From the cases, the courts are clearly protecting the tenant. However not all leases contain a covenant by the landlord to insure. A gross lease has no specific requirement for a tenant to pay its share of the insurance premiums. Many leases only exempt fire, lightning and tempest from the tenant's repair covenant and accordingly damage from explosion or water or other cause is not exempted. In order to be protected, the tenant must be certain that its lease contains the appropriate provisions but keep in mind this protection is only partial.

The foregoing leads us to consider the necessity for a waiver of subrogation. For those who have forgotten, “subrogation” is the right of the insurer to step into the shoes of the landlord and claim, in the name of the landlord, compensation for moneys paid to the landlord under its policy.

Tenants and their solicitors have been arguing and negotiating for eons to have a clause in their leases requiring the landlord to obtain from the insurance company a waiver of subrogation in favour of the tenant, i.e. an acknowledgment that the insurance company will not sue the tenant for loss arising out of a fire caused by the tenant's negligence.

A waiver of subrogation expands the protection the tenant receives to include **all** the risks the landlord has insured and not just the risks required by the lease.